

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 S.R.O.,

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,
AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE
AND RESEARCH LIBRARIES, ASSOCIATION OF RESEARCH
LIBRARIES, CENTER FOR DEMOCRACY AND TECHNOLOGY, COPIA
INSTITUTE, ENGINE ADVOCACY, FREEDOM TO READ
FOUNDATION, IFIXIT, PUBLIC KNOWLEDGE IN SUPPORT OF
PETITION FOR REHEARING**

Kit Walsh
Corynne McSherry
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Email: kit@eff.org
Telephone: (415) 436-9333
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

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

Dated: October 28, 2021

By: /s/ Kit Walsh
Kit Walsh
Corynne McSherry
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
kit@eff.org

Counsel for Amici Curiae

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STATEMENT OF INTEREST¹

Section 230 is the legal cornerstone of online speech, commerce, and innovation. By vesting online service providers with immunity to claims based on their publishing and editorial functions, Section 230 has promoted free speech and innovation for over 20 years. Amici are public interest groups, library associations, small tech companies, and representatives of the start-up community that, collectively, represent the diverse concerns and perspectives of technology industries and users. Accordingly, amici have a direct and substantial interest in ensuring that the legal rules governing online discourse promote innovation, competition, and free speech—just as Congress intended.

¹ Pursuant to Federal Rule of Appellate Procedure Rule 29(c), amici certify 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 Facebook employee.

INTRODUCTION

Amici urge the Court to grant Facebook’s petition for rehearing, to protect online speech and competition.

The panel majority creates a circuit split that will unsettle and undermine Section 230 protections that have enabled decades of innovation and online expression, both issues of exceptional importance.

The term “intellectual property” in Section 230(e)(2) refers to copyrights and patents. The majority misconstrues the law and contradicts Congress’s intent by including state right of publicity claims. Publicity rights are a 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 Ms. Hepp's interest in this very case.* If state publicity rights claims were excluded from Section 230 immunity, intermediaries could host only as much speech as they could screen beforehand. Wildly varying state law standards will force email providers, social media platforms, and any site with user-generated content to adhere to the most restrictive regime, or risk potentially devastating litigation costs. Litigants around the country will sue platforms for acts of their users, based on publicity rights or other supposed “intellectual property,” and extract settlements from platforms that

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.

cannot afford to fight. Users who rely on intermediaries to communicate and learn will suffer the consequences.

The majority opinion upends the legal landscape and delegates the scope of crucial legal protection to the various states. It requires online sites and services to adopt draconian measures or face financial ruin. Many will simply refuse to host user-generated content at all—and we will all be the poorer for it.

ARGUMENT

I. FOR PURPOSES OF SECTION 230, “INTELLECTUAL PROPERTY” MUST MEAN COPYRIGHT AND PATENT STATUTORY MONOPOLIES

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 and is ill-defined in general.

Given the term’s ambiguity, the Court should construe it, consistently with Congress’s intent, to mean the two regimes that clearly fall within its scope: copyrights and patents. Indeed, the Constitutional clause that authorizes these 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).

Both patent and copyright laws *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.³ In addition, both are limited in *scope and term*. Copyright applies only to original, creative works and includes safeguards such as fair use and limits on secondary liability. Patents cover only new, useful, and non-obvious inventions with even stronger limits on indirect liability, Finally, they are *national* regimes that specifically preempt parallel state claims. Congress sought uniformity in internet governance, a key factor in the Ninth Circuit's analysis when it correctly construed Section 230 to bar publicity claims. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007).

Publicity rights do not share these defining characteristics of "intellectual property." *First*, publicity rights derive from common law privacy rights; they are not incentives for innovation enacted pursuant to the IP Clause. The right dates back to the advent of instantaneous photography, which made it easy to capture a person's image without consent and use it for commercial purposes. Public outrage led to court decisions and statutes determining that the right to be let alone

³ Trademark law is instead rooted in consumer protection, ensuring that a customer gets the quality they expect and knows what company is responsible if something goes wrong or if they want to speak well of the product. Since they do not embody the fundamental bargain of "intellectual property," their inclusion within that term is inaccurate, a product of sharing superficial characteristics and commonly being practiced by lawyers who are also IP specialists.

included the right to be free from “unwarranted publicity,” especially commercial publicity. *See, e.g., Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *see also generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

Thus, the right of publicity is explicitly rooted in privacy interests: it protects individuals “against economic, personal and dignitary injuries” that stem “from unauthorized uses of their identities.” Jennifer Rothman, *The Right of Publicity: Privacy Reimagined for a Public World*, Harvard University Press, 165 (2018) (“Rothman”).

Wildly varying state laws cover misuse of various aspects of a person’s “identity.” *See generally* Rothman’s *Right of Publicity Roadmap*, <https://www.rightofpublicityroadmap.com/> (all websites last visited Oct. 22, 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 catchphrase used by *someone else* to refer to them. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (modified race car); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (famous phrase referring to talk show host). Many states do not use

the term “publicity rights” at all, but covering similar ground through false endorsement and invasion of privacy regimes. The right even extends to noncommercial contexts, including artistic representations of civil rights heroes and political campaigns. Rothman at 5.

There is no threshold requirement to invent a novel, creative personality or likeness before the dignitary right to privacy kicks in, because publicity rights do not exist to promote creativity or invention. No legal incentive is necessary to ensure that people have identities. 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 catchphrase for Johnny Carson, it was Ed McMahon. 698 F.2d at 838 (Kennedy, Cir. J., *dissenting*). Rather than embodying intellectual property, publicity rights clash with those regimes because they are concerned with very different interests.

In an unusual case where a person’s entire performance was appropriated, the Supreme Court in *dicta* related publicity rights to intellectual property by suggesting that the right of publicity provided an economic incentive to invest in the performance. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977). However, a right of publicity claim does not traditionally depend on any such investment, and the Supreme Court has also made clear that intellectual

property regimes do not exist to reward the “sweat of the brow” of creators, but to benefit the public through the dissemination of new inventions and creative works. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (U.S. 1991). The *Zacchini dicta* described a *side effect* of the right of publicity: as with any right to bar another’s harmful behavior, the right has the effect of encouraging investment in the thing that might be harmed. That effect does not transform every such right into “intellectual property” regime. *Zacchini* explicitly did not avail himself of intellectual property because he did not record his performance in a tangible medium as required by copyright law; he did not fulfill his end of the public bargain by providing a tangible, reproducible creation that the public could use subject to the limited monopoly of copyright. Instead, his remedy was limited to the harm to his dignitary interest. Indeed, extending the right of publicity into the realm of intellectual property rather than dignitary concerns would likely *conflict* with federal copyright law, further reinforcing the understanding that its proper scope lies outside of IP. As Judge Kozinski noted in *White v. Samsung Electronics America*:

[I]t’s now a tort for advertisers to remind the public of a celebrity... 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, 1514 (9th Cir. 1993) (Kozinski, J., dissenting) (emphasis added).

Second, unlike intellectual property rights, the term limit of the right of publicity has reflected its status as a privacy right and ends at death in many states. Some states have created post-mortem rights, which are highly variable, lasting from 20 years to potentially forever. *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.* (as long as the identity is used).

Finally, publicity rights clash with Congress’s vision of national uniformity, subjecting platforms to highly variable regimes they have little opportunity to influence and are unlikely to be aware of.

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, they bear every characteristic of the other state torts included within Section 230’s immunities.

II. THE CONSTRUCTION OF SECTION 230(E)(2) IS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT WILL IMPACT 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” and litigation based on user-generated content—liability that would otherwise represent an existential threat. *Fair Housing Council of San Fernando*

Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) (internal quotation marks and citation omitted). Against this background, Congress plainly intended a narrow and well-defined carveout for intellectual property rather than a freewheeling, open-ended one.

Having exempted federal copyright claims from Section 230, Congress also established copyright safe harbors by enacting Section 512 of the Digital Millennium Copyright Act. Thanks to Section 512, a provider can rest assured that it will not be held liable for user uploads so long as it complies with the safe harbor's requirements. At the same time, copyright owners can trigger the removal of content with a simple notice. Critically, the user can then have the content restored by submitting a counternotice, providing protection for lawful speech.

Thus, having excluded intellectual property from Section 230, Congress acted to fill that regulatory gap and ensure that the multitude of potential copyright claims would not chill online platforms. Allowing publicity rights to qualify as "intellectual property" under Section 230 would re-open the floodgates.

B. Exempting Publicity Rights from Section 230 Undermines Speech and Competition

Congress did not choose to protect intermediaries for their own sake, but for the sake of all of us who rely on them. Section 230 led to the emergence of all kinds of new products and forums and, crucially, kept the door open for competitors to follow. Today, users dissatisfied with dominant social media can

turn to Discord, Mastodon, Parler, Clubhouse, TikTok, and Rumble. Dissatisfied Gmail users can turn to Outlook, Yahoo, and many others. None of these entities, entrenched or emergent, would exist without Section 230.

The majority opinion narrows that doorway, with intermediaries facing potential litigation and liability not only for images and video, but mere text. The consequences are not difficult to imagine. To take a few practical examples:

- 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.
- Libraries would face pressure to monitor and restrict patrons' use of web services, which is at odds with their commitments to privacy, free expression, and access to knowledge.⁴ The fact that libraries themselves are generally noncommercial in organization and mission would not suffice to shield them: some publicity rights statutes reach

⁴ Robin Leshner, *United for Libraries opens online discussion forums to non-members to help provide COVID-19 resources*, Pennsylvania Library Association (Mar. 23, 2020), <https://www.palibraries.org/blogpost/1652016/344731/United-for-Libraries-opens-online-discussion-forums-to-non-members-to-help-provide-COVID-19-resources>.

noncommercial activities and patrons use library services for many things, including advertisements and other commercial uses of online forums.

- Email providers would have to find a way to scan communications to ensure that users are not forwarding material that might evoke an identity for some commercial purpose, degrading not only speech but privacy as well.
- An online platform for job seekers and potential employers would have to prevent users from abusing the site by posting profiles of others.⁵
- Online annotation site Fiskkit,⁶ which allows its users to comment on news reports 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.
- Blerp, a platform for sharing audio clips, would have to ensure users are not sharing audio that includes voices or sounds associated with a

⁵ Edward Graham, *#STARTUPSEVERYWHERE: Dekalb, Ill.*, Engine (Mar. 6, 2020), <https://www.engine.is/news/startupseverywhere-dekalb-ill>

⁶ Fiskkit, <https://fiskkit.com>; Nathan Lindfors, *#STARTUPSEVERYWHERE: San Francisco, Calif.*, Engine (Dec. 11, 2020) <https://www.engine.is/news/startupseverywhere-sanfrancisco-calif-fiskkit>.

person.⁷

Section 230’s safe harbor reflects Congress’s understanding that the cost of defending countless state lawsuits — even meritless ones — would be ruinous for speech and innovation online. This is doubly true for the right of publicity, a strict liability tort in many states. Tech giants might survive this flood of litigation, but nonprofits and start-ups would not. Nor can such platforms obtain consent from non-users who might be referenced on their platform. Likewise, it is simply impossible for today’s technology to evaluate text and imagery to reliably identify potential violations of the right of publicity, given how deeply such claims are connected to context, cultural conventions, and consent.⁸

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 do the opposite: further consolidating the technology sector and undermining Americans’ online expression and privacy.

⁷ Blerp, <https://blerp.com/>; Edward Graham, #STARTUPSEVERYWHERE: Salt Lake City, Utah, Engine (Feb. 21, 2020), <https://www.engine.is/news/startupseverywhere-salt-lake-city-utah>

⁸ Shenkman, C., Thakur, D., Llansó, E. (2021) *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*. Center for Democracy & Technology, <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf>.

CONCLUSION

The majority's interpretation of Section 230 would create a circuit split and eviscerate Section 230's protections, a matter of exceptional importance. It requires further review from this Court.

Dated: October 28, 2021

By: /s/ Kit Walsh
Kit Walsh
Corynne McSherry
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
kit@eff.org

Counsel for Amici Curiae

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: October 28, 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. 29(a)(4) and Fed. R. App. P. 29(b)(4). The brief is printed in proportionally spaced 14-point Times New Roman font, using Microsoft® Word for Mac 365 and there are 2,565 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).

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Dated: October 28, 2021

By: /s/ Kit Walsh
Kit Walsh

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on October 28, 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: October 28, 2021

By: /s/ Kit Walsh
Kit Walsh

Counsel for Amici Curiae