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SECTION 230'S CHARACTERIZATION PROBLEM

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ABSTRACT

Communication Decency Act ("CDA") Section 230's famous internet platform immunity contains a carve-out for intellectual property: "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." How far does this exception reach?

This Note explores the existing circuit split over Section 230(e)(2)'s construction as an instance of the characterization problem in conflict of laws. "Characterization" refers to the binary classification — either an object is in the set or it's out — that conflict of laws regimes may impose, leading to divergent outcomes according to a court's characterization of a given cause of action. Section 230 exempts "laws pertaining to intellectual property" from its grant of immunity, so Section 230 cases may turn on whether the judge believes the plaintiff's cause of action pertains to intellectual property. Examining the caselaw on Section 230(e)(2)'s application to real cases, this Note describes the courts' methodological inconsistency to date, significantly affecting the rights of litigants in internet-related state-law intellectual property cases. Since the characterization problem tends to result in "the decision of a case [varying] with the forum," this Note proposes legislative reforms to Section 230's text to eliminate the characterization opportunity altogether and offer greater certainty to litigants: providing Section 230 immunity against state-law intellectual property claims. This reform ensures Congress retains control over the contours of the federal Section 230 immunity and saves the courts from having to characterize state-law claims as "pertaining to intellectual property."

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I. INTRODUCTION

The year is 2027. Virtual entertainment technology has continued to evolve at a breakneck pace, starting with Tupac's holographic 2012 "performance" at the Coachella Valley Music & Arts Festival,[1] accelerating with the raft of pandemic-era virtual concerts,[2] and continuing in 2022 with ABBA's first "concert" in forty years.[3] The entertainment industries are rushing to adapt to these new media.

Overseas, a shady but entrepreneurial entertainment firm, DeepReality Studios, concocts the perfect business plan. Capitalizing on the success of reboots and re-runs,[4] DeepReality will produce new episodes of the award-winning reality show Keeping Up with the Kardashians using deepfake technology. DeepReality produces a new season under the name The Deeply Fake Kardashians without the Kardashians'

1. Jacob Ganz, *How That Tupac Hologram at Coachella Worked*, NPR (Apr. 17, 2012, 5:15 PM), https://www.npr.org/sections/therecord/2012/04/17/150820261/how-that-tupac-hologram-at-coachella-worked [https://perma.cc/64AC-HAH3].

2. Ryan Faughnder, *What Zoom Fatigue? Pandemic Virtual Concerns May Have Changed Live Music Forever*, L.A. TIMES (June 24, 2021, 8:00 AM), https://www.latimes.com/entertainment-arts/business/story/2021-06-24/what-zoom-fatigue-virtual-concerts-may-be-here-to-stay [https://perma.cc/H2DK-AQKW].

3. ABBA VOYAGE, https://abbavoyage.com/ [https://perma.cc/Q3YQ-PCLG].

4. *See 2023 Worldwide Box Office*, BOX OFF. MOJO, https://www.boxofficemojo.com/year/world/2023/ [https://perma.cc/VL27-4KZ4] (finding that eight of the worldwide top ten grossing films were reboots, prequels, sequels, or some other form of recycled intellectual property).

consent, then publishes its work on the American video site NewTube, where the new season is a smash hit with fans. DeepReality grows rich from NewTube's advertiser revenue sharing, and neither DeepReality nor NewTube face a viable lawsuit despite DeepReality's brazen rip-off of the Kardashians.

How can DeepReality pull off this seeming heist of intellectual property? The Kardashians probably lack a copyright claim, because DeepReality appropriated the un-copyrightable facts of the Kardashians' lives and because American copyright law generally does not protect reality television.[5] The Kardashians almost certainly have a right of publicity claim, since their likeness was commercially appropriated without their consent.[6] But they lack a proper defendant: DeepReality Studios is a fly-by-night overseas operation, making it challenging to serve process or collect a judgment. And NewTube enjoys Communications Decency Act ("CDA") Section 230 immunity, despite Section 230's immunity exception for intellectual property,[7] because the Ninth Circuit (the most obvious place where the California-domiciled Kardashians would sue) extends Section 230 immunity to state-law intellectual property claims like the right of publicity.[8] Unfortunately for the Kardashians, the Ninth Circuit stands alone: other circuits would allow them to sue NewTube.[9]

This Note explores this circuit split over Section 230(e)(2)'s construction as an instance of the characterization problem in conflict of laws. "Characterization" refers to the binary classification — either an object is in the set or it is out — that conflict of laws regimes may impose, leading to divergent outcomes according to a court's characterization of a given cause of action. Section 230 exempts "law[s] pertaining to intellectual property" from its grant of immunity, so Section 230 cases may turn on whether the judge believes the plaintiff's cause of action pertains to intellectual property.[10] Examining the caselaw on Section 230(e)(2)'s application to real cases, this Note will

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5. *See* Matthew Bunker, *Reality Bites: The Limits of Intellectual Property Protection for Reality Television Shows*, 26 UCLA ENT. L. REV. 1, 18 (2019).

6. *See* CAL. CIV. CODE § 3344(a) ("Any person who knowingly uses another's name . . . or likeness . . . for purposes of advertising or selling . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.").

7. *See* Communications Decency Act of 1996, 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

8. *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007). To get around this, the Kardashians could sue under Indiana's right of publicity statute, which does not require the plaintiff to have any connection with Indiana. Ind. Code § 32-36-1-1(a); *see also* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMMC'N LAWYER (Aug. 1, 2011), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf [https://perma.cc/T9C7-RFC5].

9. *See, e.g.*, Hepp v. Facebook, 14 F.4th 204, 211, 214 (3d Cir. 2021) (rejecting the holding of *Perfect 10* and allowing a right of publicity claim to proceed against a website).

10. 47 U.S.C. § 230(e)(2).

describe the courts' methodological inconsistency to date and its significant effect on the rights of litigants in internet-related state-law intellectual property cases. Since the characterization problem tends to result in "the decision of a case [varying] with the forum,"[11] this Note proposes legislative reforms to Section 230's text to eliminate the characterization opportunity altogether and offer greater certainty to litigants. Such a reform parallels a proposed federal choice-of-law statute, likely a lawful enactment under the Full Faith and Credit Clause, which would reduce or eliminate the conflicts characterization problem.[12]

The Note proceeds as follows. Part II introduces the characterization problem in conflict of laws, exploring several old cases in which the characterization problem disposed of the case. This provides the theoretical foundation for exploring Section 230's characterization problem. Part III applies Part II's framework to Section 230, exploring how courts have approached Section 230(e)(2)'s construction in different areas of intellectual property. Ultimately, Part III concludes that the bulk of Section 230(e)(2) jurisprudence is either conclusory or completely policy driven. Part IV considers how to resolve characterization problems in general, how to resolve Section 230's characterization problem in particular, and considers the policy advantages of the chosen solution: immunizing state-law intellectual property claims. Part V concludes.

II. THE PROBLEM OF CHARACTERIZATION IN CONFLICT OF LAWS

> In a conflict-of-laws situation, a court must determine at the outset whether the problem presented to it for solution relates to torts, contracts, property, or some other field, or to a matter of substance or procedure, in order to refer to the appropriate law. In other words, the court must initially, whether consciously or not, go through the process of determining the nature of the problem; otherwise, the court will not know which choice-of-law rule to apply to the case. This process is generally called "characterization" and sometimes "classification," "qualification," or "interpretation."[13]

Characterization is a pervasive problem in conflict of laws, particularly in the "traditional" system embodied in the American Law

11. Elliott E. Cheatham, Book Note, 55 HARV. L. REV. 164, 167 (1941) (reviewing A. H. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940)).

12. *See* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 24, 47 (1991).

13. 16 AM. JUR. 2D *Conflict of Laws* § 5 (2025) (citations omitted).

Institute's First Restatement on the Conflict of Laws. That project itself was an effort to rationalize the practices of forty-eight states while also creating a "general common law of conflicts."[14] The First Restatement strives to be a *monist* system: it purports to offer both a universal solution to the problem of selecting which law to apply in a particular dispute as well as a solution producing the same result regardless of which forum evaluates its choice-of-law rules.

In order to achieve such a monist system, the First Restatement operates on a "vested rights" theory.[15] At the moment a party violates a so-called "primary right[]" — "all the rights created by law and existent in the ordinary proper course of events, unaffected by illegal interference"[16] — the plaintiff vests a "secondary right" to sue for redress in court.[17] That right to sue is akin to personal property, and the plaintiff can take that right into a foreign jurisdiction and sue there.[18] The forum court awarding a judgment to the plaintiff is thus merely recognizing a secondary right that vested under foreign law.[19]

However, determining the moment of transgression of a primary right proves to be a tricky task. Consider negligence as an illustrative example. As a first year law student will eagerly tell you, a negligence claim relies on the existence of a duty of care, a violation of that duty, and a resulting injury, but only such injury that is proximately caused by that violation.[20] If a negligence case takes place in multiple jurisdictions — perhaps a train negligently not maintained in Alabama travels to Mississippi and causes an injury there[21] — where did the plaintiff's right vest? That is, which state's law is to govern? Professor Beale, the famous conflict of laws scholar, proposed the "last act doctrine": the jurisdiction containing the site of the last act necessary to form a complete cause of action is the jurisdiction whose laws govern the cause of action.[22] As applied, this doctrine could result in bizarre results. In a

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14. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455 (1999).

15. Roosevelt, *supra* note 14, at 2455–56.

16. Joseph H. Beale, A Treatise on the Conflict of Laws § 8A.9 (1935).

17. Roosevelt, *supra* note 14, at 2456–57.

18. *Id.*

19. *Id.*

20. *See* RESTATEMENT (THIRD) OF TORTS § 3 (AM. L. INST. 2010).

21. *E.g.*, Ala. Great S. R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892). Mississippi followed the "fellow servant doctrine" (absolving employers of liability of the torts committed by one employee against another) while an Alabama statute provided the employee a right to recovery. Because the injury — the last act necessary to give rise to the secondary right to sue in negligence — occurred in Mississippi, the court applied Mississippi law and denied recovery. Note that the railroad and plaintiff were both Alabama domiciliaries, the employment contract was made in Alabama, and an overwhelming majority of the track worked by the plaintiff lay in Alabama.

22. Roosevelt, *supra* note 14, at 2458; *see also* RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 377 (AM. L. INST. 1935) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.").

mailed poison candy hypothetical ending with death, the First Restatement pronounces "the place of wrong is where the deleterious substance takes effect," *not* the place the poison was mailed to the victim, the place of consumption by the victim, nor the site of death.[23] Determining the meaning of a "substance tak[ing] effect" is an exercise for the beleaguered advocate or judge tasked with interpreting that provision.

In addition to the arbitrariness in determining *the one* place a given cause of action exists in, the First Restatement suffers from the characterization problem. The First Restatement pronounces crisp rules to decide the "site" of a wide variety of different causes of action, and in turn what jurisdiction's laws govern the cause. But what if a case does not fit neatly into one category or another?

For instance, in *Haumschild v. Continental Casualty Co.*, a wife sued her husband in negligence after a car crash.[24] Both spouses were Wisconsin domiciliaries, Wisconsin was the forum, and the crash occurred in California; the wife could maintain her cause under Wisconsin law but not under California law, due to California's interspousal immunity.[25] Under prior Wisconsin caselaw and the First Restatement, California law governed, as California was the site of the injury and thus the site of the last act.[26] But the court *re-characterized* the case as *actually* being about "incapacity to sue because of marital status . . . rather than tort law."[27] Now that the court faced a family law question "where domicile usually controls the law to be applied," the court avoided applying California's interspousal immunity law and allowed the plaintiff spouse to recover.[28]

The *Haumschild* case neatly illustrates why the characterization problem is so important: under the First Restatement's system, *the characterization of the case's substance may be outcome determinative*. Ms. Haumschild won under a family law theory and would have lost under a tort theory.

Characterization problems exist along axes other than bodies of substantive law. For instance, the First Restatement distinguishes

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23. RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 377 note 2, illus. 2 (AM. L. INST. 1935).

24. 95 N.W.2d 814, 815 (Wis. 1959).

25. *Id.*

26. *Id.*; RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 384(2) (AM. L. INST. 1935) ("If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.").

27. *Haumschild*, 95 N.W.2d at 819.

28. *Id.* at 818, 820.

between substance and procedure, instructing the forum to apply forum law to all matters of procedure.[29] But what is procedure?

In *Grant v. McAuliffe*, the court confronted the question of whether or not the survivability of a cause of action is a procedural matter.[30] There, the California-resident defendant died in a car crash in Arizona, and several California plaintiffs sued the estate in negligence.[31] Under the Beale site-of-wrong rule described above, Arizona law would apply, but Arizona did not allow plaintiffs to recover against a tortfeasor's estate.[32] Rejecting the First Restatement's characterization of survivability as a substantive matter, Justice Traynor instead analogized survivability to the statute of limitations, a classically procedural matter for conflict of laws purposes.[33] With a procedural question now before him, Justice Traynor could thus apply the law of California and offer recovery.[34]

Grant illustrates the incoherence of the First Restatement's vested rights system. Under the vested rights theory, Arizona law ought to determine whether a secondary right — here, to sue in negligence to recover — ever existed at all. And Arizona law unambiguously did not recognize such a right. However, by *re-characterizing* the case as concerning survivability and procedure rather than tort and substance, the plaintiffs managed to select the more favorable forum law and win. In other words, the court found a right that never vested in the "home" state (i.e., Arizona).

My general message from this crash course of the first two weeks of a conflicts of law course is straightforward. Characterization — the question of deciding whether a particular issue is inside or outside a given category — determines winners and losers.

III. SECTION 230'S CHARACTERIZATION PROBLEM(S)

We can now turn to the characterization problem embedded in Section 230's immunity exception. Section 230 contains a broad grant of immunity to web platforms.[35] The key portion provides 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

29. RESTATEMENT (FIRST) OF CONFLICTS OF LAWS §§ 584–85 (AM. L. INST. 1935). The substance-procedure dichotomy in conflict of laws appears tantalizingly similar to the substance-procedure dichotomy appearing in *Erie* analyses. But "something that is procedural from the conflict of laws perspective may still be 'substantive for *Erie* purposes.'" Kermit Roosevelt III & Bethan R. Jones, *Adrift on* Erie: *Characterizing Forum-Selection Clauses*, 52 AKRON L. REV. 297, 297–98 (2018).

30. 264 P.2d 944 (Cal. 1953).

31. *Id.* at 946.

32. *Id.*

33. *Id.* at 946–48.

34. *Id.* at 948.

35. 47 U.S.C. § 230(c)(1).

information content provider."[36] The plain language of the statute "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[37] However, subsection (e) contains several carve-outs. Section 230 is not to impair the enforcement of any federal criminal statute,[38] several sex trafficking statutes,[39] or the Electronic Communications Privacy Act of 1986 "or any similar State law."[40]

Finally, Section 230 is not to "be construed to limit or expand any law pertaining to intellectual property."[41] The policy behind this provision is immediately discernible. Section 230's drafters likely did not want to extend immunity to a computer platform offering pirated copyrighted materials for download, already a major concern by 1996.[42]

But subsection (e)(2)'s language is vague and invites several questions: What does "intellectual property" mean? What does it mean for a law to "pertain[]" to intellectual property? These are the characterization problems that the remainder of this Note takes up.

As an illustrative exercise of the wide breadth of discretion courts exercise when handling characterization problems, let's begin by determining a sensible construction of "intellectual property." The World Intellectual Property Organization ("WIPO") defines "intellectual property" as "creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce."[43] Already, this definition separates the substance of intellectual property from its judicial enforceability. For instance, a recipe is a creation of the mind, embodying the skill and creativity of its creator, yet under U.S. law, recipes enjoy next to no intellectual property protection.[44] Similarly, WIPO lists geographical indications, "a sign used on

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36. *Id.*

37. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

38. 47 U.S.C. § 230(e)(1).

39. *Id.* § 230(e)(5).

40. *Id.* § 230(e)(4). The "any similar State law" language itself implies a separate characterization problem!

41. *Id.* § 230(e)(2).

42. *See Federal Judge Dismisses LaMacchia Charges*, MIT NEWS (Jan. 11, 1995), https://news.mit.edu/1995/lamacchia-0111 [https://perma.cc/NSB6-BGSZ] (discussing a criminal indictment where the government charged an MIT student with "operat[ing] a computer bulletin-board service that permitted users to copy copyrighted business and entertainment software without paying to purchase the software"). Such a bulletin-board service was a precursor to later sites like the Pirate Bay.

43. *What is Intellectual Property?*, WORLD INTELL. PROP. ORG., https://www.wipo.int/about-ip/en/ [https://perma.cc/RJ4R-QZHD].

44. Recipes are hard to patent because of the "novelty" and "non-obvious[ness]" hurdles to obtaining a patent. *See* 35 U.S.C. §§ 102–03. Recipes are impossible to copyright because of the "idea-expression dichotomy": copyright extends to a particular expression, not the underlying idea. *See* Baker v. Selden, 101 U.S. 99, 102 (1879) ("To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the

products that have a specific geographical origin and possess qualities or a reputation that are due to that origin," as a form of intellectual property, though the United States does not separately recognize geographical indications beyond the Lanham Act's protection of collective marks.[45]

Given this vague definition, courts have inconsistently applied Section 230's immunity exception. In the remainder of this Part, I will examine this variable treatment in different areas of substantive law. I will highlight characterization problems directly embedded in Section 230, such as the precise reach of "intellectual property law," and I will also note a court's grappling with a characterization problem in the underlying substantive claim, such as whether the right of publicity is a property right or not. Section 230 thus functions as a "looking glass," amplifying characterization problems in the substantive law to which it is applied.

A. Right of Publicity

Let's begin with the right of publicity, the example used in the introduction. First, I will briefly describe the right of publicity and its own embedded characterization problem. Then, I will turn to Section 230 and discuss how Section 230(e)(2)'s failure to address this characterization problem has produced a circuit split.

The right of publicity is a state-law commercial tort barring unauthorized uses of a person's identity, such as by using the plaintiff's name, signature, photograph, or voice.[46] The first case to recognize this tort with the name "right of publicity" was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, protecting the endorsement value of "prominent persons" with a judicially enforceable exclusive grant.[47] In the one challenge it has considered to a right of publicity law, the Supreme Court approvingly upheld the right of publicity against a First Amendment attack.[48]

Because the right of publicity is a creature of state law, each state defines the scope of the right of publicity for itself, and consequently

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province of letters-patent, not of copyright."). Recipes do nothing to indicate the origin of goods, so they are out of trademark's scope. *See* 15 U.S.C. § 1052. The only viable intellectual property regime is trade secrets, requiring the recipe creator to keep the recipe totally secret in order to benefit.

45. *Geographical Indications*, WORLD INTELL. PROP. ORG., https://www.wipo.int/geo_indications/en/ [https://perma.cc/NLE8-NAPZ]; *Geographical Indications*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/ip-policy/trademark-policy/geographical-indications [https://perma.cc/8SRL-X9ZH]; 15 U.S.C. § 1054 ("[C]ollective and certification marks, including indications of regional origin, shall be registrable . . . .").

46. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 89 (2020).

47. 202 F.2d 866, 868 (2d Cir. 1953).

48. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 579 (1977).

the right varies tremendously state to state. In some states, the right of publicity is statutory; in others, the right is a feature of state common law; and some states provide parallel causes of action under statutory and common law. In some states, the right is alienable; in others, only the subject can assert a claim. Some states recognize a postmortem right of publicity (i.e., a separate right accruing in the estate of the decedent celebrity), while others don't.[49] And some states even allow *any plaintiff*, including out-of-state domiciliaries with no connection to the forum state, to assert the right; most do not.

The right of publicity itself faces a characterization problem familiar to students of traditional conflicts of law: is the right of publicity merely a tort, or does is it have a property dimension as well?[50] The right of publicity's dual nature derives from its intellectual history as a branch of privacy.[51] In comparing appropriation (the closest tort to right of publicity) to his other three privacy torts — public disclosure of private facts, intrusion upon seclusion, false light in the public eye — Dean Prosser noted that the right of publicity resembles the others in that they are all personal, not assignable, and do not provide a cause of action for a publication about a deceased person absent a statute expressly providing so.[52]

Certainly, a proven infringement of the right of publicity is tortious, just like plain old trespass of real property is tortious. But is the right of publicity more analogous to trespass, a tort defending a property interest with independent existence?[53] Or is it closer to torts like unfair competition or public disclosure of private facts, which punish wrongful conduct without resort to an independent property interest? And does the right of publicity's proprietary nature vary state by state, depending on the specific attributes of each state's version of the right?[54]

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49. *See infra* notes 132–139 and accompanying text.

50. *See* Lauren Hency Scholz, *Privacy as Quasi-Property*, 101 IOWA L. REV. 1113, 1120–21 (2016) (noting that the torts of "appropriation of likeness and public disclosure of private facts[] are routinely handled as the property interest 'right of publicity' in several jurisdictions").

51. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389, 401–07 (1960) (describing the core features of the tort of "appropriation," also known as the right of publicity, in comparison to three other types of privacy tort). The Second Restatement on Torts adopted Dean Prosser's four-part classification. *See* RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1977).

52. Prosser, *supra* note 51, at 408–09.

53. *Id*. at 406–07 (while discussing the tort of "appropriation," Dean Prosser notes its "proprietary nature" because the plaintiff can sell licenses and describes an exclusive license of such as "a 'right of publicity'" (quoting Haelan Lab'ys v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953))).

54. For example, an alienable and inheritable right of publicity is more property-like than a right of publicity lacking these features. *See generally* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006) (describing the interplay of alienability and heritability throughout American history as defining attributes of property interests).

Accordingly, early courts arrived at different conclusions while applying the First Restatement on Conflicts rubric to right of publicity claims, which requires the judge to categorize the claim as tort, property, or some other substantive body of law.

For instance, in *Ettore v. Philco Television Broadcasting Corp.*, the Third Circuit took up a difficult conflicts question in a case lodging a right of publicity-esque claim.[55] Ettore consented to having a boxing fight filmed in exchange for royalties; thirteen years later, defendants then re-ran the fight in Pennsylvania, Delaware, New Jersey, and New York, as part of a sponsored program intended to advertise a Vaseline cream hair tonic.[56] Ettore complained of invasion to "his property rights, right of privacy, good name and reputation."[57] Applying the Pennsylvania conflicts rule, which used the place of the injury to select the governing substantive law,[58] the Third Circuit thus had to decide whether Ettore suffered an injury to his person (and thus only in Pennsylvania, his place of residence) or to his property (and thus in the four states receiving the television broadcast).[59]

To resolve this, the Third Circuit distinguished two types of precedent cases — those "rend[ing] the veil of obscurity surrounding an average person and mak[ing] [them], arguably, newsworthy," and those "involv[ing] the appropriation of the performance or production of a professional performer."[60] The former invaded the "very personal" right to privacy, whereas the latter (at least where a professional performer is involved) implicated "a kind of property right in the performer to the product of his services."[61] The Third Circuit chose to analyze the case under a property rubric,[62] forcing it to take on *Erie Railroad Co. v. Tompkins*'s[63] "ferocious task" of guessing how the

55. 229 F.2d 481, 483 (3d Cir. 1956). This was a very early case, coming just a few years after *Haelan*, and as such this case does not use the term "right of publicity." *See supra* note 47.

56. *Id.* at 483–84. The broadcast television context complicated the conflicts analysis — "unusual atmospheric conditions" could carry the carrier signal into further states, which could possibly increase the number of jurisdictions in which Ettore experienced injury! Happily, the court confined the difficult electrical engineering analysis to a footnote. *Id.* at 484 n.5.

57. *Id.* at 484.

58. *Id.*; *see also* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941) (requiring federal courts sitting in diversity to apply the host state's conflicts rules).

59. *Ettore*, 229 F.2d at 484–85, 488–89; *see also id.* at 485 ("The state of the law is still that of a haystack in a hurricane").

60. *Id.* at 486 (alliteration in original); *accord* Prosser, *supra* note 51, at 406 ("It seems sufficiently evident that appropriation is quite a different matter from intrusion . . . . The interest protected is not so much a *mental* as a *proprietary* one . . . ." (emphasis added)); *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 94 & n.25 (2020) (enumerating states sharply distinguishing the torts of intrusion and appropriation and states conflating the two).

61. *Ettore*, 229 F.2d at 487.

62. *Id.* at 489.

63. 304 U.S. 64, 79 (1938).

Pennsylvania Supreme Court would apply the publicity and privacy laws of each of the four states.[64]

Thus, the *Ettore* approach instructs courts adjudicating privacy claims to look to the plaintiff's celebrity status to decide whether the claim is more tort-like (for "average person" plaintiffs) or proprietary (for professional performers). This determines the situs of the injury, in turn determining the operative substantive law under the First Restatement approach.

Currently, there is a circuit split concerning whether to extend Section 230 immunity to right of publicity claims.[65] Three circuits have taken up the issue, each arriving at a different outcome. Their diverging holdings ultimately reduce to the right of publicity's characterization problem under the First Restatement on Conflicts: is it property or not?

In *Perfect 10, Inc. v. CCBill LLC*,[66] the Ninth Circuit distinguished "well-established" federal intellectual property regimes from the "varying causes of action and remedies" and "varying purposes and policy goals" of state laws protecting intellectual property.[67] Perfect 10, an adult entertainment publisher that was an assignee for approximately 5000 models' rights of publicity, sued web platform host CCBill, which provided services to clients allegedly infringing those rights of publicity.[68] In reversing the district court's denial of Section 230 immunity as to the right of publicity claims, the Ninth Circuit expressed concern about the wide variety in state-level intellectual property laws:

> States have any number of laws that could be characterized as intellectual property laws: trademark, unfair competition, dilution, right of publicity and trade defamation, to name just a few. Because such laws vary widely from state to state, no litigant will know if he is entitled to immunity for a state claim until a court decides the legal issue. And, of course, defendants that are otherwise entitled to CDA immunity will usually be subject to the law of numerous states. An entity otherwise entitled to § 230 immunity would thus be forced to bear the costs of litigation under a wide variety of state statutes that could arguably be classified as "intellectual property." As a practical matter, inclusion of rights protected by state law within the

64. *Ettore*, 229 F.2d at 491.

65. *See generally* Courtney Kim, Note, *Analyzing the Circuit Split over CDA Section 230(e)(2): Whether State Protections for the Right of Publicity Should Be Barred*, 96 S. CAL. L. REV. 449 (2022).

66. 488 F.3d 1102 (9th Cir. 2007).

67. *Id.* at 1118.

68. *Id.* at 1108.

> "intellectual property" exemption would fatally undermine the broad grant of immunity provided by the CDA.[69]

Hinting at an extraterritoriality concern of allowing "the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity" and considering "Congress's express goal of insulating the development of the Internet from the various state-law regimes," the Ninth Circuit narrowly construed "intellectual property" in Section 230 to mean "federal intellectual property."[70]

This purposivist analysis of state-law right of publicity identifies the right's underlying tort-versus-property characterization problem as a policy reason to offer immunity to the platform as a reasonable default. Section 230(e)(2) thus functions as a sort of "looking glass," magnifying a characterization problem embedded in the underlying substantive law.

By contrast, the Third Circuit reached the opposite result in *Hepp v. Facebook*.[71] A dating app posted a Facebook advertisement featuring Hepp's face and the caption "meet and chat with single women near you" without her consent.[72] Hepp, a television news host in Philadelphia, sued Facebook for violating her Pennsylvania statutory and common law right of publicity.[73] While citing *Perfect 10* and acknowledging the "policy considerations" justifying the Ninth Circuit's holding, Judge Hardiman wrote that "policy considerations cannot displace the text" and instead held that "the most natural reading of § 230(e)(2)'s text" embraced state law claims.[74]

Finally, in *Almeida v. Amazon.com, Inc.*,[75] the Eleventh Circuit punted on the opportunity to opine on the "difficult issues" arising from applying Section 230(e)(2) to a state-law right of publicity claim.[76] Rather than addressing the immunity issue, the Eleventh Circuit noted that

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69. *Id.* at 1119 n.5.

70. *Id.* at 1118–19; *see also supra* note 69 and accompanying text; *cf.* Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083, 1084–85 (2023) (discussing the Dormant Commerce Clause concerns inherent in state regulation of online conduct via tort law).

71. 14 F.4th 204 (3d Cir. 2021); *see also* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422–23 (1st Cir. 2007) (declining to extend 230(e)(2) immunity for a state-law trademark claim with two sentences of analysis).

72. *Hepp*, 14 F.4th at 206–07.

73. *Id.*

74. *Id.* at 211–12. The Third Circuit also noted policy considerations cutting in favor of construing Section 230(e)(2) to reach state claims: "[I]f likeness interests are disregarded on the internet, the incentives to build an excellent commercial reputation for endorsements may diminish." *Id.* at 211.

75. 456 F.3d 1316 (11th Cir. 2006).

76. *Id.* at 1324.

the plaintiff's right of publicity claim could not survive a motion to dismiss.[77]

Trial courts have grappled with characterizing the right of publicity as well. A prototypical example, and an excellent illustration of this tort-property dichotomy, is *Ratermann v. Pierre Fabre USA, Inc.* from the Southern District of New York.[78] The plaintiff asked for relief under Sections 50 and 51 of the New York Civil Rights Law, New York's statutory version of the right of publicity, and the defendants raised a Section 230 defense.[79] The Southern District immunized the defendants under Section 230(e)(2) because "New York courts have long construed Sections 50 and 51 to provide a statutory right to *privacy*, not property."[80] The court distinguished the *Hepp* case, noting that the Third Circuit limited its holding to just the Pennsylvania right of publicity law and that the New York courts had expressly construed their state's right of publicity as sounding in privacy alone.[81]

Courts today applying Section 230(e)(2) face a characterization problem of the same sort faced by the *Ettore* court nearly seventy years ago. Rather than categorizing the right of publicity claim as tort versus property to select the underlying substantive law, courts today must categorize a given state-law right of publicity to decide whether it "pertain[s] to intellectual property."[82] Just like courts applying the First Restatement, courts applying Section 230(e)(2) today benefit from little guidance, allowing (perhaps even requiring) policy rationalizations to enter the analysis.

B. Trademark, Unfair Competition & False Advertising

The right of publicity context will prove to be the simple case: courts simply disagree on the proper construction of "law pertaining to intellectual property," arising in part from the rich diversity of state versions of the right of publicity. As we enter the trademark domain, the few on-point cases arrive at wildly different conclusions without even sharing a baseline analytical framework.

Some Ninth Circuit courts have divided up federal statutes and conducted claim-by-claim analysis in implementing the Perfect 10

77. *Id.*; *cf.* Pearson v. Callahan, 555 U.S. 223, 236–37 (2009) (granting lower federal courts discretion to choose which branch of the two-prong qualified immunity test to analyze first, to avoid "[u]nnecessary litigation of constitutional issues").

78. 651 F.Supp.3d 657 (S.D.N.Y. 2023).

79. *Id.* at 662–63.

80. *Id.* at 668–69 (emphasis in original).

81. *Id.* at 669 n.5; *see also* Gautier v. Pro-Football, Inc., 106 N.Y.S.2d 553, 560 (N.Y. App. Div. 1951) ("The statutory creation in this state of a limited right of privacy . . . provided primarily a recovery for injury to the person, not to his property or business. The recovery is grounded on the mental strain and distress, on the humiliation, on the disturbance of the peace of mind suffered by the individual affected."), *aff'd*, 107 N.E.2d 485 (N.Y. 1952).

82. 47 U.S.C. § 230(e)(2).

standard. For instance, in Enigma Software Group USA, LLC v. Malwarebytes, Inc., the Ninth Circuit analytically separated the federal Lanham Act into its trademark infringement and false designations parts.[83] The plaintiff brought a false advertising claim under the Lanham Act's Section 43(a)(1)(B);[84] the Ninth Circuit held the defendant enjoyed Section 230(e)(2) immunity because "[t]hese allegations [did] not relate to or involve trademark rights or any other intellectual property rights."[85]

When confronting a similar question, however, the Southern District of New York reached a very different result in *Gucci America, Inc. v. Hall & Associates*,[86] in which the court ruled that Section 230(e)(2) precluded defendant's claim to Section 230 immunity for Lanham Act direct and contributory trademark infringement, Lanham Act Section 43(a) false designations of origin, and New York common law trademark infringement claims.[87] The court purported to conduct a plain meaning textualist analysis of Section 230(e)(2) but did not identify what "law pertaining to intellectual property" actually meant, focusing instead on the meaning of "limit."[88] The court thus allowed the Section 43(a) false designations of origin claim to slip through[89] — *exactly* the genus of claim the Ninth Circuit dismissed via Section 230 immunity in *Enigma Software Group*.[90]

Additionally, the Ninth Circuit's claim-by-claim immunity analysis in *Enigma Software Group* differs from the Southern District of New York's monolithic approach in *Atlantic Recording Corp. v.*

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83. 946 F.3d 1040, 1053 (9th Cir. 2019).

84. 15 U.S.C. § 1125(a) [hereinafter Section 43(a)].

85. *Enigma Software Grp.*, 946 F.3d at 1054; *accord* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("The Lanham Act may well contain provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with infringement of trademarks, which are the 'property' of the owner because he can exclude others from using them. The Lanham Act's false-advertising provisions, however, bear no relationship to any right to exclude . . . ." (citations omitted)). While the holding is sensible, the logic contained in the opinion's text begs the question: the Ninth Circuit defines a law "pertaining to intellectual property" as not reaching Lanham Act claims "unless the claim itself involves intellectual property." *Enigma Software Grp.*, 946 F.3d at 1053 (quoting 47 U.S.C. § 230(e)(2)).

86. 135 F. Supp. 2d 409 (S.D.N.Y. 2001).

87. *Id.* at 411–14. The *Gucci* opinion does not state whether the Section 43(a) claim was under Section 43(a)(1)(A) (the "unfair competition" part) or under Section 43(a)(1)(B) (the "false advertising" part). *See* Mark McKenna, *Trademark Use and the Problem of Source*, 2009 U. ILL. L. REV. 773, 793 n.95 (distinguishing the subparts of Section 43(a)(1)).

88. *See Gucci*, 135 F. Supp. 2d at 412–14.

89. *See id.* at 422.

90. *Enigma Software Grp.*, 946 F.3d at 1053. Unfortunately, the Ninth Circuit did not cite to or explicitly distinguish *Gucci*, though a district court noted the contradictory results. PC Drivers Headquarters, LP v. Malwarebytes, Inc., No. 1:18-CV-234, 2018 WL 2996897, at *4 (W.D. Tex. Apr. 23, 2018). And as noted above, the *Gucci* court did not explain whether Gucci brought a Section 43(a)(1)(A) (unfair competition) or Section 43(a)(1)(B) (false advertising) claim. *See supra* note 87.

Project Playlist, Inc.[91] In *Atlantic Recording Corp.*, the plaintiff asserted state common law copyright and unfair competition claims as to their pre-1972 recordings in addition to federal copyright claims.[92] In denying the defendant's motion to dismiss state-law claims under Section 230(e)(2), the Southern District did not analytically separate the unfair competition claims from the state common law copyright claims.[93] Rather, the court applied the "plain language of the CDA" (snubbing the Ninth Circuit's purposivist analysis in *Perfect 10*)[94] and considered only the state versus federal law issue.[95] The court did not explain how unfair competition was a "law pertaining to intellectual property,"[96] despite the clear statement from the New York Court of Appeals that "causes of action for copyright infringement and unfair competition are not synonymous under New York law."[97]

The lumping of the unfair competition and state-law copyright claims together somewhat resembles the *Gucci* court's combination of Lanham trademark infringement and Lanham false designation of origin. But the *Atlantic Recording* court took claim aggregation further in its immunity analysis by fusing together two *state-level common law*

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91. 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

92. *Id.* at 694. The federal Copyright Act of 1976 does not reach sound recordings fixed before February 15, 1972, 17 U.S.C. § 301(c), and so states may regulate those sound recordings under state-law copyright regimes despite the Copyright Act's preemption provisions. *See* Goldstein v. California, 412 U.S. 546, 571 (1973) ("[N]o conflict exists between the federal copyright statute passed in 1971 and the present application of [California Penal Code] § 653h, since California charged petitioners only with copying recordings fixed prior to February 15, 1972." (footnote omitted)).

93. *Atl. Recording Corp.*, 603 F. Supp. 2d at 702–04.

94. *Id.* at 703, 703 nn.10–11.

95. *See id.* at 704. Unfair competition's possible treatment as a kind of property is an interesting doctrinal question in its own right, and it's a shame the Southern District didn't take it up. Long ago, in a pre-*Erie* diversity action, the Supreme Court described a quasi-property interest in "hot" published news such that appropriating the news gathered by another for one's own commercial gain constituted unfair competition in trade. Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) ("Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, . . . it must be regarded as *quasi property*, irrespective of the rights of either as against the public." (emphasis added)); *see also* PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2022 1239–40 (2022) (posing doctrinal puzzles arising from *International News Service*'s majority opinion). But this "quasi-property" right was expressly conditioned on the existence of commercial competition between the parties. The "quasi-property" right flunks the "allocational," "good against the world" attribute of property because it came only at International News Service's expense and did not affect anyone else's use of the news stories. *See* James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 128–29 (2014). *International News Service* proved to be a "good for one ride only" case. *See* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929) ("While it is of course true that the law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. [*International News Service*] appears to us such an instance; we think that no more was covered than situations substantially similar to those then at bar.").

96. *Atl. Recording Corp.*, 603 F. Supp. 2d at 698–704.

97. Capitol Recs., Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 266 (N.Y. 2005).

claims (that is, the unfair competition and common law copyright claims), even though the two claims did not arise from the same statute.

This confusing caselaw suggests the underlying text is simply too vague. Courts interpreting Section 230(e)(2) have deployed a wide range of analytical approaches — separate immunity rulings per claim in *Enigma Software Group*, one immunity ruling for all Lanham claims in *Gucci*, and one immunity ruling for the *entire lawsuit* in *Atlantic Recording*. This is not an instance of courts struggling to apply a tricky and subtle doctrine. There simply is no doctrinal coherence to be found!

C. Trade Secrets

Few courts have taken up the question of the application of Section 230(e)(2) to trade secret cases.

The only case I found directly addressing this question is *Craft Beer Stellar, LLC v. Glassdoor, Inc.*,[98] in which the plaintiff asserted both state- and federal-law trade secret claims as well as a violation of the Massachusetts Consumer Protection Act, civil conspiracy, and aiding and abetting twenty anonymous franchise store owners.[99] Notably, the federal trade secret statute, the Defend Trade Secrets Act ("DTSA"),[100] clearly states that the statute "shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress."[101] Applying the plain language of the statute, the court dismissed the federal trade secrets claims as well as the consumer protection, civil conspiracy, and aiding and abetting claims.[102]

Curiously, this resulted in the state-law trade secret misappropriation claim surviving the Section 230 immunity analysis even as the federal claim was dismissed. This adds yet another characterization wrinkle to Section 230's intellectual property exception: plaintiffs can bring state-law trade secret misappropriation claims (at least outside the Ninth Circuit)[103] even as Section 230(e)(2) and the DTSA together expressly immunize defendants from federal-law trade secret claims.

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98. No. 18–10510–FDS, 2018 WL 5505247 (D. Mass. Oct. 17, 2018).

99. *Id.* at *2.

100. 18 U.S.C. §§ 1831–39.

101. Defend Trade Secrets Act of 2016, Pub. L. 114-153, § 2(g), 130 Stat. 376, 383. This language directly tracks Section 230's language: "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). There is only one other provision in the United States Code using the "pertaining to intellectual property" language: the 2018 Music Modernization Act ("MMA"), targeting the unauthorized use of pre-1972 sound recordings. Unlike the DTSA, the MMA explicitly describes itself as a "law pertaining to intellectual property," meaning interactive computer services may be liable for the MMA violations of their users. 17 U.S.C. § 1401(g).

102. *Craft Beer Stellar*, 2018 WL 5505247, at *3.

103. *See* Perfect 10, Inc. v. CCBILL LLC, 488 F.3d 1102 (9th Cir. 2007).

Overall, the interplay of the DTSA and Section 230's interpretation outside the Ninth Circuit[104] produces a mess. There is no principled reason why an online platform should face liability *only* under state law for the trade secret misappropriation of its users, particularly given how the DTSA closely tracks the state-law Uniform Trade Secrets Act in force in forty-eight states.[105] The Ninth Circuit's congressional intent-driven approach uniquely avoids this mess, as the *Perfect 10* rule immunizes *any* trade secret claim. In my view, the Ninth Circuit got it right in *Perfect 10*.

IV. HOW TO RESOLVE SECTION 230(E)(2)'S CHARACTERIZATION PROBLEM

The caselaw cited above is confusing. I initially endeavored to find strands of logic uniting the analyses in the various cases, but I've come to believe no such strands exist. As discussed above, the analysis in Section 230(e)(2) applications is far too terse, perhaps far terser than it ought to be given how significant the grant or denial of Section 230 immunity is. Section 230(e)(2) is a truly ambiguous statute, and the characterization problems that ambiguity invites force courts to conduct largely ad hoc analyses.

Characterization issues matter enormously because they decide cases. Just like how the conflicts-of-law characterization rulings in *Haumschild* or *McAuliffe* disposed of those cases, the (non-)immunity rulings in *Hepp v. Facebook* and *Perfect 10* precipitated settlements in favor of the prevailing party.[106]

To conclude, I offer some initial thoughts on resolving characterization problems in general. I then apply these observations to my conclusion that the Ninth Circuit's *Perfect 10* rule is the best solution Section 230(e)(2)'s characterization problem.

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104. Because *Perfect 10* construes Section 230(e)(2)'s immunity exception to reach only federal intellectual property laws, *Perfect 10* results in Ninth Circuit courts granting Section 230 immunity when confronted with a state-law trade secret claim. *See, e.g.*, Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1125–27 (D. Nev. 2013) (applying Section 230 immunity against Florida state-law trade secret claims). Ninth Circuit doctrine thus immunizes trade secret claims across the board.

105. H.R. REP. NO. 114-529, at 5 (2016) ("The Act's definition of misappropriation is modeled on the Uniform Trade Secrets Act, versions of which have been adopted by 48 states.").

106. *See* Stipulation of Dismissal, Hepp v. Meta Platforms, Inc., No. 19-CV-4034 (E.D. Pa. May 23, 2023); Stipulation and Order for Dismissal, Perfect 10, Inc. v. CCBILL LLC, No. CV02-7624 (C.D. Cal. Dec. 13, 2007) (filed less than nine months after the Ninth Circuit's ruling).

A. Resolving Characterization Problems

How do we resolve characterization problems? Ultimately, the characterization problem is a specific instance of the judge possessing too much discretion: the judge can defensibly rule either way with little guidance beyond judicial precedent, which the judge can artfully distinguish if desired. In these circumstances, characterization problems arise as a litigating strategy to take advantage of this discretion. Thus, the proper solution is to eliminate that discretion by reference to an external source of authority.

In their own attempts to resolve characterization problems, early twentieth-century American legal writers proposed to solve the issue by stripping judges of discretion. In a 1920 summary of the French legal scholar Etienne Bartin's writings on the matter, Professor Ernest Lorenzen offered the forum's internal law as a tiebreaker.[107] As a theoretical justification, Bartin relies on a theory of sovereignty: whenever the forum chooses to apply foreign law in preference to its own, the forum voluntarily restricts its own sovereignty. Thus, in order to preserve the forum's sovereignty, forum law alone must control this voluntary cessation of power.[108] Using forum law eliminates the discretion judges have to characterize legal relationships with reference to a foreign body of law.

Writing amid the "conflicts revolution" of the 1960s, Professor Robert Leflar arrived at a similar conclusion via a very different path. Professor Leflar advocated for what is now known as the "better rule of law" approach to conflicts — where the litigants offer two conflicting substantive rules to apply to the case, the judge should select rules she thinks "make good socio-economic sense for the time when the court speaks, whether they be [her] own or another state's rules."[109] This is quite the grant of discretion! But Leflar did not advocate *new* judicial discretion as much as *acknowledge the existing discretion* in

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107. Ernest G. Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247, 259–61 (1920) ("[W]henever the application of the internal law of the forum or that of another country depends upon the nature of a particular juridical relationship, it is the law of the forum which must decide what the nature of the relationship is."); *see also* Etienne Bartin, *De l'Impossibilite d'Arriver a la Suppression Definitive des Conflits de Lois [On the Impossibility of Achieving the Definitive Suppression of Conflicts of Laws]*, 24 Journal du Droit International Privé et de la Jurisprudence Comparée [J. DR. INT'L PRIVÉ & JURIS. COMPARÉE] 225 (1897) (Fr.). "Qualification" is a synonym for "characterization." *See* 16 AM. JUR. 2D *Conflict of Laws* § 5 (2020).

108. A. H. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 26 (1940).

109. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966); *accord* Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 81 (1989) ("The first step in my analysis requires the forum to determine which substantive law is best as a matter of social policy and justice. This determination should be made on the same basis as determinations of domestic substantive law, relying on the same moral, economic, and social policy considerations applicable in domestic cases."); *see also* Note, *Bundled Systems and Better Law*, 129 HARV. L. REV. 544 (2015).

the conflicts system, including via the characterization problem. That is, Leflar saw judges regularly picking better law under the guise of characterizing issues before the court, and thus "better law" served as an intellectually honest way to describe what real judges did every day.[110] In this scheme, the judge's assessment of the comparable welfare of each rule of law is the external source of authority. This framing puts discretion front and center.

Finally, there is plain old explicit legislative text. This Note has already discussed such an example: the DTSA explicitly states that it "shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress."[111] This leaves no discretion for judges, and the sole Section 230(e)(2) case with a DTSA claim resulted in immunity, as the mechanical application of the two statutes together demands.[112] Textual interpretation is comparatively simple in comparison to arbitrarily complicated conflicts regimes, but a plain text solution requires the participation of the democratically accountable legislature.[113]

B. The Future of Section 230 and a Proposed Solution to Section 230(e)(2)'s Characterization Problem

Currently, there is a robust national conversation centered on reforming Section 230.[114] The motivations for this conversation are far beyond the scope of this Note, which only concerns an overlooked but consequential characterization issue in one of Section 230's immunity exceptions. While Section 230 reform is on the agenda, Congress

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110. Leflar, *supra* note 109, at 1588 ("In conflicts cases, just as in other cases, courts have always taken the content of competing rules into account, but they have too often used *characterization*, renvoi, multiple-choice rules or the like as manipulative devices to cover up what they were really doing, when there was no need at all for any cover-up." (emphasis added and footnote omitted)).

111. *See supra* Section III.C.

112. *See id.*

113. *Cf.* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 110 (2006) ("Textualists asserted that [their] approach was more faithful to the background constitutional notion of legislative supremacy because it favored the enacted text — the only thing that had cleared the constitutional process of bicameralism and presentment — over unenacted evidence of purpose. Moreover, whereas focusing on the text was said to represent an objective measure of statutory meaning, focusing on purpose unrealistically sought to discover the unknowable subjective intentions of a complex, path-dependent, and opaque multimember lawmaking body."). Textualism is attractive partially because it purports to constrain judicial discretion and minimize the judicial policymaking role.

114. *See, e.g.*, John Villasenor, *Why Creating an Internet "Fairness Doctrine" Would Backfire*, BROOKINGS INST. (June 24, 2020) https://www.brookings.edu/articles/why-creating-an-internet-fairness-doctrine-would-backfire/ [https://perma.cc/V5F8-ETEZ] (critiquing Section 230 reform proposals that would require online platforms "to present a balanced range of perspectives on issues of public interest"); Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1222–26 (2021) (Thomas, J., concurring) (proposing a common carrier-style regulatory model for online platforms).

should take advantage of the opportunity to clean up other parts of the statute, including Section 230(e)(2), by explicitly delimiting the scope of Section 230's intellectual property exception, thereby eliminating the characterization problem.

In the alternative, the Supreme Court could take the issue up. As discussed above, there is a circuit split on whether Section 230 immunizes platforms for state-law right of publicity claims, satisfying one of the Supreme Court's certiorari guidelines.[115] But given the policy tradeoffs inherent in deciding how far to extend platform immunity and liability, and the lack of a legal question beyond pure statutory construction, this question seems best suited for Congress.

As to the specifics, I favor the Ninth Circuit's approach in *Perfect 10* — decline to extend immunity for only federal intellectual property claims, namely Lanham Act trademark infringement, copyright, and patent — largely for the purposivist reasons the Ninth Circuit itself spelled out in *Perfect 10*. In other words, Congress should amend Section 230(e)(2) to read as follows, where italics indicate additions: "Nothing in this section shall be construed to limit or expand any law pertaining to *federal* intellectual property."

The Ninth Circuit's approach has its critics. The *Atlantic Recording* court, for instance, criticized the Ninth Circuit's refusal to hew to the "plain language" of Section 230.[116] However, this critique is inapposite when Congress can simply change the plain language. The district court in *Doe v. Friendfinder Network, Inc.*[117] additionally criticized the Ninth Circuit's putatively unsupported assumption that state-law intellectual property regimes differ sufficiently so as to impose a significant burden on internet service providers.[118]

In my view, however, the Ninth Circuit got this proposition right: state-law intellectual property regimes vary *wildly*. This will be explored in greater detail in the next section.[119]

C. The Advantages of Limiting Liability to Only Federal-Law Intellectual Property Claims

The Ninth Circuit's approach in *Perfect 10* has several advantages over the more expansive liability regime adopted by the Third Circuit in *Hepp*.

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115. *See supra* note 65 and accompanying text (documenting a circuit split between the Third Circuit and Ninth Circuit on this issue); *see also* Sup. Ct. R. 10(a).

116. Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009); *see also* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 299–300 (D.N.H. 2008) (advancing the same argument as in *Atlantic Recording*).

117. 540 F. Supp. 2d 288 (D.N.H. 2008).

118. *Id.* at 301.

119. I take up this critique below in the text accompanying *infra* notes 133–141.

First and foremost, immunizing state-law claims (i.e., construing Section 230(e)(2) as not embracing state-law intellectual property claims) ensures that Congress controls the extent of the powerful Section 230 immunity shield. Limiting liability to federal-law intellectual property claims creates a closed set of Section 230 exemptions defined exclusively in federal law.[120] Second, there is a rich variety in state-law intellectual property regimes, leaving the outer bounds of what qualifies as "intellectual property" nebulous and thus at risk of unguided judicial characterization.

California's recent expansion of its postmortem right of publicity illustrates the advantages of cabining state law's control over the contours of the federal Section 230 immunity. In September 2024, Governor Gavin Newsom signed Assembly Bill 1836 ("AB 1836") into law, expanding the state's postmortem right of publicity to embrace "digital replica[s]."[121] Concerns over the "quickly advancing technology" behind digital replicas motivated the major screen actors strike beginning in summer 2023,[122] and the legislation's author argued "performers deserve protection from exploitation by AI" and "no one anticipated the ability to re-animate the dead with AI."[123]

Despite the legislation's clear concern with the rapid development of artificial intelligence ("AI") imperiling performers' livelihoods,[124] the bill's definition of "digital replica" sweeps far wider to embrace any "computer-generated, highly realistic electronic representation" with a readily identifiable person and a materially altered appearance or performance.[125] While this definition invokes concepts from trademark[126]

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120. Sharp-eyed readers will note that other Section 230 provisions reference state law. *E.g.*, 47 U.S.C. § 230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any *State law* that is consistent with this section." (emphasis added)); *id.* § 230(e)(5)(B) ("Nothing in this section . . . shall be construed to impair or limit . . . any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18."). These provisions, however, ensure federal law controls because they require either "consisten[cy]" with either Section 230, a federal law, or a state criminal offense matching the federal criminal code.

121. Assemb. B. 1836, 2024 Leg., Reg. Sess. (Cal. 2024). In this context, the Legislature defined "digital replica" as "a computer-generated, highly realistic *electronic representation* that is readily identifiable as the voice or visual likeness of an individual that is embodied in a sound recording, image, audiovisual work, or transmission in which the actual individual either did not actually perform or appear, or the actual individual did perform or appear, but the fundamental character of the performance or appearance has been materially altered." *Id.* (emphasis added).

122. *See* Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 160–61 (2023).

123. S. 5066, 2024 Leg., Reg. Sess., at 3 (Cal. 2024).

124. *Id.* Note that the Screen Actors' Guild, an organizer of the summer 2023 strike, was a sponsor of the bill. *Id.*

125. *See* Cal. Civ. Code § 3344.1(a)(2)(B)(ii)(I) (2024).

126. *See* 15 U.S.C. § 1127 (defining "trademark" as a name, symbol, device, or combination of the above used "to *identify* and distinguish . . . goods . . . from those manufactured or sold by others" (emphasis added)).

and copyright law's fair use doctrine,[127] this definition isn't moored to any traditional type of intellectual property. However, because AB 1836 facially concerns the postmortem right of publicity, it is exactly the sort of law that a court following the *Hepp v. Facebook* approach may consider "pertaining to intellectual property" and thus ineligible for Section 230 immunity.[128] In other words, AB 1836 creates a "novel" intellectual property right purely as a matter of state law.[129]

Among other critical commentators, Professor Jennifer Rothman highlighted the discrepancy between the limited problem of AI-generated sound recordings and visual performances and the much broader language in the enacted legislation.[130] Nothing in the newly enacted law limits its applicability to, for example, a screen recording of a Fortnite player using a celebrity-mimicking "skin" as a form of personal expression[131] beyond the argument that the Fortnite avatar is not "highly realistic."

Therefore, in a world in which Section 230(e)(2) does not immunize state-law intellectual property claims, state-law innovations like AB 1836, which push the envelope of what qualifies as "intellectual property," could immediately eliminate the Section 230 immunity that established internet companies have long relied upon to build their products. This loss of immunity could occur even where the state is legislating against a problem in an unrelated industry using a broad, novel definition of intellectual property. By contrast, my proposed amendment ensures that *only* Congress controls the contours of the federal Section 230 immunity. If the claim arises from a federal intellectual property regime, the claim is in the closed set of claims entitled to pierce the Section 230 immunity shield; otherwise, the defendant is eligible to claim Section 230 immunity. This is an easy-to-administer,

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127. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 545–48 (2023) (discussing how to analyze *alterations* to copyrighted works under fair use's "transformative use" doctrine).

128. *See supra* notes 71–74 and accompanying text.

129. Andrew Klungness, Jennifer Stanley, Kristen Rovai & Kimberly Culp, *California's New AI Laws Limit Uses of Digital Likeness*, FENWICK (Sept. 26, 2024), https://www.fenwick.com/insights/publications/californias-new-ai-laws-limit-uses-of-digital-likeness [https://perma.cc/MQQ8-ULLC].

130. Jennifer E. Rothman, *California Considers a Digital Replica Law for the Dead*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Mar. 21, 2024), https://rightofpublicityroadmap.com/news_commentary/california-considers-a-digital-replica-law-for-the-dead/ [https://perma.cc/HM8P-63ZB]. Note that the Legislature amended AB 1836 after Professor Rothman's critique, and the final enacted version addresses shortcomings identified in Professor Rothman's post. *See* Cal. Civ. Code § 3344.1 (2024).

131. *See, e.g.*, @jonesykisser_hishusband, *NICKIE MINAJ*, TIKTOK (Apr. 8, 2024), https://www.tiktok.com/@jonesykisser_hishusband/video/7355534680009051425 [https://perma.cc/2ZQU-Q3NE]. I chose Nicki Minaj for this example due to the rich library of Nicki Minaj videos; note, however, that her likeness is not covered by AB 1836 because she is not deceased.

bright-line rule, leaving no discretion for judges to characterize state-law regimes as "pertaining to intellectual property."

Second, contrary to the Ninth Circuit's judicial critics,[132] the extent of state-law intellectual property law actually varies quite widely. Consider the state-by-state variations in the right of publicity. Many states, such as California, provide parallel causes of action under both statutory law and common law, each covering different scenarios.[133] Some states require that a right of publicity defendant be engaged in advertising or trade, while other states allow claims for any use to the defendant's advantage.[134] Some states require the plaintiff to have some sort of valuable persona a priori, while others do not.[135] Only twenty-five states provide a postmortem right of publicity at all.[136] Some states with a postmortem right limit its availability to soldiers.[137] Some states allow the postmortem right to continue forever, while others extinguish the right ten, thirty, seventy, or one hundred years after the person's death.[138] One state, Indiana, even makes its postmortem right available to anyone "regardless of a personality's domicile, residence, or citizenship" — the successors of a celebrity dying anywhere in the world have an Indiana right of publicity![139]

Even when applying a single right of publicity law, courts may arrive at diametrically opposite results. For example, in applying California's statutory right of publicity,[140] the Northern District of California has ruled that plaintiffs must plead that their personas have preexisting commercial value to survive a motion to dismiss, but in a separate case decided in the same year against the same defendant on "highly similar" allegations, the same court arrived at the exact opposite conclusion.[141]

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132. *See supra* note 118 and accompanying text.

133. *E.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001). As an example intrastate distinction, California's common law right of publicity may impose liability for a vocal imitation of a nationally known actress and singer while the statute would not. *E.g.*, Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

134. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 96 (2018).

135. *Id.* at 97.

136. *Id.* at 97–98.

137. *Id.* at 98.

138. *Id.*

139. Ind. Code § 32-36-1-1(a) (2024).

140. Cal. Civ. Code § 3344 (2024).

141. *Compare* Cohen v. Facebook, Inc., No. C 10–5282 RS, 2011 WL 5117164, at *1 (N.D. Cal. Oct. 27, 2011) (noting "the central question presented by this motion to dismiss . . . is whether the use of the names and likenesses of non-celebrity private individuals without compensation or consent causes injury sufficient to support standing, *where plaintiffs cannot allege that their names and likenesses have any general commercial value*" (emphasis added) before granting the motion to dismiss), *with* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 806 (N.D. Cal. 2011) ("[T]he Court finds nothing in the text of the statute or in case law that supports Defendant's interpretation of § 3344 as requiring a plaintiff pleading economic injury to provide proof of *preexisting* commercial value and efforts to capitalize on such value in

Leaving the door open to state-law intellectual property claims and their greatly varying sweep creates multiple policy problems. First, as the Perfect 10 court wrote, allowing states to control the scope of the federal Section 230 immunity is in direct opposition to the goal of "insulating the development of the Internet from the various state-law regimes."[142] Second, declining to immunize state-law claims invites creative pleading — that is, exploiting the characterization problem discussed in this Note — expressly to circumvent Section 230's broad grant of immunity. In dismissing a case facially about Florida trademark law, the First Circuit noted that the plaintiffs "effectively [brought] a defamation claim in the guise of an antidilution claim" in an attempt to evade Section 230 immunity.[143] Closing the courthouse doors on state-law intellectual property claims ensures that federal immunity will not be controlled by the rich variety of state-law intellectual property regimes and their questionable tethering to traditional intellectual property concepts.[144]

V. CONCLUSION

This Note has applied the concept of characterization from the field of conflicts of law to a significant ambiguity in Section 230. Tracing the caselaw in a variety of intellectual property fields, from the right of publicity to unfair competition to common-law copyright, this Note has identified the inconsistent, ad hoc rationalizations courts have offered when characterizing claims as "pertaining to intellectual property." This ambiguity enables creative pleading and forum shopping, undermining the purpose of Section 230's immunity shield. A legislative amendment to Section 230(e)(2) explicitly limiting the immunity exception to federal intellectual property claims — thereby codifying the Ninth Circuit's construction of Section 230(e)(2) in Perfect 10 into statutory text — offers the most effective solution to preserving the policy aims of Section 230. This approach ensures that Congress, not state legislatures worried about diverse social and economic problems of local concern, retains control of the contours of the federal Section 230 immunity.

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order to survive a motion to dismiss."). Indeed, the *Fraley* court distinguished *Cohen*'s "highly similar" facts by crediting Fraley with better pleading of general facts equally applicable in both cases: "By contrast, Plaintiffs here have quoted explicit statements by Facebook's own CEO and COO that friend endorsements are two to three times more valuable than generic advertisements sold to Facebook advertisers." *Fraley*, 830 F. Supp. 2d at 800.

142. Perfect 10, Inc. v. CCBILL LLC, 488 F.3d 1102, 1118 (9th Cir. 2007).

143. Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 417 (1st Cir. 2007) (quoting Universal Commc'n Sys., Inc. v. Lycos, Inc, No. 05–11172, 2005 WL 5250032, at *4 (D. Mass. Dec. 21, 2005)).

144. *See supra* notes 129–131 and accompanying text (discussing a state-law "digital replica right").