

No. A148623

---

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

---

FACEBOOK, INC.,

*Defendant-Appellant,*

v.

JASON CROSS, A/K/A MICHAEL KNIGHT; 1230 ENTERTAINMENT, LLC; AND MDRST  
MARKETING/PROMOTIONS, LLC,

*Plaintiffs-Respondents.*

---

Appeal from an Order of the Superior Court of San Mateo County

Case No. CIV537384

Hon. Donald J. Ayoob, Judge

---

**Application of Airbnb, Inc., IAC/InterActiveCorp, Google Inc., LinkedIn Corp., Reddit, Inc., and Twitter, Inc. For Leave To File As Amici Curiae And Brief As Amici Curiae Urging Reversal**

---

PATRICK J. CAROME (*pro hac vice pending*)

ARI HOLTZBLATT (*pro hac vice pending*)

EMILY J. BARNET (*pro hac vice pending*)

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue NW

Washington, DC 20006

(202) 663-6000

MARK D. FLANAGAN # 130303

WILMER CUTLER PICKERING

HALE AND DORR LLP

950 Page Mill Road

Palo Alto, California 94304

(650) 858-6000

January 10, 2017

*Attorneys for Amici Curiae*

---

# TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS OR ENTITIES .....	iii
TABLE OF AUTHORITIES .....	iv
APPLICATION FOR LEAVE TO FILE AS AMICI CURIAE.....	1
BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT .....	5
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	7
I.    THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT ONLY <i>FEDERAL</i> INTELLECTUAL PROPERTY LAW IS EXCEPTED FROM SECTION 230 IMMUNITY.....	9
II.   THE TRIAL COURT FURTHER ERRED BY NEGLECTING TO LOOK THROUGH KNIGHT’S ARTFUL PLEADING OF WHAT IS IN ESSENCE A DEFAMATION CLAIM .....	17
III.  THE TRIAL COURT’S ORDER WOULD HAVE FAR-REACHING NEGATIVE EFFECTS ON AMICI AND OTHER PROVIDERS OF INTERACTIVE COMPUTER SERVICES .....	22
CONCLUSION .....	28

## **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Pursuant to California Rule of Court 8.208, Airbnb, Inc.,

IAC/InterActiveCorp, Google Inc., LinkedIn Corp., Reddit, Inc., and Twitter, Inc.

make the following disclosures:

Airbnb, Inc. is a privately held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

IAC/InterActiveCorp is a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

Google Inc. is a wholly owned subsidiary of Alphabet Inc., a publicly held corporation. No publicly traded corporation owns ten percent or more of Alphabet Inc.'s stock.

LinkedIn Corp. is a wholly owned subsidiary of Microsoft Corporation, a publicly held corporation.

Reddit, Inc. is a privately held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

Twitter, Inc. is a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

## TABLE OF AUTHORITIES

### CASES

	Page(s)
<i>Adams v. Pacific Bell Directory</i> (2003) 111 Cal App.4th 93 .....	15
<i>Almeida v. Amazon.com, Inc.</i> (11th Cir. 2006) 456 F.3d 1316 .....	16
<i>Atlantic Recording Corp. v. Project Playlist, Inc.</i> (S.D.N.Y. 2009) 603 F.Supp.2d 690 .....	17
<i>Barnes v. Yahoo!, Inc.</i> (9th Cir. 2009) 570 F.3d 1096 .....	8, 20, 22
<i>Barrett v. Rosenthal</i> (2006) 40 Cal.4th 33 .....	7, 15, 19
<i>Batzel v. Smith</i> (9th Cir. 2003) 333 F.3d 1018 .....	22
<i>Carafano v. Metrosplash.com, Inc.</i> (9th Cir. 2003) 339 F.3d 1119 .....	7, 21, 23
<i>Commissioner of Internal Revenue v. Clark</i> (1989) 489 U.S. 726.....	11
<i>Daimler AG v. Bauman</i> (2014) 134 S.Ct. 746.....	16
<i>Doe v. Friendfinder Network, Inc.</i> (D.N.H. 2008) 540 F.Supp.2d 288 .....	16
<i>Evans v. Hewlett-Packard Co.</i> (N.D.Cal. Aug. 15, 2013) 2013 WL 4426359 .....	15
<i>Fair Housing Council of San Fernando Valley v. Roommates.com, LLC</i> (9th Cir. 2008) 521 F.3d 1157 .....	7, 18, 26
<i>Free Kick Master LLC v. Apple Inc.</i> (N.D.Cal. 2015) 140 F.Supp.3d 975.....	15

<i>Garcia v. Google, Inc.</i> (9th Cir. 2015) 786 F.3d 733 .....	12
<i>Gentry v. eBay Inc.</i> (2002) 99 Cal.App.4th 816 .....	20, 26
<i>Gignilliat v. Gignilliat, Savitz &amp; Bettis, L.L.P.</i> (S.C. 2009) 684 S.E.2d 756 .....	14
<i>Goddard v. Google, Inc.</i> (N.D.Cal. Dec. 17, 2008) 2008 WL 5245490 .....	11, 26
<i>Gucci America, Inc. v. Hall &amp; Assocs.</i> (S.D.N.Y. 2001) 135 F.Supp.2d 409 .....	17
<i>Gustafson v. Alloyd Co.</i> (1995) 513 U.S. 561.....	11
<i>Hinton v. Amazon.com.dedc, LLC</i> (S.D.Miss. 2014) 72 F.Supp.3d 685 .....	26
<i>Hupp v. Freedom Communications, Inc.</i> (2003) 221 Cal.App.4th 398 .....	24
<i>Jones v. Dirty World Entertainment Recordings LLC</i> (6th Cir. 2014) 755 F.3d 398 .....	24
<i>Joude v. WordPress Foundation</i> (N.D.Cal. July 3, 2014) 2014 WL 3107441 .....	15
<i>Kimzey v. Yelp! Inc.</i> (9th Cir. 2016) 836 F.3d 1263 .....	21
<i>M.A. ex rel. P.K. v. Village Voice Media Holdings</i> (E.D.Mo. 2011) 809 F.Supp.2d 1041 .....	26
<i>Malibu Media, LLC v. Weaver</i> (M.D.Fla. Apr. 8, 2016) 2016 WL 1394331 .....	17
<i>Montgomery v. Montgomery</i> (Ky. 2001) 60 S.W.3d 524.....	14

<i>O’Kroley v. Fastcase, Inc.</i> (6th Cir. 2016) 831 F.3d 352 .....	20
<i>Obado v. Magedson</i> (3d Cir. 2015) 612 F.App’x 90 .....	24
<i>Ohio State University v. Skreened Ltd.</i> (S.D.Ohio 2014) 16 F.Supp.3d 905 .....	16
<i>People v. Superior Court (Moore)</i> (1996) 50 Cal.App.4th 1202 .....	9
<i>Perfect 10, Inc. v. CCBill LLC</i> (9th Cir. 2007) 488 F.3d 1102 .....	9, 12, 13
<i>Perfect 10, Inc. v. Giganews, Inc.</i> (C.D.Cal. Mar. 8, 2013) 2013 WL 2109963 .....	15
<i>Parts.com, LLC v. Yahoo! Inc.</i> (S.D.Cal. 2013) 996 F. Supp. 2d 933 .....	15
<i>Ricci v. Teamsters Union 456</i> (2d Cir. 2015) 781 F.3d 25 .....	24
<i>Smith. v. United States</i> (1993) 508 U.S. 223.....	11
<i>Stratton Oakmont, Inc. v. Prodigy Services Co.</i> (N.Y.Sup.Ct. May 24, 1995) 1995 WL 323710 .....	18
<i>United States v. Williams</i> (2008) 553 U.S. 285.....	11
<i>Universal Communications Systems, Inc. v. Lycos</i> (1st Cir. 2007) 478 F.3d 413.....	16, 20
<i>Zacchini v. Scripps–Howard Broadcasting Co.</i> (1977) 433 U.S. 562.....	12
<i>Zeran v. America Online, Inc.</i> (4th Cir. 1997) 129 F.3d 327 .....	passim

**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

U.S. Const. art. I, § 8, cl. 8.....12  
47 U.S.C. § 230 .....7, 9, 10, 13  
Ind. Code § 32-36-1-6.....14  
Mass. Gen. Laws Ann. ch. 214, § 3A .....14

**OTHER AUTHORITIES**

H.R. Rep. No. 104-458 (1996).....18  
1 McCarthy, J. Thomas, *Rights of Publicity and Privacy* (2d ed. 2016  
update) § 6:1 .....14  
Dogan, Stacey L. & Mark A. Lemley, *What The Right Of Publicity  
Can Learn From Trademark Law*, (2006) 58 Stan. L. Rev. 1161 .....12

## **APPLICATION FOR LEAVE TO FILE AS AMICI CURIAE**

Pursuant to California Rule of Court 8.200(c), Airbnb, Inc., IAC/InterActive Corp, Google, Inc., LinkedIn Corp., Reddit, Inc., and Twitter, Inc. (collectively “Amici”) request leave to file the attached brief as amici curiae urging reversal.

Airbnb, Inc. (“Airbnb”) provides an Internet platform through which persons desiring to book accommodations, and persons listing unique accommodations available for rental, can locate each other and enter into direct agreements with each other to reserve and book travel accommodations on a short and long-term basis. Airbnb’s North American headquarters are located in San Francisco, California.

IAC/InterActiveCorp (“IAC”) is a diversified online media company with more than 150 brands and products. IAC’s businesses are leaders in numerous sectors of the Internet economy. Many of these businesses, including Match.com, OkCupid, Ask.com, The Daily Beast, and Vimeo, provide users with the ability to post, search for, and view a wide variety of user-generated content. IAC’s family of websites receive more than 2.5 billion visits each month from users in over 200 countries.

Google Inc. (“Google”) is a technology company whose mission is to organize the world’s information and make it universally accessible and useful. Google offers a variety of web-based products and services—including Search,



Gmail, Maps, and YouTube—that are used around the world. Google’s search engines process trillions of searches every year. Google’s Gmail Service provides email for more than 1 billion users. Google Maps is used by more than 1 billion people each month. YouTube has over a billion users, with users uploading 400 hours of video onto the site every minute. Google Inc.’s headquarters are located in Mountain View, California.

LinkedIn Corp. (“LinkedIn”) hosts the world’s largest professional network, with over 450 million members worldwide and over 130 million members in the United States. LinkedIn’s mission is to connect the world’s professionals to enable them to be more productive and successful. LinkedIn’s headquarters are in Sunnyvale, California.

Reddit, Inc. (“Reddit”) operates the [reddit.com](https://www.reddit.com) platform, which is a collection of thousands of online communities attracting over 260 million monthly unique visitors that create, read, join, discuss and vote on conversations across a myriad of topics. Reddit is based in San Francisco, California.

Twitter, Inc. (“Twitter”) operates a global platform for self-expression and communication, with the mission of giving everyone the power to create and share ideas and information instantly. Twitter’s more than 300 million active monthly users use the platform to connect with others, express ideas, and discover new information. Hundreds of millions of short messages (known as “Tweets”) are

posted on Twitter every day. Twitter has headquarters in San Francisco, California.

Amici have a substantial interest in the legal rules governing whether providers of interactive computer services may be subjected to lawsuits for alleged harms arising from content posted by third parties on their platforms. Since they serve as platforms for communication among billions of users, amici have been and will continue to be parties to lawsuits in which they are immune from liability under Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (“Section 230”). The success of amici’s businesses—and the vitality of online free speech that these businesses support—depends on their being shielded from the risks, burdens, and uncertainty of lawsuits that seek to hold them liable for harms allegedly arising from tortious content originated by their users or other third parties.

Amici rely on the settled interpretation of 47 U.S.C. § 230 granting broad immunity to online intermediaries for harms arising from third-party content. The robustness of this immunity has been recognized by courts across the country, and the trial court’s order threatens to erode this settled interpretation. If allowed to stand, the order would contravene Congress’s policy choices and introduce substantial uncertainty to a law that has been crucial to the growth and success of

the Internet, and has become a prerequisite for the provision of services upon which the public has come to rely.<sup>1</sup>

Respectfully submitted,

PATRICK J. CAROME (*pro hac vice pending*)  
ARI HOLTZBLATT (*pro hac vice pending*)  
EMILY J. BARNET (*pro hac vice pending*)  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue NW  
Washington, DC 20006  
(202) 663-6000

/s/ Mark D. Flanagan  
MARK D. FLANAGAN # 130303  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
950 Page Mill Road  
Palo Alto, California 94304  
(650) 858-6000

January 10, 2017

*Attorneys for Amici Curiae*

---

<sup>1</sup> Pursuant to California Rule of Court 8.200(c)(3), counsel certify that this brief was authored solely by attorneys for amicus curiae; no party contributed either to the authorship or the financing of the time spent on the brief or the out-of-pocket expenses connected with the filing.

## **BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT**

### **SUMMARY OF ARGUMENT**

Amici respectfully urge reversal of the trial court’s order finding that California right of publicity claims fall outside the broad scope of Section 230’s immunity. Section 230 grants interactive computer service providers—like Appellant Facebook and amici here—broad immunity against claims for alleged injuries resulting from online content created by third parties. The trial court held that Jason Cross a/k/a Michael Knight (“Knight”) nonetheless could seek to hold Facebook liable for failing to remove third-party content that Knight found objectionable.

The trial court’s decision was premised in part on the erroneous conclusion that Section 230’s exception for intellectual property claims includes Knight’s state-law right of publicity claims and his derivative Unfair Competition Law (“UCL”) claim. While also supporting Facebook’s additional grounds for reversal, Amici submit this brief to address the ways in which the trial court’s decision departs from existing Section 230 case law and, absent reversal, would threaten a fundamental legal protection on which the Internet industry depends.

The court’s decision unjustifiably departs from Ninth Circuit precedent holding that Section 230’s intellectual property exception includes only *federal*

intellectual property claims. The trial court also ignored well-established precedent in the California appellate courts, the Ninth Circuit, and other federal courts of appeal blocking efforts, like Knight's, to artfully plead around Section 230 immunity.

The trial court's order, if upheld, would invite a combination of forum-shopping and artful pleading that could largely eviscerate the protections of Section 230. Upholding this order would provide plaintiffs in California state courts a roadmap to pursue exactly the sort of claim that prompted Congress to enact Section 230 and that Congress most clearly intended to foreclose in enacting Section 230: a claim against an interactive computer services provider based on allegedly defamatory content posted by third-parties to an online platform. And it would threaten to deprive service providers of resources that are essential to the vitality of their businesses and the Internet by forcing them to choose between generating advertising revenue and preserving Section 230 immunity. Under the court's reasoning, a platform could lose Section 230 immunity if it generates advertising revenue by displaying an advertisement next to third-party content that includes a person's name or likeness. The specter of litigation and liability would undermine the growth and development of the Internet that Congress enacted Section 230 to promote. The court's decision disregards Section 230's text,

frustrates congressional intent, contradicts settled precedent, and should be overturned.

## ARGUMENT

Section 230 of the Communications Decency Act (47 U.S.C. § 230) broadly “immunizes providers of interactive computer services against liability arising from content created by third parties.” (*Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1162 (*en banc*).) The powerful protection afforded by this immunity is plain on the face of the statute. It commands that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” (47 U.S.C. § 230(c)(1).) And it expressly preempts State and local law that violates that command, mandating that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (*Id.* § 230(e)(3).) Given the expansive reach of this language and the important interests at stake (see *infra* Part III), state and federal courts all across the country have consistently—and for more than two decades—“treated § 230(c) immunity as quite robust.” (*Carafano v. Metroplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1123; see also *Barrett v. Rosenthal* (2006) 40 Cal.4th 33; *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327.)

Knight’s right of publicity claims and derivative UCL claim clearly fall within the ambit of this protection. Because Section 230 prohibits claims that treat interactive computer services providers as “publisher[s]” of third-party content, it bars any claim that turns on whether a service provider exercised a “traditional editorial function” with respect to the torrent of third-party content that flows through its networks, including “reviewing, editing, and deciding whether to publish or to withdraw from publication” any content created by users of its service. (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102.) That is precisely what Knight’s claims seek to do. His claims seek to hold Facebook liable for hosting content created solely by *Facebook users* that allegedly used Knight’s name and likeness to criticize Knight and his business practices. (1 AA 10 ¶ 11; 1 AA 15 ¶ 31.)<sup>2</sup> According to Knight, Facebook is liable not because Facebook created this content (it did not), but because Facebook failed to remove the content (1 AA 13-14 ¶¶ 23-26; 1 AA 16 ¶ 34; 1 AA 17 ¶¶ 38, 42) and displayed advertising (also created by third-parties, not Facebook) adjacent to that content (1 AA 10 ¶ 11). Deciding whether to remove content created by third-parties is a quintessential publisher decision. Such a decision lies at the very heart of what

---

<sup>2</sup> “AA” refers to Appellant’s Appendix here and throughout this brief.

Section 230 protects. (See *Barnes, supra*, 570 F.3d at p. 1103.) Knight’s claims attacking such decisions must therefore be dismissed.

In this Court, Knight disputes none of this analysis. (Respondents’ Br. at 15-18.) Instead, he argues that his right of publicity claims and derivative UCL claim fall within an exception to Section 230 for laws “pertaining to intellectual property.” (See 47 U.S.C. § 230(e)(2) [“Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”].) That argument fails for two independent reasons. *First*, Ninth Circuit precedent and the text and purposes of Section 230 make clear that Section 230’s intellectual property exception applies to only *federal* intellectual property laws, not the state law claims at issue here. *Second*, Section 230 prohibits exactly the sort of artful pleading on which Knight relies: courts routinely reject efforts to evade Section 230 by dressing up a defamation claim as some other claim that superficially appears to fall outside the scope of the statute. For both these reasons, Section 230 requires that this case be dismissed in its entirety.

**I. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT ONLY FEDERAL INTELLECTUAL PROPERTY LAW IS EXCEPTED FROM SECTION 230 IMMUNITY**

As the Ninth Circuit held in *Perfect 10, Inc. v. CCBill LLC*, the term “intellectual property” in subsection 230(e)(2) refers to *federal* intellectual property law, not state law. (See *supra* (9th Cir. 2007) 488 F.3d 1102, 1118-1119;



see also *People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202 [federal appellate court decisions are “persuasive and entitled to great weight.”])

Subsection 230(e)(2) was enacted alongside three other provisions that also create certain narrow exceptions from Section 230 immunity. (See 47 U.S.C. § 230(e)(1), (3), (4).) These provisions share two common features. *First*, each provision defines the outer-boundary of its exception based on nationally-uniform federal law. *Second*, to the extent that each provision permits enforcement or application of state law, it cabins that permission within the boundary that federal law establishes.

Thus, for example, subsection 230(e)(4) permits continued “application of the Electronic Communications Privacy Act of 1986”—a *federal* law—as well as “any *similar* State law.” (Italics added.) Subsection 230(e)(3) likewise allows “any State” to continue “enforcing any State law” but only if it is “*consistent* with [Section 230]”—again, a *federal* law. (Italics added.) And subsection 230(e)(1) permits “enforcement” of certain enumerated *federal* criminal laws “or any other *Federal* criminal statute,” but does not permit enforcement of *any* state criminal laws, let alone state criminal laws that reach beyond the scope of federal criminal statutes. (Italics added.) These features reflect Congress’s judgment that while a handful of specifically identified federal interests should co-exist with the federal

policies embodied in Section 230, those interests should in no way undermine the uniform application of Section 230 throughout the country.

Fundamental principles of statutory construction require that subsection 230(e)(2) be interpreted in a way that is consistent with these neighboring provisions. (See *United States v. Williams* (2008) 553 U.S. 285, 294 [“[A] word is given more precise content by the neighboring words with which it is associated.”]; *Gustafson v. Alloyd Co.* (1995) 513 U.S. 561, 575 [applying the principle of “*noscitur a sociis*”—“a word is known by the company it keeps”]; see also *Smith v. United States* (1993) 508 U.S. 223, 233 [“Just as a single word cannot be read in isolation, nor can a single provision of a statute.”]) Applying this principle “avoid[s] ascribing to one [provision] a meaning so broad that it is inconsistent with its accompanying [provisions].” (*Gustafson, supra*, 513 U.S. at p. 575.) That is particularly important here, where the provision at issue is a statutory “exception,” which must be read “narrowly in order to preserve the primary operation of the [statute].” (See *Commissioner of Internal Revenue v. Clark* (1989) 489 U.S. 726, 739; see also *Goddard v. Google, Inc.* (N.D.Cal. Dec. 17, 2008) 2008 WL 5245490 at \*5, fn.5 [subsection 230(e)(1) creates only a narrow exception from Section 230 immunity].)

Interpreting “intellectual property” in subsection 230(e)(2) to encompass *state* intellectual property laws, as the lower court did here, would violate these

well-established interpretive principles by allowing plaintiffs to pursue otherwise-barred claims that sweep well beyond the bounds of federal intellectual property law. As this case illustrates, state right of publicity law protects interests that federal intellectual property law does not. “Intellectual property” under federal law aims exclusively to “promote the Progress of Science and useful Arts,” (U.S. Const., art. I, § 8, cl. 8), and “ha[s] little to do with protecting feelings or reputation,” (*Zacchini v. Scripps-Howard Broad. Co.* (1977) 433 U.S. 562, 573; see also *Garcia v. Google, Inc.*, (9th Cir. 2015) 786 F.3d 733, 745 (*en banc*) [holding that federal copyright law does not redress injuries to reputation]). The right of publicity, by contrast, is “deeply rooted in offense to person, to acts that caused ‘pain and mental stress.’” (Dogan & Lemley, *What The Right Of Publicity Can Learn From Trademark Law*, (2006) 58 *Stan. L. Rev.* 1161, 1170-1171.) The same is true of many other state laws that nominally purport to protect “intellectual property.” “Such laws ... bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.” (*Perfect 10, supra*, 488 F.3d at p. 1118.) Exempting state “intellectual property” claims from Section 230 immunity would thus swerve from the pattern established by the three other provisions of Section 230(e)—none of which, as noted, permit state law claims that have no analogue in federal law.

Section 230’s expressly enacted “[f]indings” and “[p]olicy” reinforce the conclusion that subsection 230(e)(2) exempts only federal intellectual property law. The preamble to Section 230 recognizes that the Internet has “flourished, to the benefit of all Americans, *with a minimum of government regulation,*” and announces a national policy of promoting “the continued development of the Internet” “*unfettered by Federal or state regulation.*” (47 U.S.C. § 230(a)(4), (b)(1), (2) (Italics added).) “[P]ermitting 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.” (*Perfect 10, supra* 488 F.3d at p. 1118.) State intellectual property laws “vary widely from state to state” and “are by no means uniform.” (*Id.* at pp. 1118, 1119 & fn.5.) If the scope of Section 230 were linked to this patchwork of state laws, the immunity of a defendant that operates throughout the country would turn on and off depending on the state in which a claim is brought. And any state would be empowered to whittle away at the scope of Section 230 immunity simply by purporting to re-categorize one or more tort—perhaps even defamation—as one sounding in “intellectual property.” Moreover, uncertainty about the scope and characterization of each state’s laws would mean that “no litigant w[ould] know if [it] is entitled to immunity for a state claim until a court decides the legal issue.” (*Id.* at p. 1119 fn.5.) “As a practical

matter, inclusion of rights protected by state law within the ‘intellectual property’ exemption would fatally undermine the broad grant of immunity provided by [Section 230].” (*Ibid.*)

These concerns are especially acute for right of publicity claims. Half the states recognize the right of publicity “in some form,” either at common law or by statute. (1 J. Thomas McCarthy, *Rights of Publicity and Privacy* (2d ed. 2016 update) § 6:1.) While some states consider the right of publicity to be an “intellectual property” right, other states consider it a tort, rooted in principles of privacy. (See, e.g., *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.* (S.C. 2009) 684 S.E.2d 756, 759; *Montgomery v. Montgomery* (Ky. 2001) 60 S.W.3d 524, 528). On top of that, each state’s right of publicity law protects a range of attributes. (Compare, e.g., Mass. Gen. Laws Ann. ch. 214, § 3A [covering the use of a person’s “name, portrait, or picture”] with, e.g., Ind. Code § 32-36-1-6 [extending to a person’s “name; voice; signature; photograph; image; likeness; distinctive appearance; gesture; or mannerisms.”]). Tying the scope of Section 230 immunity to such a wide array of differing legal regimes would expose interactive computer services providers to the very uncertainty and disuniformity that Section 230 was designed to eliminate.

The trial court analyzed none of these issues; indeed, it exempted Knight’s right of publicity claims from Section 230 immunity without conducting any

analysis at all and without so much as citing the Ninth Circuit’s contrary decision in *Perfect 10*. (1 AA 328.) And Knight has offered no persuasive argument for upholding this unreasoned conclusion. He contends first that this Court should disregard the Ninth Circuit’s reasoning in *Perfect 10* because “decisions within the Ninth Circuit do not bind California courts.” (Respondent’s Br. at 16.) But while the Ninth Circuit’s decision is not binding here, California courts “give great weight to federal appellate court decisions”—“particularly ... in the context of their determination of federal law.” (*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97-98.)

Moreover, as the California Supreme Court explained in this exact context, “[a]dopting a rule of liability under [S]ection 230 that diverges from the rule announced in [federal courts] ... would be an open invitation to forum shopping by defamation plaintiffs.” (See *Barrett, supra*, 40 Cal.4th at p. 58.) Forum shopping certainly is a grave concern here. Accepting Knight’s position would place California state courts directly in conflict with the law that binds federal courts in this jurisdiction.<sup>3</sup> And because many interactive computer service providers

---

<sup>3</sup> Bound by *Perfect 10*, numerous federal district courts in California have barred plaintiffs from pursuing state-law right of publicity claims, as well as other claims brought under state intellectual property law. (See, e.g., *Joude v. WordPress Foundation* (N.D.Cal. Jul. 3, 2014) 2014 WL 3107441 at \*7 [right of publicity]; *Evans v. Hewlett-Packard Co.* (N.D.Cal. Aug. 15, 2013) 2013 WL 4426359 at \*3 [same]; *Perfect 10, Inc. v. Giganews, Inc.* (C.D.Cal. Mar. 8, 2013) 2013 WL

(including five of the six amici here) are based in California, California state courts may well be available even for claims that otherwise have no connection to California. (See *Daimler AG v. Bauman* (2014) 134 S.Ct. 746, 760 [“With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.” (internal quotation and alterations omitted)].) Thus, even beyond the persuasive force of the Ninth Circuit’s reasoning, both comity and significant practical considerations counsel strongly against departing from the holding in *Perfect 10*.

Knight also points to several other federal courts that, he claims, have disagreed with the Ninth Circuit and have held that Section 230’s intellectual property exception applies to both state and federal intellectual property claims. (Respondent’s Br. at 17-18.) But neither appellate decision that Knight cites actually decided the question. (See *Almeida v. Amazon.com, Inc.* (11th Cir. 2006) 456 F.3d 1316, 1320-1324 [avoiding the question]; *Universal Commc’n Sys., Inc. v. Lycos* (1st Cir. 2007) 478 F.3d 413, 422-423 & fn.7 [addressing the issue in dicta, without any analysis]). And the small handful of federal trial court cases that did reach the issue either (1) failed to grapple with the purposes underlying Section

---

2109963 at \*15 [same]; see also *Free Kick Master LLC v. Apple Inc.* (N.D.Cal. 2015) 140 F.Supp. 3d 975, 983 [California trademark claim]; *Parts.com, LLC v. Yahoo! Inc.* (S.D.Cal. 2013) 996 F.Supp.2d 933, 938-939 [same].)

230, (e.g., *Ohio State Univ. v. Skreened Ltd.* (S.D. Ohio 2014) 16 F. Supp. 3d 905, 918); (2) incorrectly rejected the premise that state intellectual property law varies widely from state to state, (see *Doe v. Friendfinder Network, Inc.* (D.N.H. 2008) 540 F. Supp. 2d 288, 301-302 [erroneously asserting that state intellectual property laws impose no “materially greater burden” than federal intellectual property law]); or (3) exempted only state law claims that are analogous to claims available under federal intellectual property law and that therefore present fewer of the concerns detailed above, (see *Atlantic Recording Corp. v. Project Playlist, Inc.* (S.D.N.Y. 2009) 603 F. Supp. 2d 690, 704 [state copyright law]; *Gucci Am., Inc. v. Hall & Assocs.* (S.D.N.Y. 2001) 135 F. Supp. 2d 409, 416 [trademark infringement]; *Malibu Media, LLC v. Weaver* (M.D.Fla. Apr. 8, 2016) 2016 WL 1394331 at \*8 [copyright].) None of these cases provides any persuasive reason to break with the Ninth Circuit’s holding in *Perfect 10* or to disregard the clear text and purposes of the statute—all of which limit subsection 230(e)(2) to *federal* intellectual property law.

## **II. THE TRIAL COURT FURTHER ERRED BY NEGLECTING TO LOOK THROUGH KNIGHT’S ARTFUL PLEADING OF WHAT IS IN ESSENCE A DEFAMATION CLAIM**

The lower court’s failure to reject Knight’s attempt to creatively plead his way around Section 230 independently requires reversal. At their core, Knight’s claims are for defamation. As Facebook thoroughly explains in its opening brief



(at 13-14, 39-41), Knight seeks to hold Facebook liable for allegedly false content critical of him, and allegedly damaging to his reputation, that was authored and posted by Facebook users. (E.g. 1 AA 10 ¶¶ 12-13 [alleging that commenters posted “false and derogatory statements” about Knight].) Permitting this case to proceed would thus allow Knight to pursue exactly the sort of claim that Congress most clearly intended to foreclose when it enacted Section 230: a defamation claim based on online content created by third-parties. Section 230 immunity, however, cannot so easily be evaded.

Section 230 was enacted in response to a case holding an early online service provider potentially liable for an allegedly defamatory message posted by a user on one of its message boards. (See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* (N.Y.Sup.Ct. May 24, 1995) 1995 WL 323710 [unpublished]; see also *Barrett, supra*, Cal.4th at p. 43 [detailing this history]; *Roommates.com, supra* 521 F.3d at p. 1163 [same].) In *Stratton Oakmont*, the court found that the defendant “exercised sufficient editorial control over its computer bulletin boards to render it a publisher” and therefore ruled that the defendant could be held responsible for a defamatory message posted on the bulletin board. (*Supra*, 1995 WL 323710 at \*3-4.) The legislative history makes it crystal clear that one of Congress’s objectives in passing Section 230 was to ensure that Internet platforms be immunized from claims like those brought in *Stratton Oakmont*. (See H.R. Rep. No. 104-458

(1996) at p. 194 [“One of the specific purposes of [Section 230] is to overrule *Stratton-Oakmont* [sic] *v. Prodigy* and any other similar decisions which have treated such providers ... as publishers or speakers of content that is not their own.”].) Given this history, Section 230 has “been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.” (*Barrett, supra*, 40 Cal.4th at p. 39.)

Shortly after Congress enacted Section 230, courts recognized that if a plaintiff could evade the statute by simply relabeling a defamation claim under another theory of liability, then the broad protection Congress intended would be quickly eviscerated. The Fourth Circuit confronted this issue in the first case to construe Section 230. (See *Zeran, supra*, 129 F.3d 327.) The plaintiff in that case, Mr. Zeran, sought to hold America Online liable under a negligence theory on the ground that it had “unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.” (*Id.* at p. 328.) The Fourth Circuit quickly swept aside any notion that Section 230 might not apply because of how Zeran had labeled his claims: “Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action.” (*Id.* at p. 332.) After addressing various other issues, the Fourth Circuit

thus affirmed dismissal of Zeran's negligence claims under Section 230. (*Id.* at p. 328.)

Following *Zeran*'s lead, courts have uniformly rejected attempts to creatively plead around Section 230's prohibition on claims that seek to hold a platform liable for defamatory speech initiated by a third party. In *Universal Communications Systems*, for example, echoing the Fourth's Circuit's warning against "artful pleading," the First Circuit held that Section 230 immunized Lycos against claims brought under a Florida securities law and a Florida cyberstalking law because these claims fundamentally sought to treat Lycos as the publisher of defamatory third-party content hosted on its platform. (*Supra*, 478 F.3d at pp. 418, 421-422.) And the Sixth Circuit recently found Google immune under Section 230 from causes of action "ranging from 'libel' to 'invasion of privacy'" on the grounds that all these claims sought to hold Google liable for "merely providing access to, and reproducing, the allegedly defamatory text." (*O'Kroley v. Fastcase, Inc.* (6th Cir. 2016) 831 F.3d 352, 354-355, cert. den. (U.S. Jan. 9, 2017, No. 16-6499) 2017 WL 69376; see also *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 831-832 [holding claims barred by Section 230 notwithstanding appellants' contention that they sought to enforce "eBay's independent duty under the statute to furnish a warranty" because "[t]he substance of appellants' allegations reveal they ultimately seek to hold eBay responsible for ... content supplied by other

information content providers”]). As the Ninth Circuit has explained, “what matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress.” (*Barnes, supra*, 570 F.3d at pp. 1101-1102.) What matters is the claim’s essential nature. If a claim is based on defamatory content created by third parties it must be dismissed—no matter how it is labeled.

Knight’s right of publicity claims and derivative UCL claim constitute the same sort of artifice, and suffer from the same fatal defects, as the claims rejected in these prior cases. Their essential nature is to try to impose on Facebook liability for allegedly defamatory third-party content posted on Facebook’s site by Facebook users. Just as in *Zeran*, Knight’s right of publicity and derivative UCL claims “are indistinguishable from a garden variety defamation action.” (*Supra*, 129 F.3d at p. 332.) Indeed, Knight first brought these claims under a defamation theory in Tennessee. (1 AA 68-72.) Only after Facebook successfully invoked Section 230 (1 AA 68-72), did Knight restyle his claims under a right of publicity theory in the present case. Approving of Knight’s strategy would not only exalt form over substance, but also provide a roadmap that countless plaintiffs undoubtedly would follow to try to strip interactive computer services providers of an important immunity guaranteed to them under federal statute. This Court cannot permit such blatant artful pleading and forum-shopping to “casually

eviscerate[.]” “[Section 230] and its purpose of promoting the ‘free exchange of information and ideas over the Internet.’” (*Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1263, 1269 [quoting *Carafano, supra*, 339 F.3d at p. 1122].) For this reason, as well, the decision of the trial court must be reversed.

### **III. THE TRIAL COURT’S ORDER WOULD HAVE FAR-REACHING NEGATIVE EFFECTS ON AMICI AND OTHER PROVIDERS OF INTERACTIVE COMPUTER SERVICES**

The trial court’s order not only is incorrect, it also threatens to cripple the growth and development of the Internet industry, as well as the ability of numerous California-based businesses, including the amici here, to continue to provide the sort of free or low-cost innovative services for which the industry has become famous. Such a result would directly contravene Congress’s purpose in enacting Section 230: “to encourage the unfettered and unregulated development of free speech on the Internet.” (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027; see also *Barnes, supra*, 570 F.3d at p. 1099 [Section 230 is designed “to promote the free exchange of information and ideas over the Internet”]; *Zeran, supra*, 129 F.3d at p. 331 [“The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.”].)

When Congress enacted Section 230 “[i]nteractive computer services ha[d] millions of users” (*Zeran, supra*, 129 F.3d at p. 331)—and that number has now risen into the billions, due in part to the success of Section 230 itself. Given the

“staggering” amount of information communicated by these users, Congress recognized that “[i]t would be impossible for service providers to screen each of their millions”—and now billions—“of postings for possible problems.” (*Ibid.*) Fearing that service providers would “severely restrict the number and types of messages posted” if “[f]aced with potential liability for each message republished by their services,” “Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.” (*Ibid.*) Thus, Congress “made a policy choice . . . not to deter harmful online speech through . . . imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” (*Carafano, supra*, 339 F.3d 1119 at p. 1123 [quoting *Zeran, supra*, 129 F.3d at pp. 330-331]). Instead, Congress determined that only the actual creators of online content that causes harm should be subject to potential liability.

Industry experience confirms the wisdom of this policy. Section 230’s grant of immunity from liability has allowed services like those offered by amici to flourish, providing consumers with innovative (and often free) ways to connect and interact. Affirming the trial court’s erroneous decision would undercut those advances and deter future innovation by weakening the protection that Congress provided. The effects of such a decision would reach far beyond the facts in this case and impact a wide range of services that the trial court never considered.

As discussed above, affirming the trial court’s order would open the door to precisely the sort of claims that Congress had most in mind when it enacted Section 230—defamation claims seeking to impose liability on service providers for third-party content hosted on their platforms. For example, rather than suing for defamation, the plaintiffs in *Ricci v. Teamsters Union 456* (2d Cir. 2015) 781 F.3d 25 (*per curiam*) and *Jones v. Dirty World Entertainment Recordings LLC* (6th Cir. 2014) 755 F.3d 398, could just as easily have brought right of publicity claims against GoDaddy and Dirty World, respectively, on the basis of those websites’ generating revenue from defamatory content about plaintiffs. That is bad enough. But the consequences of such a decision could sweep even farther: unleashing so-called right of publicity claims that would seek to impose liability on service providers in a wide variety of situations that courts have previously held to be well within the scope of Section 230’s protection. Indeed, many claims previously held to be barred by Section 230 could be refashioned as right of publicity claims and, under the lower court’s reasoning, subject providers to burdensome litigation and possible liability. The plaintiff in *Obado v. Magedson* could have eluded dismissal of his invasion of privacy and intentional and negligent infliction of emotional distress claims against Yahoo and GoDaddy, among others, had he simply characterized them as right of publicity claims. (See *supra* (3d Cir. 2015) 612 F.App’x 90, 91-92.) Similarly, the plaintiff in *Hupp v. Freedom Communications*,

*Inc.* could have avoided Section 230 immunity by seeking to hold the Orange County Register liable for user comments on its website under a right of publicity theory, instead of a breach of contract theory. (See *supra* (2013) 221 Cal.App.4th 398, 404-405.)

The logic of the lower court's opinion would also threaten to starve Internet companies of the resources that have made it possible for them to offer a vast array of valuable services to billions of users, and to do so either free of charge or for fees that are far lower than the costs of providing those services. According to the trial court, to show that Facebook *commercially* misappropriated Knight's name and likeness, Knight need only establish that Facebook generated advertising revenue by placing advertisements next to pages on which Facebook's users posted Knight's image. (1 AA 328.) Under the district court's opinion, then, merely generating advertising revenue would open an Internet platform to possible right of publicity liability—and, by extension, would jeopardize the platform's immunity under Section 230. Internet companies would be forced to choose: Either expose themselves to potentially immense liability by continuing to sell advertisements, or forego that revenue in order to preserve Section 230 immunity.

Imposing such a choice would be catastrophic—not only for Internet companies but also for the billions of users worldwide who would be deprived of online services if those companies could not reliably generate revenue from



advertising. As is commonplace in the Internet industry (as well as in predecessor media such as newspapers, radio, and television), advertising revenue is a critical element of each of amici's (as well as Appellant Facebook's) business models. This exact concern has led courts uniformly to reject "creat[ing] a for-profit exception to [Section] 230's broad grant of immunity." (*M.A. ex rel. P.K. v. Village Voice Media Holdings* (E.D.Mo. 2011) 809 F.Supp.2d 1041, 1050; see also *Gentry, supra*, 99 Cal.App.4th at pp. 816, 822, 828-831; *Goddard, supra*, 2008 WL 5245490 at p. \*3; *Hinton v. Amazon.com.dedc, LLC* (S.D.Miss. 2014) 72 F. Supp. 3d 685, 690 fn.9.) And it should lead this Court to reverse the trial court in this case.

In addition, affirming the lower court's decision would undercut a principal objective of Section 230 immunity: "to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." (*Roommates.com, supra*, 521 F.3d at p. 1175; see also *Zeran, supra*, 129 F.3d at p. 330 [Section 230 was designed to promote "freedom of speech in the new and burgeoning Internet medium" by eliminating the "threat [of] tort-based lawsuits"].) Having to litigate the merits of a litany of diverse state intellectual property law claims—even weak ones—would place a substantial burden on existing Internet services and deter the development of new ones. The sheer volume of third-party

content hosted by companies like amici illustrates the burdens that such companies would face if the order were allowed to stand. For example:

- Airbnb hosts more than 2.3 million listings.
- Vimeo, which is owned by IAC, hosts over 50 million videos that users view and comment on daily.
- Google's YouTube has over a billion users, with users uploading 400 hours of video onto the site every minute.
- LinkedIn has over 450 million members, with two new members signing up to join LinkedIn every second.
- Reddit provides a platform for over 130,000 active communities that generate 64 million comments each month alone.
- Twitter users send many millions of tweets per day.

Amici's services, and others like them, have revolutionized how people advertise goods, locate services, find employment, search for housing, communicate with friends, share opinions, and otherwise interact. Section 230 plays a critical role in keeping these services viable. If service providers were faced with potential liability for every instance in which their role in hosting third-party content that is critical of (or otherwise not to the liking of) someone else, or if protection from such liability depended on their not using advertising as a source of revenue, they might well be forced to limit what information can be shared on

their services, change the structure and operation of their online platforms, or even shutter some aspects of their services. Section 230 is intended to prevent this very outcome.

## CONCLUSION

For the foregoing reasons, the order denying Facebook's motion to strike plaintiffs' right of publicity claims, and the unfair business practices claim that turns on the right of publicity claim, should be reversed.

Respectfully submitted,

/s/ Mark D. Flanagan

PATRICK J. CAROME (*pro hac vice pending*)  
ARI HOLTZBLATT (*pro hac vice pending*)  
EMILY J. BARNET (*pro hac vice pending*)  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue NW  
Washington, DC 20006  
(202) 663-6000

MARK D. FLANAGAN # 130303  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
950 Page Mill Road  
Palo Alto, California 94304  
(650) 858-6000

January 10, 2017

*Attorneys for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.204(c), I hereby certify that, including footnotes, the foregoing brief contains 6,132 words. This word count excludes the exempted portions of the brief as provided in Rule of Court 8.204(c)(3). As permitted by Rule of Court 8.204(c)(1), the undersigned has relied on the word count feature of Microsoft Word 2010, the computer program used to prepare this brief, in preparing this certificate.

DATED: January 10, 2017

Respectfully submitted,

/s/ Mark D. Flanagan  
Mark D. Flanagan # 130303

## PROOF OF SERVICE

*Facebook, Inc. v. Cross a/k/a/ Mikel Knight; 1203 Entertainment, LLC; and  
MDRST Marketing/Promotions, LLC,*

**Case No. A148623**

### IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION TWO

I, the undersigned, declare:

I am employed in Palo Alto, CA. I am over the age of 18 and not a party to the within action. My business address is 950 Page Mill Road Palo Alto, California 94304.

On January 10, 2017, I served copies of the following documents described as:

**Application of Airbnb, Inc., IAC/InterActiveCorp, Google Inc., LinkedIn Corp., Reddit, Inc., and Twitter, Inc. For Leave To File As Amici Curiae And Brief As Amici Curiae Urging Reversal**

on the parties in this action as follows:

#### SEE ATTACHED SERVICE LIST

**By Truefiling:** I served the foregoing documents on the parties and/or counsel of record designated for electronic service in this action by filing it through the Court's electronic filing system (TrueFiling). Under Rule 8.212(c)(2), filing the document through TrueFiling satisfies the requirements for service.

**By Mail:** I enclosed the documents in a sealed envelope or package addressed to the persons listed at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Wilmer Cutler Pickering Hale and Dorr LLP's practice for collecting and processing correspondence for mailing. On the same day that the 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 above is true and correct.

Executed on January 10, 2017, at Palo Alto, California.

/s/ Mark D. Flanagan

Mark D. Flanagan

SERVICE LIST

***Via TrueFiling***

James Snell  
Julie E. Schwartz  
Perkins Coie LLP  
3150 Porter Drive  
Palo Alto, CA 94304  
*Counsel for Appellant*

Mark Punzalan  
Heidi Kim  
Punzalan Law, P.C.  
600 Allerton St., Suite 201  
Redwood City, CA 94063  
*Counsel for Respondents*

Paul Alan Levy  
Public Citizen Litigation Group  
1600 20th Street, NW  
Washington, DC 20009  
*Counsel for Amicus Curiae*  
*Public Citizen, Inc.*

Todd G. Cole  
Cole Law Group, PC  
750 Old Hickory Blvd.  
Building Two, Suite 202  
Brentwood, TN 37027  
*Counsel for Respondents*

Clerk of the Court  
Court of Appeal, First Appellate District  
350 McAllister Street  
San Francisco, CA 94102

***Via U.S. Mail***

Marcia Hofmann

Zeitgeist Law PC  
25 Taylor Street  
San Francisco, CA 94102  
*Counsel for Amicus Curiae*  
*Public Citizen, Inc.*