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Is That Really Me?: Social Networking and the Right of Publicity

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Is That Really Me?: Social Networking and the Right of Publicity

ABSTRACT

Social networking websites are ubiquitous in modern culture and popular with people of all ages and demographics. Operators of this kind of site, which consist largely of third party generated content, are immune from many types of civil liability for third party postings under the Communications Decency Act. However, the Act does not immunize these providers from intellectual property right infringements. Recent court decisions suggest that this immunity exception may extend not only to federal intellectual property rights, but state intellectual property rights like the right of publicity. This Note will evaluate the emerging circuit split regarding state intellectual property liability for interactive computer service providers. After determining that the existing statutory scheme does not immunize these providers from state intellectual property liability, this Note will examine the problematic implications of right of publicity liability for social networking sites. This Note will then suggest two Congressional responses to this problem. First, it will analyze the incentives created by the various types of intellectual property rights to suggest that Congress should explicitly immunize interactive computer service providers from right of publicity liability in order to consistently promote the Communications Decency Act's policy goals. Second, Congress could establish a federal right of publicity in order to minimize problems of interactive computer service providers trying to comply with the law.

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Social networking sites are exploding in popularity and changing the way people communicate. From April 2009 to February 2010, Facebook nearly doubled its membership from over two hundred million to over four hundred million active users.¹ In 2008, Twitter reported an annual growth rate of 752 percent, capping off the year with a total of 4.43 million unique visitors in December.² In addition to these two social networking giants, sites like MySpace, Match.com, and eHarmony remain widely used around the world.³

As Internet-enabled social networking has changed the way people keep in touch with one another, it has also changed the way people dispute with one another. Lawsuits related to activities conducted on social networking sites are numerous; notably, frustrated singles have sued online matchmaking services for fraudulent promises,⁴ companies have sued sites for issuing usernames that infringe their trademarks,⁵ and landlords have sued

1. Facebook, Company Timeline, <http://www.facebook.com/press/info.php?statistics#!/press/info.php?timeline> (last visited Feb. 18, 2010).

2. See Posting of Adam Ostrow (*Twitter's Massive 2008: 752 Percent Growth*) to Mashable: The Social Media Guide, <http://mashable.com/2009/01/09/twitter-growth-2008/> (Jan. 9, 2009, 15:43:55 EST).

3. See Alexa, About Myspace (myspace.com): Social Networking Site, <http://www.alexa.com/siteinfo/myspace.com> (last visited March 5, 2010) (giving Myspace traffic data); Alexa, About Match.com (match.com): Personal ads with photos, anonymous email, advice and date ideas, <http://www.alexa.com/siteinfo/match.com> (last visited March 5, 2010) (giving Match.com traffic data); Alexa, eharmony, <http://www.alexa.com/siteinfo/eharmony.com> (last visited March 5, 2010) (giving eHarmony traffic data).

4. See Thomas Zambito, *Suit: 'Match' Sticks It to Hopeful Users*, N.Y. DAILY NEWS, June 10, 2009, at 3, available at http://www.nydailynews.com/ny_local/brooklyn/2009/06/10/2009-06-10_suit_match_sticks_it_to_hopeful_users.html.

5. See Associated Press, *Oneok Drops Trademark Lawsuit Against Twitter*, ABC NEWS, Sept. 17, 2009, <http://abcnews.go.com/Technology/wireStory?id=8599399>.

tenants for defamatory postings.⁶ The communication forum created by interactive Internet sites has connected people, but it has also created a new arena of legal liability.

Not only has online social networking changed the way that people communicate with others they actually know, but it has also put them in closer touch with people they don't know, including celebrities. Far from being immune to the social networking revolution, today's celebrities have their own Facebook profiles, MySpace pages, or Twitter accounts where fans can follow their day-to-day routines.⁷ Similarly, celebrities are not immune from the litigation that has arisen surrounding these social networking sites. The recent surge in Twitter popularity has led one celebrity, St. Louis Cardinals' manager Tony LaRussa, to sue the site because a third party was using his name to impersonate him on the site.⁸

Fortunately for the providers of these interactive sites, Congress foresaw the increased liability risks interactive sites would create and, in 1996, it passed the Communications Decency Act (CDA), which contains provisions that minimize some of these liabilities.⁹ Although the Supreme Court overturned much of this Act as unconstitutionally vague,¹⁰ key provisions granting interactive computer service providers (ICSPs)¹¹ immunity from civil suit were

6. See Ben Meyerson & Andrew Wang, *A Landlord's Tweet Suit Has All Atwitter*, CHI. TRIB., July 29, 2009, at C6, available at <http://www.chicagotribune.com/news/local/chi-twitter-suit-29-jul29,0,2500898.story>.

7. See Mike Kendrick & Lucas Wagner, *How to Make the Social Net Work*, GATEWAY, Sept. 17, 2009, available at <http://www.thegatewayonline.ca/articles/features/2009/09/17/how-make-social-net-work>.

8. Associated Press, *Cardinals Manager LaRussa, Twitter Settle Lawsuit*, USA TODAY, June 5, 2009, http://www.usatoday.com/sports/baseball/nl/cardinals/2009-06-05-larussa-twitter-lawsuit_N.htm; see also, e.g., Xan Brooks, *Ewan McGregor Twitchy over Fake Twitter Site*, GUARDIAN, Mar. 9, 2009, <http://www.guardian.co.uk/film/2009/mar/09/ewan-mcgregor-fake-twitter-feed> (describing celebrity victims of online imposters); Posting of Jennifer Peebles (*Fake Twitter Account for Traffic News has TxDOT in a Lather*) to Texas Watchdog, <http://www.texaswatchdog.org/2009/09/fake-twitter-account-for-traffic-news-has-txdot-in-a-lather/> (Sept. 3, 2009, 23:27:14 CST) (describing litigation over fake Texas Department of Transportation Twitter feed).

9. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133.

10. See *Reno v. ACLU*, 521 U.S. 844 (1997).

11. *Id.* § 509, 110 Stat. at 137-39 (codified as amended at 47 U.S.C. § 230 (2006)). Notably, the service providers covered by the CDA include a wide variety of interactive web site operators, and not just "Internet Service Providers" in the traditional sense. 47 U.S.C. § 230(f)(2) (defining "interactive computer service" for the purposes of the CDA 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"); see *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (noting that "[p]roviding access to the Internet is . . . not the only way to be an interactive computer service

left intact.¹² This immunity has undoubtedly contributed to the exponential growth of social networking on the Internet—because ICSPs are insulated from legal claims related to third-party generated content, they are willing to host forums where third parties can share their ideas and connect with one another.¹³

However, a key qualification to this immunity requires that interactive online sites remain liable for “any law pertaining to intellectual property.”¹⁴ In response, most ICSPs have developed strategies that minimize intellectual property liability.¹⁵ These coping strategies seem to have been largely efficient—traditional intellectual property liability has not prevented sites that permit content, photo, or file sharing from flourishing.¹⁶

Despite the ability of these sites to cope with federal intellectual property law obligations, recent court decisions indicate a new liability threat for sites that allow users to create profile identities.¹⁷ These courts have suggested that ICSPs are liable not only for federal intellectual property law claims, but also for state intellectual property law claims, including those related to the right of publicity.¹⁸ Exposure to claims for infringement of this right—which protects each person’s inherent right to control the commercial use of his or her identity—would mean that, if third parties create accounts and falsely claim to be other individuals, those individuals could sue not only those posting the information but the commercial social networking site as well.¹⁹ Because this potential liability arises from

provider” under the CDA); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-23 (9th Cir. 2003) (noting that immunity under the CDA extends to a wide variety of Internet service providers).

12. See *Reno v. ACLU*, 521 U.S. 844 (1997).

13. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997).

14. 47 U.S.C. § 230(e)(2) (2006).

15. See discussion *infra* Part III.A.

16. See *The Utube Blog: An Unofficial Blog on YouTube + The File Sharing Industry*, *Decoding the DMCA Safe Harbors*, <http://thetubeblog.com/2009/01/27/decoding-the-dmca-safe-harbors/> (Jan. 27, 2009, 17:36).

17. See, e.g., *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

18. See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323-24 (11th Cir. 2006) (assuming state intellectual property claims are excepted from CDA immunity); *Project Playlist*, 603 F. Supp. 2d at 704; *Friendfinder*, 540 F. Supp. 2d at 302; *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) (assuming state intellectual property claims are excepted from CDA immunity).

19. See *Law Wire—Communicating the Law*, *New York District Court Rules That State Common Law Copyright Claims Are Not Barred by the Communication Decency Act [United States]*, <http://law-wire.blogspot.com/2009/04/new-york-district-court-rules-that.html> (Apr. 6, 2009, 11:22 IST) (“This conclusion, if adopted by other courts, could give a boost to the viability of a range of state law claims related to intellectual property—such as common law

the basic service these sites provide (the creation of an online identity), a change in liability law could have a profound effect on the availability of such social networking sites.

This Note examines the current case law regarding the applicability of CDA immunity to ICSPs for right of publicity claims, analyzes the likely effects of liability on these service providers, distinguishes the right of publicity from other types of intellectual property rights, and then discusses potential legislative action to mitigate the negative effects of liability on social networking sites. Part I of this Note summarizes the history of the CDA and discusses the development of the right of publicity. It then explains the emerging circuit split regarding the applicability of this immunity to state law intellectual property claims. Part II.A adopts and defends the position that the CDA, as written, does not immunize ICSPs from state intellectual property law claims. Part II.B analyzes the effects of this liability on ICSPs and identifies the problems such liability could create with regard to social networking sites. In response to these problems, Part III.A analyzes how ICSPs could act to shield themselves from liability for right of publicity claims. Alternatively, Part III.B discusses potential congressional responses to ICSP liability, by first exploring the incentives behind the right of publicity to distinguish it from traditional intellectual property rights, and then proposing that Congress statutorily immunize ICSPs from right of publicity claims. In Part IV, the Note concludes by considering the adoption of a uniform federal right of publicity statute to respond to the problems created by non-uniform state right of publicity laws.

I. THE CDA AND THE RIGHT OF PUBLICITY

A. *Section 230 of The CDA*

Congress passed the CDA in 1996.²⁰ Through the CDA, Congress sought to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring of the Internet for offensive or obscene material.²¹ In pursuing these goals, Congress consciously tried to preserve the burgeoning Internet “unfettered by Federal or State regulation,” balancing the Internet’s value as a forum for the exchange of information and ideas against the

misappropriation, right of publicity, and state or common-law trademark law claims—brought against the operators of various online services.”).

20. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133.

21. 47 U.S.C. § 230(b) (2006); see *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (citing *Batzel v. Smith*, 333 F.3d 1018, 1026-30 (9th Cir. 2003)).

need to protect its users, particularly minors, from inappropriate material.²² Thus, instead of imposing specific government regulations regarding Internet content, Congress chose to incentivize self-regulation of Internet content by ICSPs through the development of content-screening technologies.²³

To accomplish these goals, § 230 of the CDA grants ICSPs immunity from civil suits arising from third-party generated content posted on the ICSP's site.²⁴ Although granting ICSPs immunity may seem like a counterintuitive way to promote self-regulation, it incentivizes self-regulation by eliminating the disincentives created by the New York Supreme Court's 1995 decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*²⁵ Prior to *Stratton*, ICSPs were treated as distributors, not publishers, of third-party content posted to the Internet.²⁶ Consequently, all ICSPs were held to a distributor's liability standard, under which they were liable in civil suits arising from third-party generated material only if they "knew or had reason to know" that questionable content was posted.²⁷ However, *Stratton* imposed the greater publisher's liability standard on ICSPs that attempted to regulate their services, making ICSPs that monitored third-party generated content liable in civil suits arising from that material as if they had created the material themselves.²⁸ Consequently, *Stratton* discouraged ICSPs from voluntarily monitoring material posted to the Internet, since abstaining from monitoring was the only way ICSPs could limit their exposure to liability for third-party generated content.²⁹ Because § 230 of the CDA immunizes ICSPs from liability even if an ICSP chooses to monitor its services, it eliminates *Stratton's* perverse incentives and creates a

22. See Communications Decency Act of 1996 § 509, 110 Stat. at 137-39 (codified as amended at 47 U.S.C. § 230 (2006)); S. REP. NO. 104-23, at 59 (1995) (noting that Congress "has been troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography, engage children in inappropriate adult contact, terrorize computer network users through 'electronic stalking' and seize personal information").

23. 47 U.S.C. § 230(b)(4).

24. *Id.* § 230(c).

25. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); see *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision.").

26. See *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

27. *Id.* at 140-41.

28. 1995 WL 323710, at *3-*5 (imposing the publishers liability standards on an ICSP in a defamation suit).

29. See *Zeran*, 129 F.3d at 331.

legal environment that promotes self-regulation of Internet content by ICSPs.³⁰

In addition to eliminating the disincentive to self-regulate, immunity from suit promotes the growth of the Internet by encouraging ICSPs to provide forums in which third parties can express and exchange ideas.³¹ If ICSPs were exposed to liability for third-party content, it would discourage them from providing these types of forums and perhaps even eliminate the forums altogether.³² Therefore, insulating ICSPs from civil liability through § 230 of the CDA “promote[s] the continued development of the Internet and other interactive computer services.”³³

Courts have generally construed § 230 immunity broadly by classifying most web services as ICSPs.³⁴ The CDA distinguishes between “providers of interactive computer service providers” and “information content providers”: the former are granted immunity from civil liability by the Act, while the latter are not.³⁵ The difference in the two groups is that content providers are responsible, in whole or in part, for creating the information provided, whereas service providers merely enable access by multiple users to a single server or system.³⁶ Thus, to offer broad immunity under the CDA, courts have set a relatively high threshold for what constitutes “creating or developing information,” making it easier for Internet sites to be categorized as mere service providers rather than as content providers.³⁷ Ultimately, § 230 of the CDA offers broad protection for services publishing online content provided primarily by third parties.³⁸

30. *See id.*

31. *See id.* at 330.

32. *See id.* at 331 (“Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.”).

33. 47 U.S.C. § 230(b)(1) (2006).

34. *See Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (reviewing cases from other circuits and stating that “we too find that Section 230 immunity should be broadly construed”); *Zeran*, 129 F.3d at 331 (explaining that a broad reading of the provision is necessary to avoid restrictive effects on free speech interests); *see also* sources cited *supra* note 11 (discussing the CDA definition of ICSP).

35. 47 U.S.C. § 230(c), (f)(2)-(3).

36. *Id.* § 230(f)(2)-(3).

37. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-23 (9th Cir. 2003); *see* 47 U.S.C. § 230(f)(2)-(3) (distinguishing information content providers from interactive service providers).

38. *Carafano*, 339 F.3d at 1123; *see, e.g.*, *Parker v. Google, Inc.*, 242 F. App’x 833 (3d Cir. 2007) (showing links to objectionable message boards not providing content); *Universal*, 478 F.3d at 420 (operating a website while aware statements are defamatory not providing content);

Despite courts' inclination to broadly interpret who qualifies as a protected ICSP under the CDA, the scope of the immunity offered to those entities is incomplete.³⁹ In fact, the CDA itself directly limits ICSP immunity.⁴⁰ Most importantly for the purposes of this Note, the immunity does not extend to "any law pertaining to intellectual property."⁴¹ Furthermore, the CDA does not "prevent any State from enforcing any state law that is consistent with [the CDA]."⁴² Although the Supreme Court overturned parts of the CDA as unconstitutionally vague in *Reno v. ACLU*, it left § 230 of the CDA undisturbed, and it remains good law today.⁴³

B. *The Right of Publicity*

The state-law right of publicity recognizes "the inherent right of every human being to control the commercial use of his or her identity."⁴⁴ Although infringement cases typically involve celebrity plaintiffs, the majority of courts agree that enforcement of this right is not contingent upon celebrity status.⁴⁵ Every person has the right to control the commercial use of his or her identity and to recover damages and the commercial value of any unauthorized taking of that identity in court.⁴⁶

The right of publicity originated within the domain of privacy law, focusing on the mental trauma suffered when one's identity was disseminated through unauthorized commercial use.⁴⁷ However, when

Carafano, 339 F.3d at 1124-25 (providing questionnaire to structure third-party responses not providing content); *Batzel v. Smith*, 333 F.3d 1018, 1030-32 (9th Cir. 2003) (selecting e-mails for publication with some editing not providing content); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000) (communicating and occasionally correcting stock information not providing content). *But see* Fair Hous. Council of San Fernando Valley v. *Roommates.com, LLC*, 521 F.3d 1157, 1164-65 (9th Cir. 2008) (requiring answers to site-authored questions that would elicit discriminatory responses makes site a provider of that discriminatory content).

39. See 47 U.S.C. § 230(e).

40. See *id.*

41. *Id.* § 230(e)(2).

42. *Id.* § 230(e)(3).

43. 521 U.S. 844 (1997).

44. 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2009) [hereinafter MCCARTHY, *PUBLICITY AND PRIVACY*].

45. William Sloan Coats & Jennifer P. Gossain, *Right of Publicity: Who, What, When, Where, Why, and More Importantly, How Much?*, 985 PLI/PAT 271, 274 (2009).

46. *Id.*; see Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 254 (1999) (recognizing that the commercial nature of an identity merely informs what value damages related to infringement of the right will have).

47. MCCARTHY, *PUBLICITY AND PRIVACY*, *supra* note 44, § 1:7.

the rights involved were those of “famous plaintiffs,” traditional privacy doctrine failed to articulate adequately the concern at issue: famous plaintiffs, by definition, make a living through the commercialization of their identities and therefore do not suffer any “mental trauma” over the public dissemination of those identities.⁴⁸ Instead, the concern for famous plaintiffs lay with *controlling* the commercial use of identity and receiving adequate compensation for its use.⁴⁹ Thus, in 1953, Judge Frank of the Second Circuit Court of Appeals coined the term “right of publicity” to describe a new right that protected all persons’ commercial interests in the use of their personalities independent of any privacy interests associated with identity.⁵⁰

The Supreme Court expressly recognized the right of publicity in 1977.⁵¹ In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that Hugo Zacchini’s right of publicity had been infringed by a news service that broadcast his entire human cannonball act without his permission.⁵² The Court noted that the interest protected by the right of publicity was “closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.”⁵³ Thus, at least within the context of an individual’s performance, the Court recognized the distinction between the economic interests behind the right of publicity and the privacy protections motivating a right of privacy.⁵⁴

Today, the right of publicity is a “distinct legal category,”⁵⁵ clearly separable from any privacy interest related to identity.⁵⁶ Typically, courts classify the right of publicity as a type of intellectual property right.⁵⁷ However, it can simultaneously be properly viewed as a “species within the genus of ‘unfair competition’ law.”⁵⁸ In attempting to classify the right of publicity, commentators have observed that “it is more accurate to think of [the right of publicity] as

48. *Id.*

49. *Id.*

50. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *see* MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 1:26.

51. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

52. *Id.* at 563, 575, 578.

53. *Id.* at 573.

54. *Id.* at 576-77.

55. MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 1:3.

56. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (4th ed. 2009) [MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION].

57. MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 3:1.

58. *Id.*

a sui generis mixture of personal rights, property rights, and rights under the law of unfair competition than to attempt, Procrustean-like [sic], to fit it precisely into one of those categories.”⁵⁹

The right of publicity originates exclusively from state statutory or common law and has no federal counterpart.⁶⁰ Currently, nineteen states have statutes that define a right of publicity, and twenty-eight others recognize a common law right of publicity.⁶¹ The right of publicity is also recognized in the Restatement (Third) of Unfair Competition Law.⁶² Although right of publicity laws vary from state to state, establishing a prima facie case of infringement typically requires (1) the plaintiff to show that he possesses an enforceable right in a human being; (2) that the defendant has, without permission, used that persona such that the plaintiff is identifiable; and (3) that the defendant’s use was commercial.⁶³ There is no need to prove falsity of any kind—any unauthorized use of a person’s identity to draw attention to a product or advertisement is sufficient to infringe that person’s right of publicity.⁶⁴

C. Interaction of The Right of Publicity and the CDA

Recently, courts have split as to whether state law intellectual property claims are actionable against ICSPs under the CDA.⁶⁵ Generally, federal intellectual property laws preempt state law intellectual property claims, rendering the actionability of the state

59. *Id.* § 1:7 (citing Steven Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC’Y 111, 112 (1980)).

60. *Id.* § 6:135; see Goodman, *supra* note 46, at 247-48 (recognizing that some celebrities attempt to seek right of publicity claims under the Lanham Act § 43(a), but that the Act is poorly suited to right of publicity claims as right of publicity and trademark are not completely analogous).

61. Right of Publicity, Statutes, <http://rightofpublicity.com/statutes> (last visited Feb. 18, 2010).

62. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

63. See MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 28:7; Matthew Minora, Comment, *Rumor Has It that Non-Celebrity Gossip Web Site Operators Are Overestimating Their Immunity Under the Communications Decency Act*, 17 COMMLAW CONSPECTUS 821, 859-60 (2009) (distinguishing commercial use from “news” use that deserves first amendment protection).

64. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 28:6; see MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 3:4.

65. See Posting of David Johnson (*Emerging Circuit Split: Does the Communications Decency Act Shield State Law Claims for Misappropriation of Right of Publicity?*) to Digital Media Lawyer Blog, http://www.digitalmedialawyerblog.com/2009/03/emerging_circuit_split_does_th_1.html (Mar. 27, 2009).

law claim unimportant.⁶⁶ In some situations, however, where state law grants some additional right or, like the right of publicity, where there is no federal law counterpart at all, the actionability of state intellectual property claims under the CDA remains relevant because no preemption occurs.⁶⁷ With respect to the right of publicity, claims can be brought against ICSPs if the CDA's immunity exception covers state and federal intellectual property law; however, if the CDA's immunity exception covers only federal intellectual property law, ICSPs remain immune from right of publicity claims.⁶⁸

In the Ninth Circuit, case law firmly establishes that the CDA immunizes ICSPs from state law intellectual property claims.⁶⁹ In 2003, the Ninth Circuit held in *Carafano v. Metrosplash.com, Inc.* that an online matchmaking service was statutorily immune from claims related to false content posted on the service by third parties.⁷⁰ Based on the fact that historically immunity under the CDA had been broadly construed, and citing Congress's intentions to preserve the growth of the Internet, the court found that the dating service was immune under the act from all the plaintiff's claims, including a claim for misappropriation of the plaintiff's right of publicity.⁷¹

More recently, the Ninth Circuit expressly held in *Perfect 10, Inc. v. CCBill, LLC* that the CDA only abrogates ICSPs' immunity with respect to federal intellectual property claims.⁷² In that case, the court ruled that an entity that provided web-hosting and Internet connectivity services to sites that posted stolen images was immune under the CDA from any right of publicity claims.⁷³ The court supported its holding with policy reasoning, explaining that exposing ICSPs to suits under various, non-uniform state intellectual property claims would "be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes."⁷⁴

66. See U.S. CONST. art. VI (conflicting or redundant state laws are preempted by federal laws); see also *Crow v. Wainwright*, 720 F.2d 1224, 1225-26 (11th Cir. 1983) (commenting that state copyright law is preempted unless it bestows some additional right).

67. See U.S. CONST. art. VI; MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 6:135.

68. See *Law Wire*, *supra* note 19.

69. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1119 (9th Cir. 2003).

70. 339 F.3d 1119.

71. *Id.* at 1123-25. Although the court immunized the dating service from all claims under the CDA, it did not specifically discuss the right of publicity claim within the context of the intellectual property exception to Section 230 immunity. See *id.* at 1119-25.

72. 488 F.3d at 1119.

73. *Id.* at 1118-19.

74. *Id.* at 1118-19 ("States have any number of laws that could be characterized as intellectual property laws: trademark, unfair competition, dilution, right of publicity and trade

The court further noted that exposure to this type of liability could “threaten the freedom of speech in the new and burgeoning Internet medium.”⁷⁵ To avoid inflicting these consequences, the Ninth Circuit interpreted the CDA as leaving ICSP immunity for state law intellectual property infractions intact.⁷⁶

However, other courts have not immunized ICSPs from state law right of publicity claims under the CDA. In *Doe v. Friendfinder Network, Inc.*, the District Court of New Hampshire held that the operators of online adult personal websites that connected members through online personal ads could be sued for infringement of the right of publicity.⁷⁷ In ruling that immunity under the CDA does not extend to either federal or state intellectual property claims, the court focused on the language of the statute itself, which states that immunity does not extend to “any law pertaining to intellectual property.”⁷⁸ The court noted that, while federal and state law are distinguished from one another in other parts of the statute, the provision exempting intellectual property claims from immunity makes no such distinction.⁷⁹ The *Friendfinder* court rejected the policy-based reasoning of the Ninth Circuit, arguing that “[t]his court has no reason to believe that reading § 230(e)(2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law.”⁸⁰

Most recently, in *Atlantic Recording Corp. v. Project Playlist, Inc.*, the District Court for the Southern District of New York held that an Internet website that provided an index of links to songs available on third-party websites could be sued for state law copyright

defamation, to name just a few. . . . An entity otherwise entitled to § 230 immunity would thus be forced to bear the costs of litigation under a wide variety of state statutes.”).

75. *Id.* at 1118 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)) (internal quotation marks omitted).

76. *Id.* at 1119.

77. 540 F. Supp. 2d 288, 291-93. The holding was consistent with dicta from previous circuit decisions and in line with other courts which assumed state law intellectual property claims were excepted from CDA immunity. *Id.* at 298-99 (citing *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422-25 (1st Cir. 2007) (stating in dicta that ICSPs are not immune from state law intellectual property claims); see *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323-24 (11th Cir. 2006) (assuming state intellectual property claims are excepted from CDA immunity); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) (assuming state intellectual property claims are excepted from CDA immunity).

78. 47 U.S.C. § 230(e)(2) (2006) (emphasis added).

79. *Friendfinder*, 540 F. Supp. 2d at 299-300 (“[W]here Congress wished to distinguish between state and federal law in § 230, it knew how to do so.”).

80. *Id.* at 301.

infringement claims under the CDA.⁸¹ The *Project Playlist* court also rejected the Ninth Circuit's reasoning, arguing the reasoning in *Perfect 10* "lack[ed] any support in the plain language of the CDA"⁸² and agreeing with the *Friendfinder* court that "[b]ecause the language of the CDA is clear, as 'any law' means both state and federal law, the Court need not engage in an analysis of the CDA's legislative history or purpose."⁸³ This holding suggests an emerging circuit split regarding the applicability of CDA immunity for ICSPs to state law intellectual property claims.⁸⁴

II. ANALYZING THE CIRCUIT SPLIT: WHY ICSPS ARE LIABLE FOR STATE LAW INTELLECTUAL PROPERTY CLAIMS UNDER THE CDA

A. Resolving the Emerging Circuit Split

The *Friendfinder* and *Project Playlist* courts' position that ICSPs are not immune from any intellectual property claims, even those based in state law, is most persuasive based on the text of the CDA. Because case law establishes that intellectual property is not a static concept for the purposes of the CDA,⁸⁵ holding ICSPs liable under the Act for all types of intellectual property claims, even non-traditional claims such as the right of publicity, is most consistent with both the text and purposes of the CDA.⁸⁶ Therefore, based on the current law, ICSPs should remain liable for right of publicity claims, even if those claims arise from content generated by third-parties.

The immunity provision of the CDA does not suggest that liability under the Act is limited to federal intellectual property law, but instead reads that "[n]othing in this section shall be construed to limit any law relating to intellectual property."⁸⁷ The modifier, "any," is key. The Supreme Court has noted in other contexts that "any" is

81. 603 F. Supp. 2d 690, 692-93, 704 (S.D.N.Y. 2009); see 17 U.S.C. § 301(c) (2006) (explaining that federal copyright law will not preempt state law for recordings fixed prior to February 15, 1972); 603 F. Supp. 2d at 694 n.5 (noting that several songs on the website were recorded prior to February 15, 1972).

82. *Project Playlist*, 603 F. Supp. 2d at 703; see *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007).

83. 603 F. Supp. 2d at 704.

84. See Johnson, *supra* note 65.

85. See *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 414 (S.D.N.Y. 2001) ("[N]owhere does Section 230 state that the laws to which it refers . . . are limited to the intellectual property laws as they existed [when enacted].").

86. See generally *Project Playlist*, 603 F. Supp. 2d at 702-04; *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 298-302 (D.N.H. 2008).

87. *Id.*; see *Friendfinder*, 540 F. Supp. 2d at 299.

“expansive language [that] offers no indication whatever that Congress intended [a] limiting construction.”⁸⁸ “Any” law pertaining to intellectual property is thus properly construed to include both federal and state laws.⁸⁹

Furthermore, the position that ICSPs remain liable for state law intellectual property claims is consistent with the language of the CDA as a whole. To limit the immunity exception to federal intellectual property laws, the Ninth Circuit must imply the word “federal” to modify intellectual property in § 230(c)(2) of the CDA—the provision itself makes no explicit distinction.⁹⁰ However, throughout the CDA, Congress explicitly distinguishes federal law from state law when it sees fit to do so.⁹¹ For example, 47 U.S.C. § 230(e)(1) reads: “Nothing in this section shall be construed to impair the enforcement of [named federal criminal statutes] or any other Federal criminal statute.”⁹² Further, 47 U.S.C. § 230(e)(3) reads: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”⁹³ Since Congress distinguishes federal from state law elsewhere in the CDA, the lack of any qualifying label in § 230(e)(2) indicates that Congress did not intend to differentiate between state and federal intellectual property law, and ICSP immunity does not extend to either type of violation.⁹⁴

When the language of the statute is unambiguous, as it is here, further inquiry into legislative history or public policy is

88. *Friendfinder*, 540 F. Supp. 2d at 299 (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980)) (alteration in original) (internal quotation marks omitted); see *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 217-21 (2008) (reasoning that the phrase “any other law enforcement officer” in 28 U.S.C. § 2680(c) of the Federal Torts Claim Act “suggests a broad meaning”); see also *Project Playlist*, 603 F. Supp. 2d at 703-04 (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997) for its “holding that ‘any other term of imprisonment’ includes both state and federal terms of imprisonment”); *ACLU v. Dep’t of Def.*, 543 F.3d 59, 69 (2d Cir. 2008) (holding that the word “any” in statute “deserves an expansive application where the surrounding statutory language and other relevant legislative context support it”).

89. *Id.*

90. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

91. *Friendfinder*, 540 F. Supp. 2d at 299-300.

92. See 47 U.S.C. § 230(e)(1) (emphasis added).

93. *Id.* § 230(e)(3) (emphasis added). In fact, the statement that “State law[s] that [are] consistent with this section” remain valid claims against ICSPs indicates that state intellectual property laws must be enforced against ICSPs. See *id.*

94. *Friendfinder*, 540 F. Supp. 2d at 300 (“[T]he use of ‘any’ in § 230(e)(2), in contrast to the use of ‘federal’ elsewhere in the CDA, suggests that Congress did not intend the terms to be read interchangeably.”); see also *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (“[I]t is a general principle of statutory construction that when ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

unnecessary.⁹⁵ Thus, the Ninth Circuit's reliance on the history and purposes of the CDA to immunize ICSPs from state law claims is inappropriate.⁹⁶ However, even an analysis of the purposes of the CDA does not necessarily suggest that ICSPs should remain immune from state intellectual property claims. Although the CDA indicates a desire to preserve the Internet as free from "government regulation," it makes no distinction between federal and state governments that justifies immunizing ICSPs from state intellectual property claims while exposing them to federal intellectual property claims.⁹⁷ In fact, the CDA expressly reiterates that it seeks to preserve an Internet free from "Federal or State regulation."⁹⁸ Thus, the stated purposes of the Act do not support distinguishing between federal and state intellectual property law within the context of § 230(e)(2). Consequently, neither the language of the CDA nor the purposes of the Act indicate that ICSPs should be immune from state law intellectual property claims, and the *Friendfinder* and *Project Playlist* courts have correctly interpreted the statute.

B. Implications of State Intellectual Property Liability for ICSPs and the Right of Publicity

Although a major motivation behind the Ninth Circuit's holding that ICSPs should remain immune from state intellectual property claims was the consequences of inconsistent state intellectual property regimes,⁹⁹ commentators tend to agree that "[i]n general, federal and state trademark and unfair competition law can coexist and cooperate without conflict"¹⁰⁰ because "[i]n most states, courts have held that the state trademark common law and statutes on trademark law are to be given the same meaning and interpretation as the mainstream principles of common law and federal trademark law."¹⁰¹ Furthermore, federal law generally preempts state intellectual property law as long as the state law does not create some

95. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

96. *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007) ("Courts are not free to disregard the plain language of a statute and, instead, conjure up legislative purposes and intent out of thin air.").

97. 47 U.S.C. § 230(a)(4) (2006); *Friendfinder*, 540 F. Supp. 2d at 300.

98. 47 U.S.C. § 230(b)(2) (2006) (emphasis added).

99. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

100. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 22:2.

101. *Id.* § 22:1.

unique or greater enforceable right.¹⁰² Thus, although state law intellectual property law can and does differ from federal intellectual property law in some respects, it is certainly logical, in most instances, to conclude that there is “no reason to believe that reading § 230(e)(2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law.”¹⁰³

However, because the right of publicity does not have a federal counterpart,¹⁰⁴ and thus creates additional rights not subject to preemption,¹⁰⁵ enforcing the right of publicity against ICSPs would create a new, additional burden on the sites. Unfortunately for ICSPs, attempting to meet this burden by complying with each state’s right of publicity regime is not an easy task, since rights of publicity are currently “controlled by the vastly differing statutory and case law of the fifty states.”¹⁰⁶ In some jurisdictions, the right is applicable only to celebrities; in others, it applies to all individuals.¹⁰⁷ In some jurisdictions, an individual may only invoke the right of publicity if that individual has previously commercially exploited his or her identity.¹⁰⁸ State laws also differ as to whether the right of publicity exists after an individual dies, and if so how long that right lasts.¹⁰⁹ Furthermore, the available defenses in right of publicity cases vary by jurisdiction.¹¹⁰

These differences mean that holding ICSPs liable for state law right of publicity claims would expose ICSPs to non-uniform, unpredictable legal requirements.¹¹¹ Additionally, the fact that Internet sites are viewable across the country exposes ICSPs to the

102. U.S. CONST. art. VI, cl. 2; *see also* *Crow v. Wainwright*, 720 F.2d 1224, 1225-26 (11th Cir. 1983) (commenting that state copyright law is preempted unless it bestows some additional right).

103. *Friendfinder*, 540 F. Supp. 2d at 301.

104. MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 6:135.

105. *See* U.S. CONST. art. VI, cl. 2.

106. INT’L TRADEMARK ASS’N, FEDERAL RIGHT OF PUBLICITY: REQUEST FOR ACTION BY THE INTA BOARD OF DIRECTORS (1998), *available at* http://www.inta.org/index.php?option=com_content&task=view&id=285&Itemid=153&getcontent=3.

107. Publishing Law Center, Right of Publicity, <http://www.publaw.com/rightpriv.html> (last visited Feb. 18, 2010).

108. *Id.*

109. *Id.*; INT’L TRADEMARK ASS’N, *supra* note 106 (“Whether the right of publicity survives after the death of the holder has been a point of sharp division among the various states.”).

110. INT’L TRADEMARK ASS’N, *supra* note 106.

111. *Id.* (stating that there is a need for uniformity and predictability in right of publicity law).

laws of multiple jurisdictions, creating increased risk for these sites.¹¹² Consequently, within the right of publicity context, the Ninth Circuit's concern of intellectual property liability having a "chilling effect" on ICSPs is not completely unfounded.¹¹³

Particularly within the context of social networking sites, exposure to right of publicity claims poses a genuine liability concern.¹¹⁴ Arguably, a right of publicity claim could be made against social networking ICSPs for unauthorized profiles, threatening the very heart of the service these sites provide.¹¹⁵ Note that the accounts on social networking sites are used commercially—social networking sites generate income by renting advertising space to companies, and that advertising space becomes more valuable as more users visit the site.¹¹⁶ Thus, profiles on social networks, particularly celebrity profiles that attract more viewers and web traffic, are used commercially by social networking ICSPs.¹¹⁷ If an account is unauthorized and the individual is identifiable based on the aspects of persona or identity used, a prima facie right of publicity claim can be established.¹¹⁸

112. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007). Personal jurisdiction minimum contacts analysis in the context of Internet defendants is still an open question. See Eric C. Hawkins, Note, *General Jurisdiction and Internet Contacts: What Role, If Any, Should the Zippo Sliding Scale Test Play in the Analysis?*, 74 *FORDHAM L. REV.* 2371, 2385-412 (2006).

113. *Id.*

114. See *Law Wire*, *supra* note 19 ("This conclusion, if adopted by other courts, could give a boost to the viability of a range of state law claims related to intellectual property—such as common law misappropriation, right of publicity, and state or common-law trademark law claims—brought against the operators of various online services.").

115. See *supra* Part I.B.

116. See Matthew D. Hemmer, Note, *Keeping Your Name and Images Private—How Existing Property Law and Requests for Removal Could Stop Unauthorized Display of Your Identity Online*, 34 *N. KY. L. REV.* 723, 740-41 (2007).

117. See *id.*

118. See MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 28:7; Minora, *supra* note 63, at 860. In addition to liability concerns raised by the social profiles themselves, which is the focus of this Note, other potential right of publicity claims exist against social networking ICSPs for particular services offered as part of the networking site. For example, unauthorized photos of individuals may give rise to right of publicity claims against the ICSP. Hemmer, *supra* note 116, at 743-45. Furthermore, some authors have identified, at least in the non-celebrity context, potential right of publicity liability for online gossip sites. *E.g.*, Minora, *supra* note 63, at 860-61. Finally, targeted social marketing, where ads may indicate that a user endorses certain products, may implicate the right of publicity. William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 *U. ILL. L. REV.* 1105, 1117-22, 1149-52 (2009).

III. RESPONSES TO SOCIAL NETWORKING ICSPS POTENTIAL RIGHT OF PUBLICITY LIABILITY

A. Self-Protection by ICSPs

If ICSPs are not statutorily immune from state right of publicity claims, they may be able to protect themselves from liability through the development of self-regulating strategies. This response to the *Friendfinder* and *Project Playlist* readings of Section 230 is consistent with the CDA because the development of self-regulating strategies and technologies by ICSPs is one of the Act's stated congressional purposes.¹¹⁹

ICSPs likely possess the ability to self-regulate and protect themselves from liability. Although Congress established ICSP immunity in the CDA because it feared that liability for third-party content might chill the growth of the nascent Internet by making it too risky for ICSPs to continue hosting sites,¹²⁰ the position of the Internet and third-party content generated sites is not as delicate today as it was when Congress enacted the CDA in 1996. Over the past thirteen years, the Internet has progressed from an emerging technology to an integral part of everyday life. This status change indicates that the Internet and its discussion forums are no longer an infant industry requiring statutory protection to grow and function. At the same time that the ubiquitous nature of social networking media presents a large potential liability concern for ICSPs, the fact that these sites have become seemingly indispensable gives ICSPs bargaining power they can use to protect themselves by attempting to contract away some liability as a condition of use.¹²¹

One model for how social networking sites may avoid liability for right of publicity claims is to use the methods that ICSPs have implemented to attempt to limit liability for federal intellectual property right claims.¹²² Most social networking ICSPs take advantage of user-policing to monitor copyright and other intellectual property activity by creating "Notice and Take Down" systems under

119. 47 U.S.C. § 230(b)(3)-(4) (2006); see *Zeran v Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Congress enacted § 230 to remove the disincentives to self-regulation.").

120. *Zeran*, 129 F.3d at 331.

121. For example, terms of use for social networking sites can include clauses that waive the user's right of publicity. See Citizen Media Law Project, *Using the Name and Likeness of Another*, <http://www.citmedialaw.org/legal-guide/using-name-or-likeness-another> (last visited March 3, 2010). Sites could also require users to agree that they will not post material that would infringe other party's rights, so that the site has the possibility of recovering on the contract in the event they are sued. *Id.*

122. See 47 U.S.C. § 230(e)(2).

which users can report infringing content that the ICSP can investigate and remove.¹²³ These strategies are largely a response to the Digital Millennium Copyright Act (DMCA), which provides safe harbor for ICSPs that respond to reports of copyright violations and promptly remove infringing material from their sites.¹²⁴ Although the DMCA safe harbor provision applies only to copyright infringement, ICSPs have adopted similar notice and take down strategies for other types of intellectual property in an attempt to limit potential liability.¹²⁵

With respect to the right of publicity specifically, Twitter has recently taken steps to protect itself from liability by updating and expanding its terms of service.¹²⁶ The new terms of service clearly state, “You may not impersonate others through the Twitter service in a manner that does or is intended to mislead, confuse, or deceive others.”¹²⁷ The recently added “Verified Accounts” program for individual pages complements this stronger stance against impersonation.¹²⁸ The Verified Account badge indicates that Twitter has investigated whether or not the account is “approved” by the individual it claims to represent.¹²⁹ Twitter currently verifies accounts only by famous users, “[f]or example, well-known artists,

123. See, e.g., Facebook, Facebook Copyright Policy, <http://www.facebook.com/legal/copyright.php> (last visited Feb. 18, 2010); Google, Infringement Notification for Google Blogger, http://www.google.com/blogger_dmca.html (last visited Feb. 18, 2010); Twitter, Filing a Copyright Complaint or DMCA Take-Down Notice, <http://help.twitter.com/forums/26257/entries/15795> (last visited Feb. 18, 2010); YouTube, Copyright Infringement Notification, http://www.youtube.com/t/dmca_policy (last visited Feb. 18, 2010). ICSPs are also experimenting with “fingerprinting” technology that will assist in identifying infringing material. See Kenneth Li & Eric Auchard, *Youtube to Test Video ID with Time Warner, Disney*, REUTERS, June 12, 2007, available at <http://www.reuters.com/article/technologyNews/idUSWEN871820070612>.

124. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202(c), 112 Stat. 2877, 2879-81 (1998) (codified as amended at 17 U.S.C. § 512(c) (2006)); H.R. REP. NO. 105-551, pt. 2, at 52-62 (1998) (describing DMCA’s take down and put back procedures).

125. See e.g., eBay, Reporting Intellectual Property Infringements (VeRO), <http://pages.ebay.com/help/tp/vero-rights-owner.html> (last visited Feb. 18, 2010) (describing notice and takedown procedures for all intellectual property infringements modeled on the DMCA); Facebook, *supra* note 123 (follow “What should I do if someone is pretending to be me?” hyperlink) (describing notice and takedown procedures for non-copyright intellectual property infringement and for “impersonation”).

126. See Posting of Ben Parr (*Twitter Changes TOS, Opens the Door for Ads*) to Mashable: The Social Media Guide, <http://mashable.com/2009/09/10/twitter-tos/> (Sept. 10, 2009, 16:48:41 EST).

127. Twitter, The Twitter Rules, <http://twitter.zendesk.com/forums/26257/entries/18311> (last visited Feb. 18, 2010).

128. See Twitter, Verified Account, <http://twitter.com/help/verified> (last visited Feb. 18, 2010).

129. *Id.*

athletes, actors, public officials, and public agencies.”¹³⁰ This strategy is well tailored to combat the unauthorized accounts most likely to give rise to right of publicity claims and thereby limits Twitter’s exposure to liability.

B. Congressional Response

Although social networking sites like Twitter have the potential ability to self-regulate and proactively prevent right of publicity claims, these strategies are costly.¹³¹ Formerly, only celebrities were likely to assert right of publicity claims, but the growth of reality television and today’s media environment of instant celebrity results in “a much broader class of people who may assert their own rights to publicity,”¹³² enlarging the practical scope of potential liability and the corresponding cost to prevent it. This cost is a genuine concern—despite the fact that advertisement has helped social networking sites raise revenue, the profitability of these sites still lags significantly behind their popularity,¹³³ meaning that adverse judgments or settlements across the millions of site subscribers pose a significant threat to ICSPs. Furthermore, the much-used notice and takedown strategies are far from perfect—although they definitively create a defense to copyright infringement claims in many circumstances, the law is less clear as to whether attempted detection and prompt removal can defeat other kinds of intellectual property claims.¹³⁴ In light of the basic monitoring costs of self regulation, potential costs of lawsuits or settlements, and the reality that monitoring only creates an imperfect defense to many

130. *Id.* See also Posting of Logan Westbrook (*Twitter to Crack Down on Fakers*) to The Escapist, <http://www.escapistmagazine.com/news/view/94850-Twitter-to-Crack-Down-on-Fakers> (September 20, 2009, 10:34 EST).

131. See Twitter, *supra* note 128 (“[B]ecause of the cost and time required, [Twitter is] only testing this feature with a small set of folks for the time being.”).

132. Hemmer, *supra* note 116, at 740.

133. Nick Clark, *Facebook Heads Toward Profit*, INDEP., Sept. 17, 2009, at 42, available at <http://www.independent.co.uk/news/business/news/facebook-heads-towards-profit-1788430.html> (“Nigel Gwilliam, head of digital at the Institute of Practitioners in Advertisers, said: ‘To not be haemorrhaging money is an achievement, but not one that signals wild profitability. . . . Many consider the real value of websites like Facebook lies not in advertising but in engagement and participation. But no one has cracked the business model for this yet.’”).

134. See Digital Media Lawyer Blog, *Tiffany v. eBay: eBay’s Notice and Takedown System and Trademark*, http://www.digitalmedialawyerblog.com/2009/08/tiffany_v_ebay_ebays_notice_an.html (Aug. 14, 2009) (discussing whether eBay’s notice and take down form creates a valid defense to contributory trademark infringement); see generally 17 U.S.C. § 512 (2006) (stating that the Act only applies to copyright infringement, and noting that it is not shelter ICSPs who otherwise meet the requirements for vicarious liability).

claims, congressional action to grant ICSPs some sort of immunity for right of publicity suits is desirable to avoid “unbridled actions asserting violations of the rights of publicity [that] may chill internet speech, or require unmanageable monitoring of every third party contributor to a website.”¹³⁵

1. Establish Immunity for Right of Publicity Claims

Although the right of publicity is widely accepted as a type of intellectual property claim,¹³⁶ the justifications for protecting publicity rights distinguish them from other intellectual property rights. Unlike the intellectual property rights of copyright or patent, the right of publicity protects an inherent right, and does not incentivize the creation of some new intellectual property.¹³⁷ Because the CDA seeks to promote the creation of new ideas and expression by encouraging the growth of the Internet as a forum for idea exchange,¹³⁸ leaving ICSPs liable for right of publicity claims is inconsistent with the underlying purposes of the CDA.

The scope of ICSP immunity in the CDA reflects a congressional judgment regarding what rights and values should be most protected by the statutory regime, creating a hierarchy of values related to intellectual property rights and freedom of expression.¹³⁹ By immunizing ICSPs from suits related to defamation-type wrongs arising out of third-party postings, Congress effectively states that it values the promotion of free speech and idea exchange through the development of an unfettered Internet more highly than it values individual reputation.¹⁴⁰ Similarly, by revoking ICSP immunity for intellectual property claims, Congress effectively states that the rights guaranteed by intellectual property law are even more valuable than the development of the Internet as a forum for First Amendment expression.¹⁴¹ The interaction of these interests within the CDA reflects a general purpose behind the Act to promote the development of the Internet, but not at the expense of intellectual property rights. This congressional goal demonstrates a desire to promote (through the

135. Hemmer, *supra* note 116, at 746.

136. See MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 3:1.

137. See *id.* at § 1:7.

138. See 47 U.S.C. § 230(b)(1)-(2) (2006).

139. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997) (discussing congressional “policy choices” designing ICSP immunity).

140. See *id.*

141. See *id.*

growth of the Internet) and incentivize (by leaving intellectual property protection intact) creativity and idea exchange.¹⁴²

Applying this purpose to the scope of ICSP intellectual property liability reveals that, unlike traditional intellectual property rights, maintaining ICSP liability for right of publicity infringement is inconsistent with the overarching purpose of the CDA.¹⁴³ First, the justification for the limited monopoly created by copyright is that it will “stimulate artistic creativity for the general public good” by allowing the artist to “secure a fair return” on his investment.¹⁴⁴ Similarly, the limited monopoly created by a patent exists not merely to “[create] private fortunes for the owners of the patents, but as a tool to “promote the progress of science and the useful arts.”¹⁴⁵ Based on these rationales, leaving ICSPs liable for violations of patent and copyright law under the CDA complements the Act’s overall scheme—like the “continued development of the Internet and other interactive computer services,”¹⁴⁶ these rights both promote the creation of new ideas for the public good.¹⁴⁷ Alternatively, it would make little sense to develop the Internet as a forum for the exchange of ideas, and then insulate ICSPs from liability such that there is no available recourse if those intellectual property rights are infringed by anonymous site users. By leaving ICSPs on the hook for copyright and patent infringement, the CDA avoids this anomalous result.

Unlike copyright or patent law, the consistency of extending ICSP liability to the right of publicity with the goals of the CDA is questionable. The theoretical justifications for recognizing the right of publicity are multi-faceted and diverse, even “border[ing] on incoherence.”¹⁴⁸ One popular justification is that the right to one’s identity is a self-evident, natural property right, and it just seems fair that an individual should control and financially profit from the use of his or her identity.¹⁴⁹ A second popular argument for recognizing the right of publicity, called the “economic justification,” states that granting a property right in a person’s identity provides the best way

142. See 47 U.S.C. §§ 230(b)(1), (e)(2) (stating that the policy of CDA is “to promote the continued development of the Internet” and that the law has no effect on intellectual property claims).

143. See *supra* Part III.B.1.

144. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

145. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917) (internal quotation marks and citations omitted).

146. 47 U.S.C. § 230(b)(1)-(2) (stating a desire for “unfettered” Internet growth).

147. See *id.* § 230(a)(3)-(4) (commenting on the development of the Internet as a place for discourse to the benefit to all Americans).

148. McGeveran, *supra* note 118, at 1132.

149. MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, §§ 2:1-2:3.

to create a market for that identity and ensure efficient commercial use of that name and likeness.¹⁵⁰ In other words, the right of publicity privatizes an otherwise public good, giving rise to an efficient market in which the individuals who value identities most highly will buy them for commercial use.¹⁵¹ A final common justification for recognizing the right of publicity is the incentive justification, which states that people view the value of their identity as an incentive to enter the public eye and subsequently profit from their identities.¹⁵² Under this theory, the incentives created by the right of publicity are analogous to those of patents or copyrights—the right of publicity creates a “monopoly” over identity that incentivizes the creation of a profitable persona.¹⁵³

Considering the right of publicity within the context of social networking sites reveals logical shortcomings in these justifications for the right. For example, although the economic justification for the right of publicity is readily applicable to traditional commercial uses of identity, where advertisers use celebrity endorsements to advertise products, the justification breaks down in the context of social networking sites. Unlike traditional advertising, where commercial gain accrues due to specific celebrity endorsement, commercial gain for social networking sites occurs through increased site traffic and the corresponding increased potential for advertising or subscribership.¹⁵⁴ Because social networking ICSPs are not buying celebrity endorsements, but merely profiting from the public’s desire to view a particular profile, they are not participating in a market for the use of the celebrity’s identity. Barring the development of some sort of exclusive user contract, where celebrities are limited to or receive benefits for the exclusive use of one social networking service, there is no relevant market for identity within the context of social networking for the right of publicity to facilitate. Consequently, no allocative efficiency can be achieved by attaching intellectual property rights to identity.

Furthermore, outside of the performance context, some circuit courts have expressed doubt regarding the validity of the incentive justification for the right of publicity.¹⁵⁵ They point out that “most

150. *Id.* § 2:7.

151. *Id.*

152. *Id.* § 2:6.

153. *Id.*

154. *See supra* Part II.B.

155. *See* C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 824 (8th Cir. 2007); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996); *see also* Right of Publicity, Brief History of RoP,

celebrities with valuable commercial identities are already handsomely compensated,” making any extra incentive offered by a right of publicity marginal at best.¹⁵⁶ Intuitively, it seems fair to assert that people rarely seek prominence in a field for the independent commercial value that achievement adds to identity.¹⁵⁷ Additionally, the incentive rationale is further strained due to the fact that the right of publicity is an inherent right that applies to all individuals, even those who have not achieved prominence or celebrity status.¹⁵⁸ When considering the right of publicity as a non-celebrity, inherent right, “the ‘incentive rationale’ has little if any weight in support of the existence of the right.”¹⁵⁹ Consequently, the incentive justification is better understood not as an argument that the right of publicity independently incentivizes achievement such that identity gains commercial value, but instead as an assertion that the right of publicity protects against any offsetting disincentives that potential misuse of that identity may create once prominence is achieved.¹⁶⁰

Given these justifications for the right of publicity, leaving ICSPs liable for right of publicity infringement under the CDA is inconsistent with the values hierarchy established by the Act and with its underlying policy. Unlike copyright or patent law—which encourage *creation* of new ideas to benefit the public at large—the right of publicity is more concerned with protecting an inherent right. While traditional intellectual property rights foster and reward innovation and invention,¹⁶¹ nothing need be created to take advantage of the inherent right of publicity.¹⁶² Consequently, enforcing this right against ICSPs does not contribute to a legal atmosphere that incentivizes progress and creation to “promote the continued development of the Internet”¹⁶³ as a forum for “true diversity of political discourse, unique opportunities for cultural

<http://rightofpublicity.com/brief-history-of-rop> (last visited Feb. 18, 2010) (discussing the right of publicity’s position within the intellectual property family).

156. *Cardtoons*, 95 F.3d at 974.

157. *See Cardtoons*, 95 F.3d at 973 (“The incentive effect of publicity rights, however, has been overstated. Most sports and entertainment celebrities with commercially valuable identities engage in activities that themselves generate a significant amount of income; the commercial value of their identities is merely a by-product of their performance values.”).

158. MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 1:3.

159. *Id.* § 2:6.

160. *See id.*

161. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

162. *See* MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 1:3.

163. 47 U.S.C. § 230(b)(1)-(2) (2006) (stating congressional desire for “unfettered” Internet growth).

development, and myriad avenues for intellectual activity.”¹⁶⁴ Therefore, to remain consistent with the overall Act, Congress should immunize ICSPs from right of publicity claims.

Using the protective focus of the right of publicity to justify treating it differently from other intellectual property rights under the CDA’s immunity provision suggest that trademark rights should receive the same treatment. The protective aspects of the right of publicity are analogous to those of trademark.¹⁶⁵ Just as the right of publicity secures to an individual the value of the use of his or her identity,¹⁶⁶ trademark “secur[es] to a mark’s owner the goodwill of his business.”¹⁶⁷ Additionally, like the right of publicity protects against consumer confusion by limiting unauthorized endorsements,¹⁶⁸ trademark protection limits consumer confusion by allowing the public to be “confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get.”¹⁶⁹ Like the right of publicity, and in contrast to patent or copyright, trademark has a primarily protective, not creative, focus.¹⁷⁰ These similarities suggest that enforcing trademark claims against ICSPs, like enforcing right of publicity claims against ICSPs, is inconsistent with policies underlying the CDA and that immunity from trademark infringement claims should also be granted to them.

However, trademark is distinguishable from the right of publicity in ways that may counsel against extending immunity for trademark infringement claims to ICSPs. Unlike trademark, the right of publicity is inherent in people—each person, simply by virtue of being born, possess a right of publicity.¹⁷¹ Alternatively, a trademark attaches to “any word, name, symbol or device used by a manufacturer or merchant to identify his goods and distinguish them from those

164. *Id.* § 230(a)(3).

165. See MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 2:2 (identifying the twin goals of trademark law); MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 2 (identifying the policy justifications for the right of publicity).

166. *Id.* § 1:7.

167. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 763 (1992).

168. See MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 2:8 (noting, however, that falsity is not required for a right of publicity infringement, and that falsity therefore does not mark the outer limits of the right).

169. *Two Pesos*, 505 U.S. at 782 (Stevens, J., concurring).

170. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 6:3 (remarking that the policy behind trademark is “protection of identifying symbols” not “encourag[ing] invention”).

171. See MCCARTHY, PUBLICITY AND PRIVACY, *supra* note 44, § 1:3.

manufactured by others.”¹⁷² Because trademarks protect goods and services, which must be created, trademark protection can be said to provide at least some secondary incentives for creative development and new ideas.¹⁷³ The distinction between an inherent right in people and a right that attaches to goods makes the existence of secondary creation incentives in the trademark context more credible. Although people were also created at some point, it is hard to accept the argument that parents “create” children because those children will possess an enforceable identity right. Because of this distinction, it may be appropriate to enforce trademark claims against ICSPs to the extent that the enforcement of such creates secondary incentives to develop products. Regardless of how trademarks are treating under the statutory scheme, ICSPs should be granted immunity from inherent, protection-focused right of publicity claims because enforcing such rights does nothing the further the underlying idea-creating purposes of the CDA.

As an alternative to completely immunizing ICSPs from right of publicity liability, Congress could amend the DMCA, which currently applies only to copyright law, to also provide safe-harbor for right of publicity claims. Although this solution does not offer complete protection to ICSPs, it would make notice and takedown programs, like the one adopted by Twitter, more reliable defenses against the monetary damages associated with right of publicity claims and mitigate the chilling effects that concern the Ninth Circuit. This response would also be consistent with the other goals of the CDA because it encourages the development of self-regulating strategies by ICSPs.¹⁷⁴ A DMCA-like provision for right of publicity claims would promote social networking sites’ self-regulation efforts by offering them a more reliable defense if they comply with the regulatory provisions of the statute.¹⁷⁵

2. Adoption of a Federal Right of Publicity

Instead of offering full or conditioned immunity to ICSPs for right of publicity claims, Congress could respond to the liability issue

172. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 3:4 (quoting Lanham Act, Pub. L. No. 109-312, § 45, 120 Stat. 1730, 1733 (2006) (codified at 15 U.S.C. § 1127)) (internal quotation omitted).

173. Deborah R. Gerhardt, *Consumer Investment in Trademark*, 88 N.C. L. REV. 427, 447 (2010) (stating that trademark protection incentivizes the production of high quality products).

174. *See id.* § 230(b)(3)-(4).

175. *See* 17 U.S.C. § 512 (2006) (noting that safe harbor compliance is optional and only available if an ICSP chooses to comply with the statute).

by adopting a federal right of publicity that would expressly preempt state law. One of the greatest concerns with holding ICSPs liable for right of publicity violations is that the right of publicity is governed by the diverse statutes and common law of the states.¹⁷⁶ Because right of publicity laws are so fractured, it is more difficult and expensive for businesses, particularly ICSPs which host sites accessible across the entire country, to adopt a strategy that effectively limits liability.¹⁷⁷ By adopting a federal right of publicity to preempt inconsistent state laws, Congress could facilitate ICSP compliance with right of publicity laws without changing the broad intellectual property liability of ICSPs under the CDA.

Congress has the authority to regulate the right of publicity, which protects the commercial use of identity, under the Commerce Clause.¹⁷⁸ Although Congress would not have exclusive authority to regulate the right of publicity, it is highly likely that state and federal right of publicity law, like trademark and unfair competition law, could coexist without conflict.¹⁷⁹ Furthermore, the federal right of publicity could serve as a model law for the states, and, even if states don't adopt explicitly conforming legislation, the federal statute could guide state courts interpreting state right of publicity laws.¹⁸⁰ The federal standard would thus dramatically encourage the development of uniform right of publicity law, lowering the costs of compliance for ICSPs.¹⁸¹

Establishing a uniform federal right of publicity to harmonize fragmented state laws is not a new idea.¹⁸² In 1994, the International Trademark Association (INTA) formed a subcommittee to review the status of the right of publicity.¹⁸³ In particular, the INTA pushed to add a federal right of publicity to the Lanham Act, the federal trademark statute, in order to harmonize and explicitly preempt state law.¹⁸⁴ The INTA recommended that the adopted law create a descendible, transferable right of publicity for a specific time period after a person's death.¹⁸⁵ Finally, the group proposed a fair use

176. See *supra* Part II.B.

177. See *id.*

178. See Sean D. Whaley, *I'm a Highway Star: An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257, 266 (2009).

179. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 56, § 22:2.

180. See Whaley, *supra* note 178, at 266.

181. See *id.* at 266-67.

182. See generally Goodman, *supra* note 46.

183. INT'L TRADEMARK ASS'N, *supra* note 106.

184. *Id.*; see also Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1129, 1141-1142 (2006)).

185. INT'L TRADEMARK ASS'N, *supra* note 106.

exception for uses such as “news, biography, history, fiction, commentary[,] and parody.”¹⁸⁶

Although the particular proposal by the INTA was criticized and ultimately not adopted,¹⁸⁷ the proposal addressed the main harmonization issues that proponents of a federal right of publicity consider important: duration, transferability, descendibility, registration, and fair use.¹⁸⁸ Any proposed federal right of publicity should carefully consider the implications and incentives created by the proposal’s approach to each of these aspects of the right. Harmonization of the conflicts in state right of publicity law would result in a workable, uniform federal right of publicity statute. This standard right, by preempting and informing the interpretation of state laws, would facilitate the emergence of a more reliable compliance standard for ICSPs in the event that they were held liable for all intellectual property claims, even the state-law-based right of publicity, under the CDA.

IV. CONCLUSION

The language and purposes of the CDA support the position taken by some district courts that ICSPs are not immune from liability under the CDA for either federal or state intellectual property claims. The resulting exposure to right of publicity liability is threatening for ICSPs that run the social networking sites that are quickly becoming a ubiquitous part of popular culture. The uncertainty of right of publicity liability under existing state law and the resulting costs associated with self-regulation both indicate that congressional action should be taken to insulate ICSPs from right of publicity liability.

To justify immunity for right of publicity claims under the existing statutory scheme, this Note distinguishes the right of publicity from other intellectual property claims by focusing on its inherent nature and protective focus. Given the distinction made between incentivizing creation, which makes continuing copyright and patent liability consistent with the goals of the CDA, and mere protection, these arguments could be extended to the area of trademark as an intellectual property right. Future research could

186. *Id.*

187. Goodman, *supra* note 46, at 249-50 (commenting that incorporating a federal right of publicity through the Lanham Act would be bad in that the right would only apply to “celebrities” the way that the Lanham Act covers “famous” marks, and the right of publicity must be for all people).

188. *Id.* at 250-251.

focus on the relationship between the incentives underlying trademark protection and the CDA, and if these incentives are truly consistent with legal atmosphere created by the Act.

With respect to the right of publicity, the CDA's immunity carve-out will be more consistent with the Act's heirachy of values if ICSPs are immune from right of publicity claims. To achieve this, Congress should amend the CDA to shield ICSPs from right of publicity claims, or at a minimum institute a safe harbor provision, analogous to the DMCA, which would insulate ICSPs from liability by providing a reliable defense if they are sued for right of publicity infringement. Alternatively, Congress could adopt a uniform federal right of publicity statute that would make self-protection against right of publicity claims by ICSPs a more predictable and cost-effective response to liability.

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