

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

JASON CROSS, et al.,

Plaintiffs/Respondents/Cross-  
Appellants,

vs.

FACEBOOK, INC. et al.,

Defendant/Appellant/Cross-  
Respondent,

Appeal No. A148623

Cross-Appeal Case No.: A149140

Appeal From an Order of the  
Superior Court of San Mateo County,  
No. CIV537384

Hon. Donald J. Ayoob

**RESPONSE TO BRIEFS OF *AMICI CURIAE***

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## I. INTRODUCTION

Plaintiffs Jason Cross (a/k/a Mikel Knight), 1203 Entertainment, LLC, and MDRST Marketing/Promotions, LLC (collectively “Plaintiffs”) sued Facebook, Inc. (“Facebook”) for: (1) breach of written contract; (2) negligent misrepresentation; (3) negative interference with prospective relations; (4) deprivation of rights of publicity under California Civil Code § 3344; (5) violation of rights of publicity under California common law; and (6) unlawful and unfair business practices in violation of the California Business and Professions Code § 17200. (*See* Pl. Compl. at 8-11.) The San Mateo County Superior Court held that Plaintiffs’ first three causes of action were barred by 47 U.S.C. § 230(c) of the Communications Decency Act (“Section 230”), which provides certain immunities to companies that operate “interactive computer service[s].” (Judge Ayoob Order at 4 (May 31, 2016)). The Superior Court ruled that Plaintiffs’ three remaining three claims could proceed because “[i]n California, rights of publicity claims are intellectual property laws” and the Communications Decency Act “explicitly states, ‘Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.’” (*Id.* at 5 [internal citations omitted]). Both parties appealed to this Court.

The Court has accepted four *amicus curiae* briefs in this case, those of: (1) Public Citizen, Inc. (“Public Citizen *Amicus*”); (2) the Electronic

Frontier Foundation et. al (“EFF *Amicus*”); (3) Airbnb, Inc. et al. (“Airbnb *Amicus*”); and (4) Consumer Opinion, LLC and AVVO, Inc. (“Consumer Opinion *Amicus*”). These organizations (collectively “*Amici*”) raised issues regarding Section 230’s intellectual property law exemption and the validity of Plaintiffs’ California state law claims. This brief addresses those issues.

## II. ARGUMENT

Plaintiffs’ California intellectual property law claims should be allowed to proceed because Section 230’s civil liability protection for providers of interactive computer services explicitly exempts “any law pertaining to intellectual property.” (47 U.S.C. § 230(e)(2)). In California, publicity rights are a form of intellectual property. (*Comedy III Products, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 [“The right of publicity . . . protects a form of intellectual property that society deems to have some social utility.”]; *see also* Judge Ayoob Order at 5 (May 31, 2016)). The § 230(e)(2) exemption is not limited to federal intellectual property claims, so Section 230 does not shield Facebook from Plaintiffs’ valid claims based on California state intellectual property law. Plaintiffs urge the Court to affirm Judge Ayoob’s ruling.

**A. SECTION 230's INTELLECTUAL PROPERTY EXEMPTION IS NOT LIMITED TO FEDERAL INTELLECTUAL PROPERTY CLAIMS**

Judge Ayoob ruled correctly that Plaintiffs' statutory and common law right of publicity claims could proceed because the plain language of Section 230 does not immunize "interactive computer service" providers from intellectual property claims. The legislative history of Section 230 also does not suggest Congress intended to immunize service providers from intellectual property actions.

**1. The Plain Language of 47 U.S.C § 230(e)(2) Indicates That The Exemption Is Not Limited To Federal Intellectual Property Claims.**

To interpret Section 230's intellectual property exception, the Court must first "examine the language of the statute enacted as an initiative, giving the words their usual, ordinary meaning." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) Section 230 provides that: "No 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).) The statute defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (*Id.* § 230(f)(3).) But this immunity provision comes with two important limitations: "Nothing in this

section shall be construed to limit or expand any law pertaining to intellectual property[.]" *id.* § 230(e)(2), and "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section[.]" *id.* § 230(e)(3).

This ordinary meaning of these limitations clearly indicates that Section 230's grant of immunity does not extend to Plaintiffs' intellectual property claims. *Amici* understand this and attempt to argue that this Court should ignore the ordinary meaning of § 230(e)(3) and instead interpret it to preempt all California laws "pertaining to intellectual property" because those laws are "inconsistent with" Section 230. The Court should reject this invitation because it fails to account for the unambiguous meaning of the phrase "any law pertaining to intellectual property[.]" *id.* § 230(e)(2). As another court has noted, "In four different points in Section 230(e), Congress specified whether it intended a subsection to apply to local, state, or federal law." (*Atlantic Recording Corp. v. Project Playlist, Inc.* (S.D.N.Y. 2009) 603 F.Supp.2d 690, 703.) § 230(e)(1) refers to "any other *Federal* criminal statute," § 230(e)(3) refers to "enforcing any *State* law" and "any *State* or *local* law," and § 230(e)(4) refers to "any similar *State* law[.]" (47 U.S.C. § 230(e)(1, 3-4) [emphasis added]). But § 230(e)(2) does not refer to "any Federal law pertaining to intellectual property"; it refers to "*any law* pertaining to intellectual property" (*id.* [emphasis added]).

In *Atlantic Recording*, the court held that the § 230(e)(2) intellectual property exemption encompassed both state and federal law. The court reasoned that since the words “Federal,” “State,” and “Local” appeared four different times in subsection (e), if Congress wished to restrict § 230(e)(2)’s meaning to federal intellectual property claims, it would have done so. (603 F.Supp.2d at 703; *see also Barnhart v. Sigmon Coal Co.* (2002) 534 U.S. 438, 452 [“[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”]; *Universal Communications Systems, Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 422-23 [intellectual property claims based on Florida state trademark law are not precluded by Section 230]; *Gucci Am., Inc. v. Hall and Assoc.* (S.D.N.Y. 2001) 135 F.Supp.2d 409, 413 [state intellectual property law claims are not precluded by § 230(e)(2) based on the plain language of that subsection]). Section 230 as a whole also purports to sets forth “the policy of the United States” with respect to both “Federal or State regulation.” (*Id.* § 230(b)(2).) This context from § 230(b) further reinforces the notion that “any law pertaining to intellectual property” means either state or federal law.

Other courts have adopted this ordinary meaning of § 230(e)(2) as well. In *Gucci America, Inc. v. Hall & Associates*, for example, the court stated that the plain language of the intellectual property provision

precludes users or providers of interactive computer services from having immunity against state intellectual property law claims. ((S.D.N.Y. 2001) 135 F.Supp.2d 409, 413.) The First Circuit has followed *Gucci America* and also held that Section 230 immunity did not apply to state intellectual property claims. (*Universal Communication Systems, Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 423 n.7.) This Court should adopt the same logic and reject *Amici*'s invitation to disregard the ordinary meaning the phrase "any law" in § 230(e)(2).

**2. The Legislative History of 47 U.S.C § 230(e)(2) Confirms That The Exemption Is Not Limited To Federal Intellectual Property Claims.**

The legislative history of the Communications Decency Act confirms that Section 230's intellectual property exemption encompasses both state and federal intellectual property law claims. At the time of Section 230's enactment, "Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce." (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027; *see also* 141 Cong. Rec. H8469-72.) *Amici* argue that Congress passed the Communications Decency Act primarily to encourage development of free speech on the internet. Plaintiffs agree that this may have been *one* of Congress's goals, but *Amici* oversimplify the story by glossing over Congress's other motivations. For instance, as the name "Communications Decency Act" implies, Congress also sought to protect

minors from obscene material (*E.g.*, 141 Cong. Rec. H8469-72 [statements of Representatives Cox, Wyden, Lofgren, and Goodlatte admitting as much]). The Communications Decency Act ultimately struck a balance between these competing interests.

The specific circumstances surrounding the enactment of Section 230 also support Plaintiffs' proposed plain meaning interpretation. Representatives Cox and Wyden, the primary architects of the amendment that became Section 230, appeared to be particularly concerned with overruling a New York state case called *Stratton Oakmont, Inc. v. Prodigy Services Co.* (May 24, 1995) 1995 WL 323710. (*See* 141 Cong. Rec. H8469-72.) In *Stratton Oakmont*, a New York trial court held that an online service provider could be liable as a publisher of defamatory content posted by third parties to its website. *See* 1995 WL 323710 at \*10. Representatives Cox and Wyden accordingly designed a relatively narrow amendment to "protect[] from liability online services that make a good faith effort to restrict access to offensive material." (Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway* (1996) 49 FED. COMM. L.J. 51, 68.). These Representative reasoned that providers that made a "good faith effort to restrict access to offensive material" should not have to "screen each of their millions of postings for possible problems[.]" (*Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 331.)

Plaintiffs are not asking Facebook to “screen each of [its] millions of postings for possible problems[.]” On the contrary, they asked the service to address a discrete number of messages that presented a demonstrable harm to Mr. Knight and his employees. These messages involved death threats against Mr. Knight and his employees, false accusations about Mr. Knight’s business that caused attacks on his employees and his property, and false statements which caused baseless 9-1-1 calls that have wasted the resources of police departments. Plaintiffs notified Facebook of the existence of these specific posts and submitted affidavits to the company demonstrating the violent effects of keeping them online. Facebook erroneously stated that the company was not in a position to act on the reported content and refused to respond.

The architects of Section 230 intended to create a limited immunity for content providers that “make a good faith effort to restrict access to offensive material[.]” (Cannon, *supra*, at 68.) Facebook failed to do so here. The Court should acknowledge the multiple motivations behind the Communications Decency Act and adopt Plaintiffs’ proposed plain meaning interpretation of Section 230.

**3. The Cases *Amici* Cite Limiting § 230(e)(2) to Federal Intellectual Property Claims Are Not Binding and Are Readily Distinguishable.**

*Amici* cite cases in which courts have held that Section 230 immunity can preclude certain state intellectual property claims. But these

cases are not binding on this Court and are readily distinguishable. Plaintiffs' claims arise under California statutory and common law and are properly classified as intellectual property claims. (*E.g.*, *Aroa Mktg., Inc. v. Hartford Ins. Co. of Midwest* (2011) 198 Cal.App.4th 781, 788.) *Amici* rightly point out that the appellate court in *Hartford* did not decide the issue of whether a right of publicity claim implicates Section 230. But that court did note that Black's Law Dictionary includes "publicity rights" within its definition of "intellectual property," *id.*, which would close the inquiry under the plain meaning interpretation discussed above.

*Amici* rely heavily on *Perfect 10, Inc. v. CCBill LLC*, a case in which the Ninth Circuit stated that Section 230's exemption for "any law pertaining to intellectual property" referred only to federal intellectual property law. ((9th Cir. 2007) 488 F.3d 1102.) That court emphasized the lack of any explicit definition from Congress for this phrase. (*Perfect 10.*, 488 F.3d at 1118.) In the years following *Perfect 10*, many courts have criticized the Ninth Circuit's conclusion. One stated bluntly that the Ninth Circuit's reasoning "lacks any support in the plain meaning" of the statutory text. (*Atlantic Recording Corp. v. Project Playlist Inc.* (S.D.N.Y. 2009) 603 F.Supp.2d 690; *see also Doe v. Friendfinder Network, Inc.* (N.H.D.C. 2008) 540 F.Supp.2d 288, 299 ["[T]his court does not find the Ninth Circuit's resolution [in *Perfect 10*] of the statutory interpretation question to be persuasive."].) In any event, Ninth Circuit opinions do not

bind this Court. (*E.g.*, *People v. McCoy* (2005) 133 Cal.App.4th 974, 982 [“Even on federal questions . . . Ninth Circuit cases do not bind the state courts.”].)

The court in *Perfect 10* also seemed to state in a footnote that the First Circuit in *Universal Communication Systems* did not reach the question regarding Section 230’s intellectual property exemption. (*See Perfect 10*, 488 F.3d at 1118 n.5.) But the First Circuit in fact did apply the ordinary meaning of the words “any law pertaining to intellectual property,” cited *Gucci America*’s similar application of the exemption, and held that the exemption included state intellectual property law. (*Universal Communication Systems*, 478 F.3d at 423.) There, the First Circuit ultimately held that the plaintiff’s claim failed under the standards of the relevant state intellectual property law—not that the claim was barred by § 230(c) immunity. (*See id.* 423 n.7 [“We reason somewhat differently, holding that even though Section 230 immunity does not apply, the claim was properly dismissed as a matter of trademark law.”].) The First Circuit’s holding in *Universal Communication Systems* is consistent with the ordinary meaning of Section 230’s intellectual property exemption.

*Amici* also refer to the California Supreme Court’s discussion of *Zeran v. American Online, Inc.* in *Barrett v. Rosenthal*. (*See Airbnb Amicus* at 15; *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58; *Zeran v. American Online, Inc.* (4th Cir. 1997) 129 F.3d 327.) It is important to note, as *Amici*

quoted, that the Supreme Court’s discussion of “the rule announced in *Zeran* and followed in all other jurisdictions” pertained only to “defamation plaintiffs” and “noticed-based” negligence concerns that were covered by Section 230 immunity. (See *Airbnb Amicus* at 15; *Barrett*, 40 Cal.4th at 58.) The California Supreme Court did not address publicity rights claims, which are explicitly exempted from Section 230. Intellectual property claims like Plaintiffs’ are entirely consistent with Section 230 and Supreme Court’s discussion in *Barrett*. (See *Barrett*, 40 Cal.4th at 58.)

**B. PLAINTIFFS’ CLAIMS HAVE NOTHING TO DO WITH DEFAMATION**

Plaintiffs’ claims arise under California state law and pertain to publicity rights and unlawful business practices. (Pl. Compl. at 11; Judge Ayooob Order at 6 (May 31, 2016).) Plaintiffs are also not “pleading defamation claims as something else[.]” (See *Consumer Opinion Amicus* at 5.). They are seeking to vindicate their rights under California statutory and common law on intellectual property and unfair business practices. (Bus. & Prof. Code §§ 17200, 17203; Civ. Code § 3344.)

*Amici* attempt to argue that Plaintiffs have pleaded mere defamation claims in a way that circumvents Section 230 immunity in order to “hold Facebook liable for allegedly false content critical of [the Plaintiffs], and allegedly damaging to their reputations that was authored by Facebook users.” (See *Airbnb Amicus* at 17-18.) This argument dangerously

mischaracterizes Plaintiffs' case. Plaintiffs' publicity rights claims arise from Facebook's decision to "knowingly and intentionally" use Plaintiffs' likeness without consent, "for the purpose of advertising" and for Facebook's "commercial advantage." (Pl. Compl. at 11.) These publicity rights claims can be brought regardless of whether any the content at issue tends to be positive or negative because the claims focus on the unauthorized use of another's "name, voice, signature, photograph, or likeness, in any manner . . . or for purposes of advertising or selling, or soliciting purchases." (Civ. Code § 3344.) Holding a computer services provider liable for "allegedly defamatory content," which *Amici* are concerned about, is far different from the present situation of holding the Facebook liable for its knowing and unauthorized use of another's likeness in violation of California laws. (See *Airbnb Amicus* at 18 [citing *Stratton Oakmont*, 1995 WL 323710 ].) Plaintiffs have independent claims that may be brought under California state law.

Traditional defamation claims focus on the intentional act of the party that publishes defamatory content. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 796 [explaining that traditional defamation analysis that focuses on the words of the speaker].) Here, the focus is largely on what happened after the content was produced—namely Facebook's refusal to remove the content. Plaintiffs are not merely "relabeling a defamation claim under another theory of liability" to circumvent the Section 230

protection that “Congress intended,” but rather is allowing California state law claims, on which the “Plaintiffs have shown” have a “probability of prevailing,” to proceed in accordance with the explicit exemption of § 230(e)(2) for “any law pertaining to intellectual property.” (Airbnb *Amicus* at 19; Judge Ayoob Order at 6 (May 31, 2016).) Holding Facebook responsible for intellectual property law causes of action, which are explicitly exempted from Section 230 immunity by § 230(e)(2), is far different from trying to hold a content provider liable for causes of action that are not exempted. (See Airbnb *Amicus* at 20 [citing negligence as an example of a cause of action protected by § 230(c) immunity].) The essential nature of the right of publicity and derivative unfair business practices claims is not to “impose on Facebook liability for allegedly defamatory third-party content,” Airbnb *Amicus* at 21, but rather is to hold the Defendant liable for violating rights of publicity and committing unfair business practices.

Facebook’s conscious choice to not remove content—including that concerning publicity rights and business matters—once the Plaintiffs had notified Facebook of the content’s existence created independent and legitimate claims that arise under California law. These claims should be allowed to proceed accordingly.

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**C. THE PRESENT CASE POSES NO THREAT TO SECTION 230**

Plaintiffs have asserted claims under California state law. (*See* Pl. Compl. at 11; Judge Ayoob Order at 6 (May 31, 2016).) As discussed above, these claims are consistent with the provisions of Section 230. There is no reason this case should not be allowed to proceed under the pertinent laws.

*Amici* express concerns that this case could “cripple the growth and development of the Internet industry” and threatens the Section 230 protections for “providers or users of interactive computer services.” (*See* Airbnb *Amicus* at 22.) This is a dramatic overstatement. This case can be decided for the Plaintiffs under California law consistent with Section 230’s protections for internet services. As detailed out in the first section of this response, Section 230 has a specific exemption for intellectual property law. (*See* 47 U.S.C. § 230(e)(2).) Plaintiffs’ intellectual property claims are entirely consistent with Section 230. *Amici* also argue that Section 230 demands “that only the actual creators of online content that causes harm should be subject to potential liability.” (Airbnb *Amicus* at 23.) This is plainly incorrect, as it would render Section 230’s intellectual property exemption meaningless. Claims like Plaintiffs’ must allowed to proceed.

Additionally, as addressed in Section II of this brief, Plaintiffs’ claims do not attempt hold Facebook liable for all actions of its many users.

This case focuses on Facebook’s specific, conscious refusal to remove certain content pertaining to the Plaintiffs, including their likeness, once the Plaintiffs notified it of the content’s existence and requested removal. This is a narrow factual circumstance that does not threaten Facebook’s general operations. Plaintiffs have no interest in attempting to hold Facebook liable for every action of its users. (*See Airbnb Amicus* at 27.)

Finally, Amici worry that other persons might follow Plaintiffs and bring publicity rights claims against online service providers. (*See Airbnb Amicus* at 23-24, 26-28.) It is important to remember that such causes of actions can only arise if publicity rights violations actually occur. If no violations occur, then the claims do not arise. When such violations do occur, injured persons—such as Plaintiffs here—have the right to bring their cases under California law. *Amici* frame this case as a conflict between California’s state intellectual property law and Section 230. This is a false choice, as these laws do no conflict. Plaintiffs’ causes of action should be allowed to proceed and Facebook should be held responsible for any violations.

### **III. CONCLUSION**

This Court should affirm the decision below and allow Plaintiffs’ California state law claims to proceed. Section 230’s plain language and legislative history support Plaintiffs’ interpretation exempting state

intellectual property claims from the statute's limited grant of immunity. The contrary holdings of other courts, which are flawed in their reasoning and factually distinguishable from the instant case, are also not binding upon this Court. Mr. Knight shares many of the concerns of *Amici* and support the development of free speech and the internet. He does not want to remove critical speech from the internet—he merely wants content providers to remove salacious and violent speech from their websites after being given notice and evidence of a concrete connection to serious bodily injury. California law guarantees him that right, so this Court should accordingly affirm the decision below.

Date: April 13, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3,464 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

/s/Mark Punzalan  
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CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 and not a party to this action. My business address is 600 Allerton St., Redwood City, CA 94063. On the date set forth below, I served the foregoing document on the parties in the subject action by placing a true copy thereof as indicated below, addressed as follows:

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Via E-File Service*

*Via First-Class Mail*

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

**E-FILE SERVICE:** I electronically filed the foregoing document with the court using the court's e-filing system. The following parties or their counsel of record are registered as ECF Filers and that they will be served by the E-filing system.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 13th day of April at Redwood City, California.

/s/Mark Punzalan  
Mark Punzalan