

1st. Civ. No. A148623

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 2

FACEBOOK, INC., and DOES ONE through FIFTH, inclusive,

Defendant and Appellant,

v.

JASON CROSS a/k/a/ MIKEL KNIGHT; 1203 ENTERTAINMENT, LLC;
and MDRST Marketing/Promotions, LLC,

Respondents.

From the Superior Court for the County of San Mateo
The Honorable Hon. Donald J. Ayoob
Case No. CIV537384

**APPLICATION OF THE ELECTRONIC FRONTIER
FOUNDATION, ENGINE, PROFESSOR ERIC GOLDMAN,
GITHUB, INC., MEDIUM, THE ORGANIZATION FOR
TRANSFORMATIVE WORKS, PROFESSOR REBECCA TUSHNET,
SNAP INC., WIKIMEDIA FOUNDATION, AND YELP INC. FOR
PERMISSION TO FILE BRIEF AS *AMICI CURIAE*
IN SUPPORT OF APPELLANT AND
AMICI CURIAE BRIEF**

DANIEL K. NAZER (SBN 257380)
daniel@eff.org
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Counsel for Amici Curiae

**APPLICATION FOR PERMISSION TO FILE BRIEF AS AMICUS
CURIAE¹**

Pursuant to California Rule of Court 8.200(c), the Electronic Frontier Foundation, Engine, Professor Eric Goldman, Github, Medium, the Organization for Transformative Works, Professor Rebecca Tushnet, Snap Inc., the Wikimedia Foundation, and Yelp Inc. respectfully request permission to file the attached brief as *amici curiae* in support of Appellant.

EFF is a non-profit civil liberties organization that has worked for more than 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 33,000 active members have a strong interest in free speech online and in helping the courts and policy-makers develop technology policy that serves the public interest. As part of its mission, EFF has often served as *amicus* in cases involving online speech, including *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014); and *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015).

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups,

¹ Pursuant to California Rule of Court 8.200(c)(3), undersigned counsel certifies that this brief was not authored in whole or in part by any party of any counsel for a party in the pending appeal and that no person or entity other than amicus made any monetary contribution intended to fund the preparation or submission of this brief.

working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, the entrepreneur community, and the general public on issues vital to fostering technological innovation.

Eric Goldman is a professor of law at Santa Clara University School of Law (institutional affiliation provided for purposes of identification only). He has taught and researched Internet law for over two decades. He is interested in the sound development of Internet law, especially with respect to user-generated content.

GitHub, Inc. is a San Francisco-based Internet platform that enables communities of users to upload, store, and collaboratively develop software projects. These software projects can range from small projects of a few files to enterprise-scale multi-million file applications. GitHub-hosted software projects are often applications designed for computers or mobile devices, and they can also contain the material underpinning entire website deployments. GitHub is the Internet platform for Internet platforms—a one-stop shop where third parties can upload, store, and perfect the next popular app or site. As such, GitHub is responsible for protecting millions of projects that are crucial for companies ranging from nascent start-ups to multi-national corporations.

Medium is a company that provides the Medium.com web publishing platform, which allows people to compose, read, and comment on stories they create and share.

Organization for Transformative Works (“OTW”) is a 501(c)(3) nonprofit organization dedicated to protecting and preserving noncommercial fanworks: works created by fans based on existing works, including popular television shows, books, and movies. It is interested in preserving the distinction between the noncommercial speech of individuals and the commercial interests of intermediaries that host this noncommercial speech.

Rebecca Tushnet is a professor of law at Georgetown (institutional affiliation provided for purposes of identification only). She has written on and taught about the intersection between the First Amendment and intellectual property for over a decade.

Snap Inc. is a camera company whose products empower people to express themselves, live in the moment, learn about the world, and have fun together. Snap Inc.'s first product, Snapchat, is one of the world’s leading camera applications. More than 150 million people use Snapchat each day to capture images and send messages.

The Wikimedia Foundation is a non-profit organization based in San Francisco, California, which operates twelve free-knowledge projects on the Internet, including Wikipedia. Wikimedia’s mission is to develop and

maintain educational content created by volunteer contributors, and to provide this content to people around the world free of charge. In August 2016, the Wikimedia projects received 15.69 billion page views, including 7.81 billion page views on English Wikipedia. That month, users submitted nearly 13.5 million edits to Wikipedia. Since its inception, users have created over 40 million articles on Wikipedia.

Yelp Inc. provides online services, including Yelp.com, which allow consumers to share ratings, reviews, photographs, and other information about businesses, government agencies, and other local establishments. Approximately 25 million unique mobile devices accessed Yelp via the Yelp app, approximately 77 million unique visitors visited Yelp via desktop computer, and approximately 72 million unique visitors visited Yelp via mobile website on a monthly average basis during the third quarter of 2016. Yelp's users have posted over 115 million reviews since Yelp's inception in 2004.

Amici will assist the Court in this case by discussing the broader legal and policy implications of this case. *Amici* can provide the Court with important context regarding how the broad protection created by 47 U.S.C. § 230 promotes free expression online and how, if it were allowed to stand, the Superior Court's decision would undermine Congress's purpose.

For the foregoing reasons, *amici curiae* respectfully requests that the Court accept the accompanying brief for filing in this case.

DATED: January 10, 2017

Respectfully submitted,

/s/ Daniel K. Nazer
Daniel K. Nazer
ELECTRONIC FRONTIER
FOUNDATION

Counsel for Amici Curiae

1st. Civ. No. A148623

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 2

FACEBOOK, INC., and DOES ONE through FIFTH, inclusive,

Defendant and Appellant,

v.

JASON CROSS a/k/a/ MIKEL KNIGHT; 1203 ENTERTAINMENT, LLC;
and MDRST Marketing/Promotions, LLC,

Respondents.

From the Superior Court for the County of San Mateo
The Honorable Hon. Donald J. Ayoob
Case No. CIV537384

**BRIEF *AMICUS CURIAE* OF THE ELECTRONIC FRONTIER
FOUNDATION, ENGINE, PROFESSOR ERIC GOLDMAN,
GITHUB, INC., MEDIUM, THE ORGANIZATION FOR
TRANSFORMATIVE WORKS, PROFESSOR REBECCA TUSHNET,
SNAP INC., WIKIMEDIA FOUNDATION, AND YELP INC.
IN SUPPORT OF APPELLANT**

DANIEL K. NAZER (SBN 257380)
daniel@eff.org
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Counsel for Amici Curiae

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

 A. The Decision Below Expands the Right of Publicity Far Beyond
 Its Proper Boundaries. 3

 B. The First Amendment Precludes Cross’s Right of Publicity
 Claim. 7

 C. The Trial Court Erred in Applying the Intellectual Property
 Exception of Section 230. 10

 1. Congress Created Broad Immunity for Platforms to Avoid
 Imposing Liability for User-Generated Content. 11

 2. The Trial Court Erred in Finding the Claim within Section
 230’s Intellectual Property Exception. 13

 a. Section 230’s Intellectual Property Exception Applies
 Only to Federal IP Laws. 13

 b. The Right of Publicity Is Properly Considered a Privacy
 Tort Under State Law, Not an Intellectual Property
 Claim. 15

III. CONCLUSION 20

CERTIFICATE OF WORD COUNT 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Cases

<i>Alvarez Guedes v. Marcano Martinez</i> (D.P.R. 2001) 131 F.Supp.2d 272	17, 19
<i>Aroa Marketing, Inc. v. Hartford Ins. Co. of Midwest</i> (2011) 198 Cal.App.4th 781	19
<i>Barrett v. Rosenthal</i> (2006) 40 Cal.4th 33	16
<i>Browne v. McCain</i> (C.D. Cal. 2009) 611 F.Supp.2d 1062	19
<i>Cardtoons, L.C. v. Major League Baseball Players Ass’n</i> (10th Cir. 1996) 95 F.3d 959	7, 8, 9, 20
<i>Cohen v. Facebook, Inc.</i> (N.D. Cal. Oct. 27, 2011) No. C 10-5282 RS, 2011 WL 5117164	5
<i>Comedy III Prods., Inc. v. Gary Saderup, Inc.</i> (2001) 25 Cal.4th 387	7, 8, 16, 18
<i>Doe ex rel. Roe v. Backpage.com, LLC</i> (D.Mass. 2015) 104 F.Supp.3d 149	19
<i>Doe v. TCI Cablevision</i> (Mo. 2003) 110 S.W.3d 363	8, 20
<i>Drye v. United States</i> (1999) 528 U.S. 49	15
<i>Eldred v. Ashcroft</i> (2003) 537 U.S. 186	17
<i>ETW Corp. v. Jireh Publ’g, Inc.</i> (6th Cir. 2003) 332 F.3d 915	7, 9, 19
<i>Foster-Milburn Co. v. Chinn</i> (Ky. App. 1909) 134 Ky. 424	18
<i>Fraley v. Facebook, Inc.</i> (N.D.Cal. 2011) 830 F.Supp.2d 785	5
<i>Gionfriddo v. Major League Baseball</i> (2001) 94 Cal.App.4th 400	20

<i>Guglielmi v. Spelling-Goldberg Prods.</i> (1979) 25 Cal.3d 860	19
<i>Hart v. Elec. Arts, Inc.</i> (3d Cir. 2013) 717 F.3d 141	16
<i>Hoffman v. Capital Cities/ABC, Inc.</i> (9th Cir. 2001) 255 F.3d 1180	20
<i>Hogan v. A.S. Barnes & Co.</i> (Pa. Ct. C.P. 1957) 114 U.S.P.Q. 314.....	18
<i>Hustler Magazine, Inc. v. Falwell</i> (1988) 485 U.S. 46	10, 13
<i>Jane Doe No. 1 v. Backpage.com, LLC</i> (1st Cir. 2016) 817 F.3d 12.....	19
<i>Kunz v. Allen</i> (1918) 102 Kan. 883	18
<i>New York Times Co. v. Sullivan</i> (1964) 376 U.S. 254	9
<i>Obado v. Magedson</i> (3d Cir. 2015) 612 Fed. Appx. 90.....	6
<i>Obado v. Magedson</i> (D.N.J. July 31, 2014) No. CIV. 13-2382 JAP, 2014 WL 3778261	6
<i>Parks v. LaFace Records</i> (6th Cir. 2003) 329 F.3d 437	8
<i>Pavesich v. New England Life Ins. Co.</i> (1905) 122 Ga. 190	18
<i>Perfect 10 v. CCBill LLC</i> (9th Cir. 2007) 488 F.3d 1102	2, 14, 15
<i>Rogers v. Grimaldi</i> (2d Cir. 1989) 875 F.2d 994	8, 9
<i>Rosemont Enters. v. Urban Sys., Inc.</i> (N.Y. Sup. Ct. 1973) 340 N.Y.S.2d 144.....	19
<i>Sarver v. Chartier</i> (9th Cir. 2016) 813 F.3d 891	7

<i>Seale v. Gramercy Pictures</i> (E.D. Pa. 1996) 949 F.Supp.331	19
<i>Sorrell v. IMS Health, Inc.</i> (2011) 564 U.S. 552	7
<i>Stewart v. Rolling Stone LLC</i> (2010) 181 Cal.App.4th 664	4, 5, 19
<i>Universal Communication Systems, Inc. v. Lycos, Inc.</i> (1st Cir. 2007) 478 F.3d 413	15
<i>Zeran v. Am. Online, Inc.</i> (4th Cir. 1997) 129 F.3d 327	11, 13

Statutes

15 U.S.C. § 6501	5
47 U.S.C. § 230	<i>passim</i>
Civ. Code, § 3344	4
Defend Trade Secrets Act, Pub.L. No. 114–153 (May 11, 2016), 130 Stat. 376	17
Telecommunications Act of 1996, Pub.L. No. 104-104 (Feb. 8, 1996), 110 Stat. 56	2

Other Authorities

Ausness, <i>The Right of Publicity: A “Haystack in a Hurricane”</i> (1982) 55 Temp. L.Q.	18
Prosser, <i>Privacy</i> (1960) 48 Cal. L.Rev.	17
Restatement (Third) Of Unfair Competition	8, 18
Tushnet, <i>A Mask that Eats into the Face: Images and the Right of Publicity</i> (2015) 38 Colum. J.L. & Arts 1	17

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

I. INTRODUCTION

The trial court's decision in this case threatens an enormous range of online expression. The lower court found that a cognizable right of publicity claim arises for any speech on social media that: 1) is about a real person; and 2) is published on a website that includes advertisements. A large proportion, if not most, of the content on sites such as Facebook and Twitter is about real people. Similarly, most social media websites generate revenue through advertising. Thus, according to the lower court, these sites can be sued for almost every single post that their users submit.

The trial court arrived at this disastrous result by committing two major errors. First, it expanded the right of publicity tort well beyond its proper boundaries. The right of publicity requires the "commercial" use of someone's identity. But the Facebook users who created the accused page had no commercial purpose. Citing the platform's advertising activity (advertisements that did not feature or discuss the plaintiff), the trial court found a right of publicity claim where none properly exists. The lower court's error is especially troubling in light of well-established First Amendment limits to the right of publicity. If the right of publicity were truly as expansive as the trial court found, it would be struck down as unconstitutional.

The trial court also erred by failing to apply 47 U.S.C. § 230

(“Section 230”).² Congress enacted Section 230 to encourage the development of the Internet and other interactive media by shielding intermediaries not only from liability for actionable content created or posted by third parties, but also from the cost and uncertainty associated with litigation itself. Section 230 does not shield intermediaries from some intellectual property claims. The lower court incorrectly held that this limited exception applied to Cross’s right of publicity claim. This is directly contrary to *Perfect 10 v. CCBill LLC* (9th Cir. 2007) 488 F.3d 1102, 1119, which holds that only federal intellectual property rights fall outside Section 230’s protection. It is also wrong for a more fundamental reason: the right of publicity, which does not protect creative or inventive works, is not an intellectual property right.

In broadly expanding the right of publicity, the trial court’s opinion threatens the First Amendment right to comment on, ridicule, and criticize public figures. It also severely weakens the immunity granted under U.S. law to online intermediaries that enables robust free speech and has become a fundamental pillar in the architecture of the Internet. *Amici* urge this Court to reverse the decision below and remand for the anti-SLAPP motion to be granted as to Cross’s right of publicity claim.

² This was Section 509 of the Communications Decency Act, which was part of the Telecommunications Act of 1996, Pub.L. No. 104-104 (Feb. 8, 1996), 110 Stat. 56.

II. ARGUMENT

A. The Decision Below Expands the Right of Publicity Far Beyond Its Proper Boundaries.

Allowing a right of publicity claim to proceed in this case would threaten an enormous volume of speech. Huge swathes of modern communication take place on advertising-funded social media platforms like Facebook. If the decision is affirmed, any content on such platforms that is about a real person (which is to say, almost all content on social media) might give rise to a viable right of publicity claim.

The lower court's reasoning conflated the user's content with the platform's economic activity. The trial court wrote:

[I]t is alleged that Facebook had knowledge . . . that **pages using Knight's likeness and identity** were being created on its site. Knight states that **he did not consent** to these pages or the advertising Facebook placed on them. Facebook's **financial performance is based on its user base**; accordingly, Facebook's alleged use of Knight's image on the unauthorized pages generates advertising revenue for the company. . . . Accordingly, Plaintiffs have shown a probability of prevailing on their rights of publicity claims.

(Opinion at 5 (emphasis supplied and internal citations omitted).)

This analysis ignores the fact that the users' speech was not commercial and the users had no commercial purpose. The creators of the accused Facebook page merely intended to comment on and criticize Cross (aka Mikel Knight). It is true that Facebook places advertisements on many of its pages. But none of those advertisements are alleged to have included

Cross's likeness or even mentioned him in any way.

The mere fact that unrelated advertisements appear on Facebook pages cannot support a right of publicity claim. Indeed, the relevant statute expressly provides that:

The use of a name, voice, signature, photograph, or likeness in a commercial medium **shall not constitute** a use for which consent is required under subdivision (a) **solely because** the material containing such use is commercially sponsored or **contains paid advertising**.

(Civ. Code, § 3344(e) (emphasis supplied).)

The lower court's ruling, which relied *solely* on the existence of advertising on Facebook's platform, runs directly contrary to this provision.

To overcome this limitation in the statute, a plaintiff must be able to prove facts sufficient to show that the use of the likeness "was so directly connected" with the paid advertising that a right of publicity claim is appropriate. (Civ. Code, § 3344(e).) In this case, Cross has alleged no connection between the advertisements and the use of his likeness, other than that they both appeared on the Facebook website. That is simply not enough. (See *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 683, as modified on denial of reh'g (Feb. 24, 2010) (no right of publicity claim arising out of feature that appeared alongside cigarette advertisements).)

Cross also fails to satisfy the commercial injury element of the right of publicity tort. Courts have rejected the view that individuals suffer a

commercial injury when information about them is featured on social media websites.³ In *Cohen v. Facebook, Inc.* (N.D. Cal. Oct. 27, 2011) No. C 10-5282 RS, 2011 WL 5117164, at *2, the plaintiffs argued that “Facebook’s use of plaintiffs’ names and likenesses can be seen as serving a commercial purpose, undertaken with at least the intent of achieving growth in Facebook’s user base, thereby ultimately resulting in monetary gain for Facebook.” The district court rejected that argument, finding no cognizable commercial injury. (*Id.* at *3.)⁴ Indeed, the plaintiffs’ failed argument in *Cohen* (that a commercial injury could be found because Facebook had a generalized interest in growing its “user base”) is almost word-for-word identical with the lower court’s flawed reasoning here. (See *id.* at *2; see also *Stewart*, 181 Cal.App. at 664 (finding magazine feature non-commercial “as a matter of law” even though it appeared alongside advertisements).)

It is difficult to overstate how sweeping the lower court’s holding would be if allowed to stand. Social media is filled with discussion of public figures. Consider the following examples:

³ This is not to preclude the possibility of cognizable harms under other statutes, such as the Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501 *et seq.*

⁴ This holding in *Cohen* can be contrasted with the decision in *Fraleley v. Facebook, Inc.* (N.D.Cal. 2011) 830 F.Supp.2d 785. As Facebook explained in its reply brief, *Fraleley* is distinguishable because, in that case, images of the plaintiffs were used in the advertisements themselves. (See Reply at 20-22).

- *Feminist Ryan Gosling* – a Tumblr page that combines photos of actor Ryan Gosling with passages of feminist theory.⁵
- *GagaStigmata* – a blog on Google’s Blogger service devoted to “critical writings and art about Lady Gaga.”⁶
- *Cumber Collective* – a Facebook fan group devoted to actor Benedict Cumberbatch.⁷
- *Notorious RBG* – a Facebook group established by admirers of Justice Ruth Bader Ginsburg, described by them as the “flyest Justice SCOTUS has ever seen.”⁸

These pages, and many others like them, “use” the identity of celebrities. And some of these pages no doubt feature unrelated advertising placed by the platform. Under the lower court’s reasoning, all of these pages—and just about any page on Facebook, Twitter, or the like that discusses a public figure in any way—would be actionable violations of the right of publicity.

Social media is not confined to images of celebrities: most social media content “uses” the likeness or identity of a real person in some way. The right of publicity cannot be so broad that it renders all of this speech tortious. (See *Obado v. Magedson* (D.N.J. July 31, 2014) No. CIV. 13-2382 JAP, 2014 WL 3778261, at *7, *aff’d.*, 612 Fed. Appx. 90 (3d Cir. 2015) (the right of publicity should not allow a “claim from anyone whose name

⁵ At <http://feministryangosling.tumblr.com/>.

⁶ At <http://gagajournal.blogspot.com/>.

⁷ At <https://www.facebook.com/cumbercollectiveunite/>.

⁸ At <https://www.facebook.com/notoriousRBG/>.

or image appears on the Internet in a way that person does not like”).)

This Court should reverse the lower court and ensure that Cross and other celebrities do not gain veto power over speech merely because it appears on an advertising-supported website.

B. The First Amendment Precludes Cross’s Right of Publicity Claim.

Cross’s right of publicity claim is not consistent with the First Amendment. It is well-settled that the scope of the right of publicity is cabined by free speech rights. (See *ETW Corp. v. Jireh Publ’g, Inc.* (6th Cir. 2003) 332 F.3d 915, 936; *Cardtoons, L.C. v. Major League Baseball Players Ass’n* (10th Cir. 1996) 95 F.3d 959, 962; *Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 396 (acknowledging the “tension between the right of publicity and the First Amendment”).) California’s right of publicity law clearly restricts speech based upon its content. (See *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 903.) Moreover, as construed by the lower court, the right of publicity extends not only to misleading speech but to any “use” of a plaintiff’s likeness. Under Supreme Court precedent, content-based suppression of non-misleading speech is presumptively unconstitutional. (See *Sorrell v. IMS Health, Inc.* (2011) 564 U.S. 552.)

Courts have applied a variety of tests when considering how the First Amendment limits the right of publicity. The California Supreme Court

adopted the “transformativeness” test, borrowed from the fair use doctrine in copyright, which assesses the extent to which a defendant’s work “adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” (*Comedy III*, 25 Cal.4th at 391.) Other courts employ the so-called “Rogers test,” which asks whether the defendant’s use is “wholly unrelated” to the content of the accused work or was “simply a disguised commercial advertisement for the sale of goods or services.” (See *Parks v. LaFace Records* (6th Cir. 2003) 329 F.3d 437, 461 (citing *Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994, 1004).)⁹ Other courts use a balancing test: for example, the Tenth Circuit weighed one party’s “right to free expression and the consequences of limiting that right” against “the effect of infringing” the other party’s publicity rights. (*Cardtoons*, 95 F.3d at 972; see also *Doe v. TCI Cablevision* (Mo. 2003) 110 S.W.3d 363, 374 (considering whether “a product is being sold that predominantly exploits the commercial value of an individual’s identity”).)

Cross’s right of publicity claim fails the California test, just as it

⁹ The Restatement (Third) Of Unfair Competition, § 47 applies a similar standard. The Restatement limits the application of publicity rights those uses made for “purposes of trade” – that is, uses that appear “in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user.” (Rest.3d Unfair Competition, § 47.) It further explains that noncommercial use does not include “news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” (*Id.*)

would fail any of these other tests.¹⁰ The accused Facebook page is transformative because it is not simply an unadorned depiction of Cross but includes important criticism. (See *ETW Corp.*, 332 F.3d at 938 (noting that a work is transformative where it “convey[s] a message about the significance” of the celebrity’s conduct).)

If the use of another’s name, especially that of a public figure, as part of a critique of that person were permitted to serve as the basis of an actionable publicity claim, it would provide an easy end-run around the well-established constitutional protections for speech. Indeed, it would subsume much of defamation law. To see this, we can compare the low standard applied by the trial court with the high standard that would apply to a defamation claim. In *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, the Supreme Court held that, to establish a defamation claim against a public official, a plaintiff must show actual malice in addition to falsity. In that case, civil rights activists had placed an “editorial advertisement” criticizing the Montgomery Police Department’s mistreatment of civil right protestors. (*Id.* at 257-58, 266.) Commissioner Sullivan sued for libel, contending that the statement referred to him. (See *id.* at 258.) Under the

¹⁰ The page would not be actionable under the *Rogers* test because criticism of Cross plainly requires the “use” of Cross’s identity. The same result would be reached under an *ad hoc* balancing test. (See *Cardtoons*, 95 F.3d at 972-73 (“elevating the right of publicity above the right to free expression” would allow plaintiffs “to censor criticism”).)

trial court's reasoning, instead of a defamation claim, Commissioner Sullivan could have brought a right of publicity action against the New York Times, contending that the statement "used" his identity. Commissioner Sullivan would not even need to plead falsity to bring such a claim, let alone meet the actual malice standard required by the First Amendment. Yet the Supreme Court has consistently rejected attempts to plead around the constitutional protections it has applied in defamation cases. (See, e.g., *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 57 (plaintiff could not assert claim for intentional infliction of emotional distress where defamation claim failed).) That rule should apply here. Cross's true complaint is with speech he disagrees with and he has improperly used another cause of action to plead around the constitutional limits on defamation.

At a minimum, this Court should vacate the decision below and remand for consideration of whether Cross's claim is consistent with the First Amendment. Given the breadth of his claim, however, *amici* respectfully suggest that the Court vacate and order that the right of publicity claim be dismissed.

C. The Trial Court Erred in Applying the Intellectual Property Exception of Section 230.

The trial court's confluence of the user's speech criticizing a public figure with Facebook's unrelated advertising on the user's page is a fine

example of why immunity for Internet intermediaries is essential. The immunity, granted by Congress through Section 230, ensures that the intermediary is not held liable based on content created by its users. Should this Court find the publicity tort viable, it must nevertheless find that Facebook is immune from any liability, pursuant to federal law.

1. *Congress Created Broad Immunity for Platforms to Avoid Imposing Liability for User-Generated Content.*

The potentially vast application of the trial court's ruling to huge swaths of social media content perfectly illustrates why Congress passed Section 230 to immunize Internet platforms from liability based on the content of their users' posts. As Congress recognized, the opportunities for the public to disseminate information on the Internet would be vastly diminished if intermediaries, such as social media platforms, were held legally responsible for content created by the numerous persons with whom they shared only the most remote relationship. (See *Zeran v. Am. Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330 (“Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech.”); 47 U.S.C. § 230(b)(2) (stating that Congress created Section 230 immunity “to preserve the vibrant and competitive free market that presently exists for

the Internet and other interactive computer services, unfettered by Federal or State regulation”).)

But this appeal presents an even more compelling case for intermediary immunity than the typical case. Here, the platform user’s conduct is not in and of itself actionable; it only becomes actionable after it is combined with Facebook’s commercial activity. That is, Cross could not have sued the creators of the Facebook page because they did not have a commercial purpose. Rather, the platform, which played no role in the creation of the offending content, is the only possible defendant. Facebook is thus being held liable for content that it did not create or contribute to and that Facebook’s users had a First Amendment right to publish. The trial court’s opinion thus twists both the right of publicity and intermediary liability law into dangerous states.

With respect to intermediary liability, the trial court created a vast exception to Section 230 and fundamentally undermined the law’s purpose of shielding hosts of user-generated content from lawsuits. As noted above, if the trial court’s reasoning holds, the vital protections granted to intermediaries could easily be pled around by casting defamation claims as right of publicity actions, undermining the statute’s most central task.¹¹

¹¹ It is clear that, in this case, Plaintiff’s true grievance sounds in defamation. (See Complaint ¶ 13 (complaining that the Facebook page “contained false and derogatory statements”).) In another context, the Supreme Court emphasized the importance of not permitting clever

(See *Zeran*, 129 F.3d at 330-31.)

Despite Section 230's broad immunity from tort liability, the trial court's ruling means that every Facebook page, every tweet, every Tumblr post, and every Instagram post *about* a person could exist only upon the sufferance of the person being discussed or depicted. Even consumer reviews of individual professionals—such as lawyers, dentists, and locksmiths—on Yelp and other sites could be attacked as violations of the right to publicity. Further, platforms allowing such posts about other people would be operating at the peril of incurring liability for misappropriating the person's right of publicity.

2. *The Trial Court Erred in Finding the Claim within Section 230's Intellectual Property Exception.*

The trial court erred in applying the intellectual property exception to Section 230 for two reasons. First, the exception applies only to federal intellectual property claims. Second, the right of publicity claim is not an intellectual property claim under state law either, making Section 230's exception inapplicable.

a. *Section 230's Intellectual Property Exception Applies Only to Federal IP Laws.*

As the Ninth Circuit held, although Section 230 includes an exception for laws pertaining to intellectual property, found at 47 U.S.C.

pleading to defeat the constitutional protections that attach to defamation claims. (See *Falwell*, 485 U.S. at 57.)

§ 230(e)(2), the exception applies only to federal intellectual property claims. (*Perfect 10, Inc. v. CCBill LLC* (9th Cir. 2007) 488 F.3d 1102, 1119 (“[W]e construe the term ‘intellectual property’ to mean ‘federal intellectual property.’”).) In addition to being the only federal circuit authority on point, the Ninth Circuit’s holding is consistent with the purpose of Section 230 and should be followed by this Court.

The Ninth Circuit explained why its holding makes sense given the realities of the Internet and the vagaries of state laws: “[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.” (*Id.* at p. 1118.) As the court observed, “[b]ecause material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state law regimes.” (*Id.*) Indeed, “[a]s a practical matter, [it] would fatally undermine the broad grant of immunity provided by [Section 230.]” (*Id.* at p. 1119 fn. 5.)

The Superior Court did not address *CCBill* and did not explain why it declined to follow the Ninth Circuit. While *CCBill* does not bind state courts, it is the only federal appellate decision to squarely address the question of whether the intellectual property carveout to Section 230

extends to state law claims. The only other appellate decision arguably on point, the First Circuit’s decision in *Universal Communication Systems, Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, is not in conflict. As the Ninth Circuit explained in *CCBill*, 488 F.3d at 1119 fn. 5, neither party in *Universal* raised the question of whether Section 230’s exemption for “intellectual property law” applies to state laws. The First Circuit simply assumed it did without actually considering the issue.

b. *The Right of Publicity Is Properly Considered a Privacy Tort Under State Law, Not an Intellectual Property Claim.*

Even if this Court were to find that Section 230 exempted state intellectual property claims from its grant of immunity—although to preserve the robust protections of Section 230, it should not—it should nevertheless find that the right of publicity is not an intellectual property claim for the purposes of section 230.

Whether the right of publicity is a “law pertaining to intellectual property” within the meaning of 47 U.S.C. § 230(e)(2) is properly a question of federal statutory interpretation. (Cf. *Drye v. United States* (1999) 528 U.S. 49, 58 (“We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.”).) Thus, although California courts have

sometimes referred to the right of publicity as an intellectual property right (see, e.g., *Comedy III*, 25 Cal.4th at 399), that does not settle the question of whether it is such a right under Section 230. A federal definition of intellectual property serves the statute’s goal of national uniformity. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 (warning that inconsistent standards under Section 230 would be an “open invitation to forum shopping by defamation plaintiffs”).)

Applying a federal definition of intellectual property also prevents evasion of Section 230 through defamation claims repackaged as right of publicity claims, or other state law claims repackaged as “intellectual property” claims. As already noted, the right of publicity asserted by Cross is *broader* than defamation as it impacts speech that “uses” the plaintiff’s likeness but is not required to be false or defamatory. If such claims are allowed to evade Section 230 it would gut the central purpose of the law. Every defamation plaintiff could replead his or her case as a right of publicity action and force service providers to endure expensive litigation. Fortunately, the right of publicity is properly categorized as a state tort protecting an intangible, but *not* an intellectual, property right.

Unlike intellectual property claims, the right of publicity does not protect works of the human intellect. Rather, it limits the use of *factual* information such as accurate visual depictions or biographical information. (See, e.g., *Hart v. Elec. Arts, Inc.* (3d Cir. 2013) 717 F.3d 141, 168

(imposing liability for “realistic depictions” of college football players).) While the right of publicity is sometimes referred to as an intellectual property claim, it is more properly categorized as a privacy tort, and indeed is a recent offshoot of privacy law. (See *Alvarez Guedes v. Marcano Martinez* (D.P.R. 2001) 131 F.Supp.2d 272, 278 (“the right of publicity flows from the right to privacy”); see generally Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity* (2015) 38 Colum. J.L. & Arts 1, 3-4.) It was one of Prosser’s four privacy torts. (See Prosser, *Privacy* (1960) 48 Cal. L.Rev. 383, 389 (categorizing the right of publicity as a privacy tort together with intrusion on seclusion, public disclosure of private facts, and false light).) Thus, it stands in marked contrast to copyright and patent law, which have a long history and constitutional pedigree as intellectual property rights. (See, e.g., *Eldred v. Ashcroft* (2003) 537 U.S. 186, 219 (noting that the Copyright Clause and the First Amendment were adopted “close in time”).)¹²

In this case, Cross complains that posts depicting him are placed alongside advertisements. This is precisely the kind of allegation that early

¹² The limits of the intellectual property exemption to copyright and patent claims were highlighted by recent legislative action. Although trade secrets are sometimes viewed as intellectual property, Congress made sure to specify in enacting the Defend Trade Secrets Act (DTSA) that they were not creating “intellectual property” claims. Pub.L. No. 114–153, § 2(g) (May 11, 2016), 130 Stat. 376, expressly provided that the DTSA: “[S]hall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress.”

cases characterized as privacy claims. (*Pavesich v. New England Life Ins. Co.* (1905) 122 Ga. 190 [50 S.E. 68] (the “publication of a picture of a person, without his consent, as a part of an advertisement . . . is a violation of the *right of privacy* of the person whose picture is reproduced”) (emphasis supplied); see also *Kunz v. Allen* (1918) 102 Kan. 883 [172 P. 532]; *Foster-Milburn Co. v. Chinn* (Ky. App. 1909) 134 Ky. 424, 432 [120 S.W. 364, 366].)

Admittedly, the right of publicity has expanded from its privacy origins to include aspects of unfair competition such as false endorsement. (See *Hogan v. A.S. Barnes & Co.* (Pa. Ct. C.P. 1957) 114 U.S.P.Q. 314, 320 (noting that the right of publicity is “unfair competition under another label”); see also Rest.3d Unfair Competition, §§ 46-49; Ausness, *The Right of Publicity: A “Haystack in a Hurricane”* (1982) 55 Temp. L.Q. 977, 1054 (“Analytically, the right of publicity could be classified as a form of unfair competition.”).¹³ But these claims still do not relate to intellectual or creative works of the human intellect and are therefore not appropriately categorized as intellectual property claims.¹⁴

¹³ Available at http://uknowledge.uky.edu/law_facpub/392/.

¹⁴ The California Supreme Court’s statement that “The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility” is not dispositive of this question. (See *Comedy III*, 25 Cal.4th at 399.) The Court was not elevating the right of publicity to the status of intellectual property rights—the opinion is very clear to cast it as a privacy right—but merely explaining that it shares some interests with

In a recent district court decision, *Doe ex rel. Roe v. Backpage.com, LLC* (D.Mass. 2015) 104 F.Supp.3d 149, affd. sub nom. *Jane Doe No. 1 v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, the court expressed doubt that the right of publicity should be considered an intellectual property right for the purposes of Section 230. The court noted that the right of publicity does not protect works of the intellect and flows from the right to privacy. (*Id.* at p. 163 fn.16 (citing *Alvarez Guedes v. Marcano Martinez* (D.P.R. 2001) 131 F.Supp.2d 272, 278).) Ultimately, the *Doe* court did not decide the issue because it found the plaintiff in that case had not pleaded a viable right of publicity claim. (See *id.* at pp. 163-64.) Nevertheless, the court’s reasoning was sound and should be followed by this Court.

Courts should be hesitant to conclude that the broad protections of Section 230 fail because of the label “right of publicity.” This is important because, as noted above, the right of publicity potentially burdens a staggering range of speech. It has been asserted against biographies, comics, songs, computer games, movies, and magazines.¹⁵ Given its extraordinary

intellectual property claims. (See *Aroa Marketing, Inc. v. Hartford Ins. Co. of Midwest* (2011) 198 Cal.App.4th 781.)

¹⁵ See *ETW Corp. v. Jireh Publ’g, Inc.* (6th Cir. 2003) 332 F.3d 915 (painting); *Guglielmi v. Spelling-Goldberg Prods.* (1979) 25 Cal.3d 860 (film); *Rosemont Enters. v. Urban Sys., Inc.* (N.Y. Sup. Ct. 1973) 340 N.Y.S.2d 144 (board game); *Browne v. McCain* (C.D. Cal. 2009) 611 F.Supp.2d 1062 (presidential campaign commercial); *Seale v. Gramercy Pictures* (E.D. Pa. 1996) 949 F.Supp.331 (book and film); *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664 (magazine feature);

breadth, allowing right of publicity claims to escape Section 230 immunity would frustrate Congress's purpose of protecting free expression online.

III. CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court reverse the Superior Court and remand for the anti-SLAPP motion to be granted as to Plaintiff's right of publicity claim.

Dated: January 10, 2017

Respectfully submitted,

Daniel K. Nazer

Daniel K. Nazer
ELECTRONIC FRONTIER
FOUNDATION

Counsel for Amici Curiae

Hoffman v. Capital Cities/ABC, Inc. (9th Cir. 2001) 255 F.3d 1180 (digitally-altered photograph); *Doe v. TCI Cablevision* (Mo. 2003) 110 S.W.3d 363 (comic books); *Cardtoons, L.C. v. Major League Baseball Players Ass'n* (10th Cir. 1996) 95 F.3d 959 (parody trading cards); *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400 (documentary).

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Amicus Brief of Electronic Frontier Foundation is proportionally spaced, has a typeface of 13 points or more, contains 4,782 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: January 10, 2017

/s/ Daniel K. Nazer _____
Daniel K. Nazer

ELECTRONIC FRONTIER
FOUNDATION

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and not a party to the within action.
My business address is 815 Eddy Street, San Francisco, California 94109.

On January 10, 2017, I caused to be served copies of the foregoing documents described as:

**APPLICATION OF THE ELECTRONIC FRONTIER
FOUNDATION, ENGINE, PROFESSOR ERIC GOLDMAN,
GITHUB, INC., MEDIUM, THE ORGANIZATION FOR
TRANSFORMATIVE WORKS, PROFESSOR REBECCA TUSHNET,
SNAP INC., WIKIMEDIA FOUNDATION, AND YELP INC. FOR
PERMISSION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT
OF APPELLANT**

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY TRUEFILING: I caused to be electronically filed the foregoing document with the court using the court's e-filing system. The following parties and/or counsel of record are designated for electronic service in this matter on the TrueFiling website.

BY FIRST CLASS MAIL: I caused to be placed the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on January 10, 2017.

By: /s/ Daniel K. Nazer

Daniel K. Nazer

SERVICE LIST

James G Snell
Julie Erin Schwartz
Perkins Coie LLP
3150 Porter Drive
Palo Alto, CA 94304-1212

Via E-File Service

*Attorneys for Defendant and Appellant:
Facebook, Inc. and Does One through
Fifth*

Mark L Punzalan
Heidi Jaewon Kim
Punzalan Law P.C.
600 Allerton St., Ste. 201
Redwood City, CA 94063

Via E-File Service

Todd G. Cole
Cole Law Group PC
750 Old Hickory Blvd. #2-202
Brentwood, TN 37027

*Attorneys for Plaintiff and Respondent:
Jason Cross, 1203 Entertainment, LLC,
MDRST Marketing/Promotions, LLC
Via E-File Service*

Judge Donald J. Ayoob
San Mateo Superior Court
400 County Center
Redwood City, CA 940632

Via First Class Mail