

20-2725, 20-2885

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

KAREN HEPP,

APPELLANT/CROSS-APPELLEE,

v.

FACEBOOK, INC. and WGCZ a.s.,

APPELLEES;

IMGUR INC. and REDDIT, INC.,

APPELLEES/CROSS-APPELLANTS.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:19-cv-04034

The Honorable John Milton Younge, United States District Court Judge

**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION,
THE COPIA INSTITUTE, IFIXIT, ENGINE, AND CENTER FOR
DEMOCRACY AND TECHNOLOGY IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Electronic Frontier Foundation, Floor64, Inc. d/b/a/ The Copia Institute, iFixit, Inc., Engine Advocacy, and Center for Democracy and Technology state that they do not have parent corporations and that no publicly held corporation owns 10 percent or more of their stock.

Dated: March 26, 2021

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STATEMENT OF INTEREST¹

The Electronic Frontier Foundation (“EFF”) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 33,000 active donors and dues-paying members across the United States. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the development and application of law in the digital age. EFF has litigated or otherwise participated in a broad range of intermediary liability cases.

Floor64, Inc. d/b/a The Copia Institute, is a privately-held small business that advises and educates innovative technology startups on policy issues, including those relating to platforms and the important free speech interests associated with their protection. Through the Copia Institute, Floor64 works directly with innovators and entrepreneurs to better understand the regulatory terrain, while Floor64’s online publication, Techdirt.com, has published over 70,000 posts commenting on these subjects. The site regularly receives more than a million page views per month, and its posts have also attracted more than a million

¹ Pursuant to Federal Rule of Appellate Procedure Rule 29(a), amici certifies that no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Amicus iFixit notes that US Policy Lead Kerry Sheehan was formerly a product policy associate manager at Facebook. All parties consent to the filing of this brief.

reader comments—user speech that advances discovery and discussion around these topics. Floor64 depends on Section 230 both to enable the robust public discourse found on its website and for its own speech to be shared and read throughout the Internet.

iFixit is an international, open-source, online repair manual for everything. iFixit’s mission is to provide people with the knowledge they need to make their things work for as long as possible. iFixit represents the interests of a global community of makers, tinkerers, fixers, and repair professionals. In 2020, the iFixit community taught repair to over 100 million people from almost every country in the world. iFixit’s strongly collaborative online community has published over 50,000 online repair guides. This massive, free resource has helped people fix everything from cellphones and game consoles to tractors and musical instruments.

Engine Advocacy (“Engine”) is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government representatives 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.

Center for Democracy & Technology (“CDT”) is a non-profit public interest organization. For more than 25 years, CDT has represented the public’s interest in an open, decentralized internet and worked to preserve civil rights and civil liberties in the digital age. CDT regularly advocates in support of the First Amendment, protections for online speech, and privacy, and works to balance those rights and protections where they intersect.

Amici have a strong interest in this appeal and in the proper interpretation of the statute on which it turns: 47 U.S.C. § 230. Section 230 is the legal cornerstone of online speech, commerce and innovation. By vesting online service providers with immunity to claims based on the exercise of their publishing and editorial functions, Section 230 has promoted free speech and innovation for more than 20 years. Amici represent the diverse concerns and perspectives of the technology industry and technology users. Accordingly, amici have a direct and substantial interest in ensuring that the legal rules governing online discourse are properly and consistently applied so that amici and their members can continue to enjoy an Internet that promotes innovation, competition and free speech—just as Congress intended.

INTRODUCTION

The legal safe harbor of Section 230 has enabled decades of innovation and online expression. Amici urge the Court to defend that safe harbor, agreeing with the lower court and with the Ninth Circuit that a person’s “right of publicity” is not “intellectual property” within the meaning of Section 230.

The term “intellectual property” is highly contested and ambiguous, but two things are clear.

First, even apart from Section 230, the term is most naturally construed to refer to copyrights and patents, regimes Congress is authorized to create under what is known, not coincidentally, as the “Intellectual Property Clause” of the Constitution. These limited monopoly regimes share a common purpose – to spur progress in the arts and sciences – and are clearly bounded in scope and term. They are knowable and relatively stable. The right of publicity, by contrast, is a virtually unbounded, highly variable cause of action rooted in a distinct dignitary purpose: to protect a person’s ability to be free from unwanted exploitation.² Indeed, that is the purpose Ms. Hepp wants it to serve in this very case.

Second, within the context of Section 230, construing the term to include publicity rights is simply nonsensical. Congress passed Section 230 so that new

² Indeed, Pennsylvania has categorized the claims at issue here as privacy-related, not intellectual property. Brief of Appellees/Cross-Appellants Imgur Inc. and Reddit, Inc., D.I. 46 at 12-17.

sites and services could grow and thrive without fear that a failure to perfectly manage content that might run afoul of 50 different state laws might lead to crippling liability. The result is an Internet that enables new forms of collaboration and cultural production; allows ordinary people to stay informed, organize and build communities in new and unexpected ways; and, especially in a pandemic, helps millions learn, work and serve others. And new platforms and services emerge every day because they can afford to direct their budgets toward innovation, rather than legal fees.

Excluding publicity rights claims from the immunity afforded by Section 230 would put all of that in jeopardy. If state publicity rights claims are excluded from Section 230 immunity, intermediaries could only host as much speech as their lawyers, content moderators, and filters could screen beforehand, based on the most restrictive provisions in wildly varying state laws. In California, publicity rights protections apply to virtually anything that evokes a person, and endure for 70 years after the death of that person. In Virginia, a publicity rights violation can result in criminal penalties.³ Alaska doesn't recognize a right of publicity at all. Faced with a panoply of standards, email providers, social media platforms, and any site that supports user-generated content will be forced to tailor their sites and

³ Va. Code Ann. § 18.2-216.1.

procedures to ensure compliance with the most expansive state law, or risk liability and potentially devastating litigation costs.

Amici sympathize with Ms. Hepp, and do not file this brief because we are concerned about the effects of an adverse ruling on Facebook in particular, which can doubtless afford any liability it might incur. Instead, we are deeply concerned about the smaller entities that cannot afford that risk, or even the costs of defending a lawsuit.⁴ We are even more concerned about the users who rely on intermediaries to communicate with family, friends and the world, and who will be unable to share content that might include an image, likeness or phrase associated with a person should those intermediaries be saddled with defending against state publicity claims based on their users' speech.

Appellant's theory is contrary to both the meaning of the term "intellectual property" and the will of the Congress. It would upend the legal landscape that has promoted a flourishing Internet for decades, and delegate the scope of a crucial legal protection to the whims of the states. It would require online sites and services to adopt draconian measures to avoid liability in a fruitless effort to stave off a flood of meritless lawsuits. Many will simply refuse to host user-generated content at all – and we will all be the poorer for it.

⁴ See Evan Engstrom, *Primer: Value of Section 230*, Engine (Jan. 31, 2019), <https://www.engine.is/news/primer/section230costs> (last visited Mar. 24, 2021).

The district court rejected that theory. This Court should do the same.

ARGUMENT

I. FOR PURPOSES OF SECTION 230, INTELLECTUAL PROPERTY SHOULD BE CONSTRUED TO SIGNIFY *FEDERAL* INTELLECTUAL PROPERTY, PARTICULARLY COPYRIGHTS AND PATENTS

As the District Court (and the Ninth Circuit) correctly noted, the term “intellectual property” is not defined in Section 230 or the larger statutory scheme of the Telecommunications Act, and is ill-defined outside of it.

The term “intellectual property” did not come into common legal use until the latter half of the 20th Century. *See* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 *Tex. L. Rev.* 873, 895-96 n. 123 (1997) (“The modern use of the term ‘intellectual property’ as a common descriptor of the field probably traces to the foundation of the World Intellectual Property Organization (WIPO) by the United Nations; *See* Convention Establishing the World Intellectual Property Organization, *done* July 14, 1967, art. 2(viii), 21 *U.S.T.* 1749, 1772, 828 *U.N.T.S.* 3, 11.”) Since then, some courts and commentators have come to use the term more loosely – and controversially – to refer to a wide variety of intangible claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1107 (9th Cir. 2007). This use departs from a common, bounded understanding of “intellectual property” to potentially sweep in everything from confidential business information, to a

reputation, to a phrase that simply evokes a particular person.

Given the necessary ambiguity of a vaguely bounded statutory term, the better course by far is to construe that term to embrace its traditional core: federal copyrights and patent rights.⁵ Indeed, the Constitutional clause that authorizes these exclusive rights regimes is interchangeably called “the Intellectual Property Clause” and the “Patent and Copyright Clause.” Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J.1771 (2006); Karl Fenning, *The Origins of the Patent and Copyright Clause of the Constitution*, 17 Geo. L.J. 109, 109-17 (1929). Unique among constitutional provisions, it mandates that these exclusive rights, if enacted, “promote the Progress of Science and the useful Arts.” *Id.*; U.S. Const. art. 1, § 8, cl. 8; *see* Lemley, 75 Tex. L. Rev. at 888 (“The rather unusual constitutional grant of power to enact the patent and copyright laws is decidedly instrumental in nature”).

In addition to being rooted in the Intellectual Property Clause of the Constitution, copyrights and patents share several other distinctive qualities.

First, copyrights and patents share *common origins* in 15th and 16th century

⁵ Trademark rights are also federal, but they too lie within a grey area, as a body of law rooted in consumer protection yet sometimes referred to as intellectual property. However, the relationship between trademarks and Section 230 is not before the Court.

Venetian printing monopolies. Joanna Kostlyo, *From Gunpowder to Print: The Common Origins of Copyright and Patent*, Privilege and Property: Essays on the History of Copyright (Ronan Deazly et al. eds., 1st ed. 2010) (available at <https://www.jstor.org/stable/j.ctt5vjt9v.5>). Most of the common features discussed below have been shared by both copyright and patent regimes since this conception.

Second, both *embody a fundamental bargain*: the public grants a limited monopoly to encourage creativity and innovation and, in exchange, gets full use of that creativity and innovation after that monopoly has expired. *See, e.g., Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 9 (1966) (“The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare”); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”).

Third, both are limited in *scope*. Copyright applies only to expressive works, as set forth in the Copyright Act. *Feist Publications, Inc., v. Rural Telephone*

Service Co., 499 U.S. 340 (1991). Patent applies only to new, useful and nonobvious inventions concerning certain subject matter, as set forth in the Patent Act. Those limits are crucial because, as the Supreme Court puts it, federal patent and copyright laws “determine not only what is protected, but also what is free for all to use.” *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

Fourth, they are limited in *time* to specific terms set out by Congress, unlike other species of exclusive rights, such as trade secrets and trademarks, which can persist so long as their putative owners invest in them. Those term limits are an integral part of the intellectual property bargain.

Fifth, they are *national* statutes that can only be revised by Congress, which means the people and companies Section 230 is intended to protect can know them with relative ease and have some opportunity to weigh in if change is contemplated.

Sixth, they are almost fully *alienable*. An author or inventor can assign their exclusive rights to another, giving up their own ability to make use of the copyrighted work or patented invention.

Publicity rights do not share these characteristics. Publicity rights are of relatively recent origin and derive from common law privacy rights. Thus, “the right of privacy was and remains the original right of publicity” and, accordingly, “dignitary and liberty-based justifications are central to the right’s existence.”

Jennifer Rothman, *The Right of Publicity: Privacy Reimagined for a Public World*, Harvard University Press, 2018, at 11.

The history of the right can be traced to the advent of instantaneous photography, which made it easy to capture a person's image without their consent and then use it for all kind of commercial purposes. Public outrage at the practice led to court decisions and statutes forbidding it, on the theory that the right to be let alone included the right to be free from "unwarranted publicity," especially commercial publicity. *See, e.g., Pavesich v. New England Life Ins.*, 50 S.E. 68 (Ga. 1905). Indeed, many of the earliest privacy cases in the United States concerned not the use of private facts, but the use of likenesses for commercial purposes. *Id.*; *see also generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

Decades later, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court partially unmoored publicity rights from privacy rights, suggesting that the right of publicity, like copyrights and patents, provides an economic incentive to invest in the best possible performance. 433 U.S. 562 (1977). The Court noted, however, that the facts before it were unusual in that the appropriation at issue involved the Petitioner's entire performance, not simply a general use of his name or likeness in advertising. *Id.* at 573. In most instances, the close tie between privacy and publicity interests continues to be reflected in the practical

scope of the right: it protects individuals “against economic, personal and dignitary injuries” that stem “from unauthorized uses of their identities.” Rothman at 165.

“Identity” is itself an ambiguous term, which may help explain why publicity rights vary wildly from state to state. *See generally* Rothman’s *Right of Publicity Roadmap*, <https://www.rightofpublicityroadmap.com/> (last visited Mar. 24, 2021). Some states specifically define the aspects of a person’s identity that may be the basis of a claim, *e.g.*, Okla. Stat. Ann. tit. 12 § 1448(A) (name, voice, signature, photograph, or likeness), while other state laws bar virtually any use that evokes a person, including names, faces, voices, signature, a car, a robot, gestures, mannerisms, and even a catch-phrase used by *someone else* to refer to them. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (use of modified plaintiff’s race car); *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983) (use of famous phrase associated with talk show host: “Carson’s identity may be [wrongfully] exploited even if his name, John W. Carson, or his picture is not used.”). Many states don’t use the term “publicity rights” at all, but instead have a patchwork of common law and statutory rights covering different combinations of false endorsement and invasion of privacy rights. The right is not even strictly limited to commercial uses, but has rather been invoked in multiple noncommercial contexts, including artistic representations of civil rights heroes and political campaigns. Rothman at 5.

In light of this broad scope, and despite the Supreme Court's rough analogy in *Zacchini*, it is hard to see how publicity rights fulfill any public interest in promoting creativity or invention, rather than a general interest in protecting people against unfair commercial exploitation and unwanted attention. Celebrities do not need any special incentive to have a public identity, nor do regular people. Race car drivers do not need extra incentives to choose a particular car number. Singers do not need extra incentives to develop a distinctive voice. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (imitation of singer's voice in commercial). And if anyone was encouraged to develop a catch phrase for Johnny Carson, it was Ed McMahon, which is why the court's analysis in *Carson v. Here's Johnny Portable Toilets, Inc.* focused entirely on whether or not the phrase was associated with Carson's identity. 698 F.2d at 834.

Thanks to their vague scope, in many respects publicity rights reach far more broadly than, for instance, copyright. As Judge Kozinski famously noted in *White v. Samsung Electronics America*:

[I]t's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It conflicts with the Copyright Act and the Copyright Clause.

989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting). Judge Kozinski went on to argue that a crucial characteristic of intellectual property laws is that they are

specific and bounded. *Id.* Publicity rights, in 2021, are neither.

The duration of publicity rights further demonstrates the variability and the potentially limitless nature of these state claims. As a privacy right, the “right of publicity” traditionally did not survive the death of the person in question, and this is still the rule in many states. *See, e.g., Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990); *Swickard v. Wayne County Medical Examiner*, 475 N.W.2d 304 (Mich. 1991); *Abernathy v. Thornton*, 83 So.2d 235, 237 (Ala. 1955); Neb. Rev. Stat. § 20-208. But other states allow the heirs of a deceased person to continue to control use of their likeness for either a fixed or indefinite period of time. *E.g.* Va. Code Ann. § 8.01-40 (20 years postmortem); Cal. Civ. Code § 3344.1 (70 years postmortem); Tenn. Code Ann. § 47-25-1101 *et seq.* (postmortem right of publicity as long as the identity is used); Ark. Code Ann. § 4-75-1101 (50 years postmortem).

State liability standards can also be rewritten with little opportunity for intervention by most intermediaries or their users in other states. A small service provider in Pennsylvania can, through its representatives in Congress, seek to influence changes to copyright law that might be detrimental to its operations. It will be infinitely more difficult for that same provider to be aware of, much less influence, legal developments in California, or Florida, or Texas.

Copyrights and patents are relatively clear, relatively knowable, and embody

a longstanding balance between rightsholders, future creators and inventors, and the public at large. Publicity rights are none of these things. Instead, whether or not we describe them as intellectual property rights, they bear every characteristic of the other state torts included within Section 230’s traditional immunities.

II. CONSTRUING SECTION 230 TO EXCLUDE PUBLICITY RIGHTS TORTS WOULD UPEND CONGRESS’ INTENT, TO THE DETRIMENT OF ONLINE SPEECH, COMPETITION AND INNOVATION

A. Congress Intended for Section 230 to Be Construed Broadly

Section 230 was “enacted to protect [intermediaries] against the evil of liability” based on user-generated content—liability that would otherwise represent an existential threat to many. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 1998) (internal quotation marks and citation omitted); *see also, e.g., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-19 (1st Cir. 2016) (holding providers liable for “an enormous amount of potentially harmful content” created by “an infinite number of users” would “have an obvious chilling effect”) (internal quotation marks and citation omitted).

The impetus for Section 230 was a troubling decision from a New York state court finding that online platform Prodigy could be held liable for a user’s speech. Investment firm Stratton Oakmont complained that a user had falsely posted claims that one of its stock offerings was fraudulent. *Stratton Oakmont, Inc. v. Prodigy*

Servs. Co., 1995 WL 323710, 3-4 (N.Y. Sup. Ct. May 24, 1995). At the time, Prodigy had over 60,000 posts uploaded from users each day – a tiny fraction of today’s Internet, but already far too many to perform a legal review of each one. *Id.* But Prodigy’s adoption and enforcement of community standards, the court said, meant that it was exercising editorial control and could be considered a publisher liable for transmitting user content. *Id.* This holding threatened to open the floodgates of litigation against online platforms, with disastrous consequences for free speech and innovation. Congress acted swiftly to enact Section 230 and prevent this outcome. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (discussing role of *Stratton Oakmont* in inspiring Section 230).

Against this background, it is far more plausible that Congress intended a narrow and well-defined carveout for intellectual property rather than a freewheeling, open-ended one. Indeed, “[t]here has been near-universal agreement that Section 230 should not be construed grudgingly.” *Backpage.com*, 817 F.3d at 18. Instead, “[t]he majority of federal circuits have interpreted [Section 230] to establish broad federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service.” *Perfect 10*, 488 F.3d at 1118 (9th Cir. 2007) (internal quotation marks and citation omitted) (emphasis added).

Moreover, it is no coincidence that, having exempted federal copyright

claims from Section 230, Congress took steps to ensure that platforms would not be exposed to potential litigation over every paragraph and photo by passing Section 512 of the Digital Millennium Copyright Act. Section 512 provides for a carefully balanced system of notices, takedowns, and counternotices that allows platforms to host users' speech with relative confidence. A provider can rest assured that it will not be held liable for user uploads so long as it complies with the requirements of the safe harbor, while copyright owners can trigger the removal of content with a simple notice. Critically, the user then has the opportunity to have the content restored by submitting a counternotice, providing protection for lawful speech.

Thus, having excluded intellectual property from Section 230, and thereby potentially allowed a wave of copyright litigation to chill speech and innovation on the Internet instead, Congress acted to prevent that wave from cresting. Allowing state torts to qualify as "intellectual property" under Section 230 would re-open the floodgates.

What is worse, reversing the district court's order would invite "artful pleading" designed to undermine Section 230 immunity in future cases. *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 423 n.7 (1st Cir. 2007). Many courts have warned against "attempted end runs" around Section 230 immunity, *Backpage.com, LLC*, 817 at 24, forcing providers to "fight costly

and protracted legal battles.” *Roommates.com*, 521 F.3d at 1175. For example, it is not difficult to imagine that business owners who are unhappy with their online reviews might characterize their defamation claims as protecting “intellectual property” rights in their business reputation and the value of their products. *See Lycos*, 478 F.3d at 422 (discussing whether trademark dilution claim should be considered “intellectual property”; holding platform not liable on First Amendment grounds).

Finally, it is worth noting that the protection of Section 230 was considered so important that it even applies to state criminal law claims. It is absurd to imagine that Congress would go so far as to preempt state enforcement of criminal laws in order to give online platforms freedom to operate, yet leave platforms exposed to litigation over publicity rights.

B. Exempting Publicity Rights From Section 230 Would Undermine Congress’ Intent to Foster Speech and Competition

Congress didn’t choose to protect intermediaries, be they social media platforms, news sites, or email forwarders, for their own sake. It protected them so they would be available to all of us who rely on them. By providing Internet intermediaries, both commercial and noncommercial, with robust, flexible and simple – but not absolute – immunity from legal liability for user-generated content, Section 230 lowered the barrier to entry for online platforms and other services and “paved the way for a robust new forum for public speech as well as a

trillion-dollar industry centered around user-generated content.” *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (internal quotation marks and citation omitted).

This has led to the emergence of all kinds of new products and forums and, equally importantly, kept the door open for competitors to follow. Today, social media is dominated by Twitter, Facebook and Youtube, but dissatisfied users can turn to Discord, Parler, Clubhouse, TikTok and Rumble. Dissatisfied Gmail users can turn to Proton, Yahoo!, Riseup and many others. None of these entities, entrenched or emergent, would exist without Section 230.

Appellant’s theory⁶ raises that barrier to entry back up, particularly given that intermediaries would face potential liability not only for images and video, but mere text as well. To mitigate that liability risk, any company that relies on ads will be forced to try to screen potentially unlawful content, rewrite their terms of service, and/or require consent forms for any use of anything that might evoke a persona. The parade of horrors is not difficult to imagine. To take a few practical examples:

⁶ Notably, Appellant argues that her right of publicity bars commercial sites like Imgur and Reddit from hosting images of her, even when the users uploading those images aren’t engaged in a commercial use or violating any law at all. This theory would mean that no company could offer users the opportunity to engage in even *lawful* speech. It would be disastrous enough to hold platforms liable for unlawful speech of their users; holding them liable for *lawful* user speech would be an even more serious blow to the vibrant Internet upon which we all rely.

- A knitting site like Ravelry.com, which also has ads, would be unable to host users' pictures of friends wearing the sweaters they have made.
- A news site, like Democratic Underground, would have to shut down its discussion forums, for fear its users might use a phrase associated with a celebrity incorrectly.
- Email providers would have to find a way to scan communications to ensure that users aren't forwarding material that might evoke an identity for some commercial purpose, degrading not only opportunities for speech but privacy as well.
- An online agricultural marketplace, like HitchPin, would have to scan or limit the use of images in user listings to ensure those images do not include any likenesses of people.⁷
- An online platform for job seekers and potential employers would have to do the same, in case a user decided to abuse the site by posting profiles of others.⁸
- Online annotation site Fiskkit,⁹ which allows its users to comment on

⁷ Hitchpin, <https://www.hitchpin.com/> (last visited Mar. 24, 2021).

⁸ Edward Graham, *#STARTUPSEVERYWHERE: Dekalb, Ill.*, Engine (Mar. 6, 2020), <https://www.engine.is/news/startupseverywhere-dekalb-ill>.

⁹ Fiskkit, <https://fiskkit.com/> (last visited Mar. 24, 2021); Nathan Lindfors, *#STARTUPSEVERYWHERE: San Francisco, Calif.*, Engine (Dec. 11, 2020)

news reports in order to flag false or misleading information, would have to screen those comments to ensure no names, images, or phrases associated with a person are used without permission.

- Blerp, a platform for sharing audio clips, would have to screen those clips to ensure users aren't sharing audio that includes voices or sounds associated with a person.¹⁰

And so on.

All of this will be expensive – indeed, it may be so expensive that these services will shut down altogether. It is physically impossible for all speech transmitted across Internet services to be vetted in advance by the intermediaries that facilitate that transmission. Even if it was, investors who would rather support innovation than lawyers, filtering technologies, and content moderators, will choose not to fund emerging alternative services at all.¹¹

Moreover, even strict terms of service, consent forms, and content filters would not suffice: many services will be swamped by meritless claims or shaken

<https://www.engine.is/news/startupseverywhere-sanfrancisco-calif-fiskkit>.

¹⁰ Blerp, <https://blerp.com/> (last visited Mar. 24, 2021); Edward Graham, *#STARTUPSEVERYWHERE: Salt Lake City, Utah*, Engine (Feb. 21, 2020), <https://www.engine.is/news/startupseverywhere-salt-lake-city-utah>.

¹¹ See generally *The Impact of Internet Regulation on Early Stage Investment* (November, 2014), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/%20EngineFifthEraCopyrightReport.pdf>.

down for nuisance settlements, particularly given that in many states publicity rights is a strict liability tort. Tech giants like Facebook and Google might survive this flood of litigation, but nonprofit platforms and startups – like the next competitors to Facebook and Google – would not.

When it enacted Section 230, Congress intended “to preserve the vibrant and competitive free market that presently exists for . . . interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). A publicity rights carveout would have the opposite effect, leading to further consolidation in the technology sector and undermining Americans’ ability to speak online.

CONCLUSION

Appellant’s interpretation of Section 230 would effectively eviscerate its protections altogether. That cannot be reconciled with the purpose and history of the statute. For these reasons, the Court should agree with the District Court, and the Ninth Circuit, and hold that Appellant’s publicity-based claims are barred by Section 230.

Dated: March 26, 2021

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned certifies pursuant to Third Circuit Local Appellate Rule 46.1 that I, Kit Walsh, am a member of the bar of this Court and was admitted on July 2, 2013.

Dated: March 26, 2021

By: /s/ Kit Walsh
Kit Walsh

CERTIFICATE OF COMPLIANCE

That I, Kit Walsh, counsel for Amici Curiae, hereby certify that the following statements are true:

The foregoing brief of Amici Curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Appellate Rule 31.1. The brief is printed in proportionally spaced 14-point Times New Roman font, using Microsoft® Word for Mac 2016 and there are 5,013 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6).

The text of the electronic brief is identical to the text of the seven paper copies mailed to the Court. The electronic file of this brief was scanned with antivirus Virustotal version 3.0 and no virus was detected.

Dated: March 26, 2021

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CERTIFICATE OF SERVICE

I certify that on March 26, 2021 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. All participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 26, 2021

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