

I. Introduction

A. Introduction to the Comment

While the Internet may have been created for information exchange between expert coders, in the last couple of decades it has emerged as an interactive tool allowing everyday people to communicate with one another.¹ Although these new developments have made our world more efficient and communication instantaneous, they have created new problems involving legal liability.² The 1996 amendments to the Communications Act of 1934, known as the Communications Decency Act (CDA),³ were crafted by Congress to deal with these new issues.⁴ In order to encourage the development of the Internet, this Act minimized liability for interactive online sites and granted them immunity from third-party generated content.⁵ One exception, however, barred immunity from intellectual property claims.⁶ As a result, most of these providers were incentivized to self-regulate and they developed their own mechanisms to reduce potential liability.⁷ These strategies appear to have worked because the Internet is flourishing today, but recent court decisions suggest these sites should not only be held liable for federal intellectual property claims but also for state intellectual property claims, such as the right of publicity.⁸ The rise of social networking sites that were founded on the ability to create online identities has led to a circuit split on whether these platforms should be immune from state law intellectual property claims or if they were meant to be included within the intellectual property exceptions of the CDA.⁹ One such argument was found in *Perfect 10, Inc. v. CCBill, L.L.C.*¹⁰

B. Facts of the Case

Perfect 10 is the publisher of an adult entertainment magazine and website, perfect10.com.¹¹ The website hosts content and customers pay a membership fee to gain access.¹² The website includes “approximately 5,000 images of models” in which many of the models have signed releases giving away their rights of publicity to Perfect 10.¹³ Perfect 10 holds registered copyrights for those images as well as other registered trademarks and service marks.¹⁴

CCBill is an interactive computer service provider (ICSP) that “allows consumers to use credit cards or checks to pay for subscriptions or membership to e-commerce venues.”¹⁵ The other ICSP

defendant, CWIE “provides webhosting and related Internet connectivity services to the owners of various websites.”¹⁶

On August 10, 2001, Perfect 10 notified both defendants that “CCBill and CWIE clients were infringing on [its] copyrights”¹⁷ by “providing services to websites that posted images stolen from [its] magazine and Internet website.”¹⁸ On September 30, 2002, Perfect 10 filed an action involving several copyright and trademark violations, including a state law claim for violation of right of publicity.¹⁹ Judge Lourdes J. Baird of the U.S. District Court for the Central District of California, in favor of Perfect 10, held that the right of publicity was an intellectual property claim that was excluded from immunity under the CDA and thus the defendants were not immune.²⁰ CCBill and CWIE subsequently appealed to the Ninth Circuit Court of Appeals.²¹

C. Holding

The Ninth Circuit Court of Appeals reversed the lower court’s decision as to the right of publicity claim.²² Judge Smith wrote for the court that interactive computer service providers (ICSPs) were immune from state law right of publicity claims because this type of liability would “fatally undermine the broad grant of immunity provided by the CDA.”²³ The court reasoned that the “intellectual property” exception in the CDA could only apply to federal claims,²⁴ otherwise Congress’s express intent of encouraging the development of the Internet²⁵ would be obstructed by inconsistent state laws.²⁶ Thus, ICSPs like CCBill were eligible for CDA immunity for state intellectual property claims such as the right of publicity.²⁷

D. Roadmap

The Ninth Circuit was correct when it reversed the District Court’s decision, holding CCBill and CWIE eligible for immunity as to the right of publicity claim; however, the court used the wrong analysis. This comment will argue first that the court’s reasoning for granting immunity to ICSPs for state law intellectual property claims would have been more robust if more emphasis was placed on policy and less on the express language of the CDA. Second, this comment will argue that the right of publicity should not be considered an intellectual property claim because it greatly diverges from other intellectual property claims. Finally, this comment will argue that classifying the right of publicity as a traditional tort

will more closely align with Congress's express intent in the CDA to promote the development of the Internet.

II. Analysis

A. The court's reasoning for granting immunity to ICSPs for state law intellectual property claims would have been more robust if more emphasis was placed on policy and less on the express language of the CDA.

In analyzing the language of section 230 of the Communications Decency Act (CDA), the court in *Perfect 10* determined that immunity exceptions referring to intellectual property (IP) only related to federal claims. Therefore, since the right of publicity is purely a state law claim, CCBill and CWIE were immune and could not be charged with that violation. One of the main arguments to support this was that because state laws vary in causes of action and remedies, ICSPs would be subject to inconsistent laws that would contradict the goal of Congress to "insulat[e] the development of the Internet from the various state law regimes."²⁸ However, the sections of the CDA the court used to support this argument, sections 230(a) and (b), mention the goal of preserving the free market on the Internet, "unfettered by Federal or State" laws. The language does not mention anything about inconsistent state laws, and further, as the court in *Hepp v. Facebook* pointed out, state property laws are important in preserving the free market, and thus including state laws in the exception provision would be consistent with that goal.²⁹ Therefore, the Perfect 10 Court's argument about the structure and language of the provision is easily disproven with a valid, alternate reading. Furthermore, the language in the statute specifically states, "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property"³⁰ which does not appear to limit the provision to federal law on its face, nor are there any surrounding terms to suggest that limit.

Other strong arguments against the court's interpretation include the failure to account for the term "any" which suggests more expansive language that could include a wide variety of intellectual property laws.³¹ Also, the other exceptions specifically relating to federal criminal law³² and state law³³ indicate that Congress chose to distinguish between the two in other provisions and most likely would have done so for intellectual property if that was the intent. These simple counterarguments about the

provision itself undermine the court's reasoning for interpreting "intellectual property" as only federal, and thus a stronger policy argument may have been persuasive enough for the Hepp Court to reach a different conclusion.³⁴

B. The right of publicity should not be considered an intellectual property claim because it greatly diverges from other intellectual property claims.

The right of publicity has often been held to be an intellectual property claim.³⁵ The court in Hepp analyzed various definitions of "intellectual property" and found that many included a reference to "publicity rights."³⁶ This inclusion is largely because the right to commercialize one's own name and likeness feels like an inherent property right,³⁷ and because likeness is not tangible, it most logically would fit into the "intellectual" category. But when compared to other intellectual property rights such as copyright and patent, the protection of those rights has an entirely different purpose.³⁸ Traditional intellectual property rights were granted to encourage innovation³⁹ and often depended on an economic incentive, whereas the origins of the right of publicity came from a right to privacy⁴⁰ and did not depend on an economic incentive. Furthermore, copyrights are for original, creative works and patents are for useful inventions,⁴¹ both of which provide a benefit to society that the right of publicity does not provide and instead only benefits the individual. The similarities of right of publicity and other intellectual property claims are very limited.

One closer intellectual property analogy to the right of publicity would be a trademark. Trademark protection, like the right of publicity, was not developed to encourage innovation. It was created to protect consumers who should have the right to buy the product or service they expect without being misled.⁴² It is argued the right of publicity is similar in that it also "secures commercial goodwill."⁴³ However, as this relates to social networking websites where this claim is likely to be at issue, there is not a commercial market because ICSPs do not purchase endorsements for a person's likeness but rather just benefit from "the public's desire to view a particular profile."⁴⁴ Sometimes celebrities can establish an aspect of their identity as a trademark in the market and argue they will lose out on an economic benefit if their identity is used without their permission, but everyday people are usually not able to establish their likeness as a trademark and the right of publicity they inherently own is not based on this incentive.⁴⁵ Thus, the right of publicity that everyone has can be clearly distinguished from an intellectual property trademark, as well.

C. Classifying the right of publicity as a traditional tort will more closely align with Congress's express intent in the CDA to promote the development of the Internet.

The purpose of the immunity Congress granted in the CDA was to encourage innovation of the Internet;⁴⁶ therefore, if intellectual property claims were not exceptions to the broad immunity that was granted to ICSPs, creative works would decline because users would fear their work would be stolen and that they would not benefit from their time and energy. Furthermore, it would motivate ICSPs to adapt restrictive rules to avoid liability⁴⁷ which would undermine speech and innovation.⁴⁸ ICSPs are immune from most other torts in the CDA because Congress believed too much liability such as this would stunt the progress of the Internet.

The court in *Perfect 10* was conscious of this potential issue which led to its conclusion that ICSPs should be immune from state law intellectual property claims; however, the court's focus on interpreting the language of the CDA that can be reasonably interpreted in two ways has not prevented the recent circuit split which has, in turn, created even more uncertainty about the future of the Internet. A more effective approach would have been to focus on the purpose of intellectual property and compare that with the purpose of the right of publicity which would lead to the logical conclusion that the right of publicity was not intended to be an intellectual property claim.

When Congress drafted the CDA in 1996, it likely did not foresee the potential impact of allowing users of Internet platforms that host hundreds of millions, or even billions of people, to sue the providers simply because they did not appreciate how a third-party used their likeness. One of the major tenets of the CDA was to prevent incredulous tort claims from dismantling the Internet.⁴⁹ Allowing the right of publicity to fall under the "nebulous (and expansive)"⁵⁰ intellectual property umbrella and be subject to disputes about whether it is an exception or not would threaten the Internet as we know it today. Thus, if the right of publicity was considered a traditional tort⁵¹ and not an intellectual property tort, the fear of ICSPs adopting "draconian measures"⁵² to avoid debased state law claims will be alleviated and the confusion surrounding the language of the CDA will be less detrimental for the Internet into the future.

III. Conclusion

The Perfect 10 Court correctly held that ICSPs should be immune from right of publicity claims because otherwise the future of the Internet would be severely threatened. The court's argument would

be more robust if it focused more on policy and less on interpreting the vague language of the CDA where two interpretations were feasible. The court also could have argued that the right of publicity should not be considered an intellectual property claim because it differs greatly from other intellectual property claims. Lastly, classifying the right to publicity as a traditional tort instead of an intellectual property claim would more closely align with Congress's goal of encouraging the growth of the Internet.

¹ See generally Rachel A. Purcell, Note, *Is That Really Me?: Social Networking and the Right of Publicity*, 12 Vand. J. of Ent. & Tech. L. 611, 612-13 (2010) [hereinafter *Social Networking & the Right of Publicity*] (discussing the rise of communication on the Internet).

² *Id.*

³ 47 U.S.C. § 230.

⁴ Purcell, *Social Networking & the Right of Publicity*, *supra* note 1, at 613.

⁵ *Id.* at 614.

⁶ See 47 U.S.C. § 230(e)(2).

⁷ Purcell, *Social Networking & the Right of Publicity*, *supra* note 1, at 614.

⁸ See *id.* (explaining that the right of publicity “protects a person’s right to control the commercial use of his or her identity.”)

⁹ *Id.*

¹⁰ Perfect 10, Inc. v. CCBill, L.L.C., 488 F.3d 1102 (9th Cir. 2007).

¹¹ *Id.* at 1108.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1102.

¹⁹ *Id.* at 1108.

²⁰ *Id.* at 1102.

²¹ *Id.*

²² *Id.* at 1121.

²³ *Id.* at 1108.

²⁴ *But see* Atl. Recording v. Project Playlist, Inc., 603 F. Supp. 2d. 690, 704 (S.D.N.Y. 2009) (finding that exception applies to any law relating to intellectual property).

²⁵ *See* 47 U.S.C. § 230(b)(1).

²⁶ *Perfect 10, Inc.* 488 F.3d at 1108.

²⁷ *Id.* at 1119.

²⁸ *Id.* at 1118.

²⁹ Hepp v. Facebook, Inc., 14 F.4th 204, 211 (3rd Cir. 2021).

³⁰ 47 U.S.C. § 230(e)(2).

³¹ *See* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d. 288, 299 (D.N.H. 2008) (explaining the Supreme Court has noted the modifier “any” amounts to expansive language).

³² *See* 47 U.S.C. § 230(e)(1).

³³ *See* 47 U.S.C. § 230(e)(2).

³⁴ *Hepp*, 14 F.4th at 206.

³⁵ Purcell, *Social Networking & the Right of Publicity*, *supra* note 1, at 619.

³⁶ *See Hepp*, 14 F. 4th at 213.

³⁷ Purcell, *Social Networking & the Right of Publicity*, *supra* note 1, at 632.

³⁸ *But see* Purcell, *supra* at 619 (quoting Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977)) (arguing that the interest protected by right of publicity is analogous to the goals of patent and copyright law).

³⁹ *See* Brief for Elec. Frontier Found. et al. as Amici Curiae Supporting Respondents at 9, Hepp v. Facebook, Inc., 14 F.4th 204 (3rd Cir. 2021) (No. 20-2725).

⁴⁰ *See id.*

⁴¹ *See id.* (comparing traditional intellectual property rights with the right of publicity).

⁴² *See Hepp*, 14 F.4th at 213 (stating that trademarks help consumers ability to distinguish competitors).

⁴³ *Id.*

⁴⁴ Purcell, *Social Networking & the Right of Publicity*, *supra* note 1, at 633.

⁴⁵ *See id.* at 634 (stating even those who are not celebrities have this inherent right).

⁴⁶ *See generally* 47 U.S.C. § 230(b).

⁴⁷ See Brief for the Respondents at 7, *Hepp v. Facebook*, 14 F.4th 204 (2021) (No. 20-2725) (discussing negative impacts that would occur if state publicity rights were excluded from § 230).

⁴⁸ See *id.* at 17.

⁴⁹ See *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d. 288, 294 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)) (discussing Congress's goal not to impose too much tort liability on Internet service providers from third party activities).

⁵⁰ See *Hepp v. Facebook, Inc.*, 14 F.4th 204, 220 (3rd Cir. 2021) (Cowen, J., dissenting) (finding it unlikely that Congress would grant immunity from state criminal law but not claims under the right of publicity).

⁵¹ See *Doe*, 540 F. Supp. at 294 (arguing publicity rights have more in common with the other state torts in § 230 immunities).

⁵² Brief for the Respondents at 8, *Hepp v. Facebook*, 14 F.4th 204 (2021) (No. 20-2725).