

# NOTES

## *Hepp v. Facebook*: Third Circuit Splits with Ninth Circuit on Whether Section 230’s Intellectual Property Exception Applies to State Law

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### I. OVERVIEW

In 2018, Karen Hepp, a news industry professional and the current host of Fox 29’s *Good Day Philadelphia*, discovered that her photograph was circulating on various internet platforms.<sup>1</sup> The photograph, allegedly taken without Hepp’s consent, appeared in a Facebook advertisement and Reddit thread, which linked to an Imgur post of the photograph.<sup>2</sup>

Hepp filed suit against Facebook, Reddit, and Imgur in the United States District Court for the Eastern District of Pennsylvania, alleging violations of Pennsylvania’s right of publicity statute and common law.<sup>3</sup> The district court dismissed the complaints, holding that Facebook, Reddit, and Imgur were all entitled to Section 230 immunity.<sup>4</sup> Hepp appealed to the United States Court of Appeals for the Third Circuit, which dismissed claims against Reddit and Imgur for lack of personal jurisdiction, but allowed claims against Facebook to proceed.<sup>5</sup> The United States Court of Appeals for the Third Circuit *held* that Hepp’s claims of right of publicity violations under Pennsylvania state law satisfied the 230(e)(2) exception as pertaining to intellectual property. *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021).

### II. BACKGROUND

Section 230 was passed in 1996 when the internet was in its nascency, largely in response to *Stratton Oakmont, Inc. v. Prodigy Services*

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1. *Hepp v. Facebook*, 14 F.4th 204, 206 (3d Cir. 2021).  
2. *Id.* at 206-07.  
3. *Id.* at 207.  
4. *Id.*  
5. *Id.*

Co.<sup>6</sup> There, the New York Supreme Court for Nassau County held an internet platform liable for defamation as a publisher, for moderating user-generated content on its site.<sup>7</sup>

Lawmakers were concerned that the *Stratton* decision would disincentivize internet platforms from taking measures to self-regulate content on their sites, particularly sexually explicit material.<sup>8</sup> Senator J. James Exon promptly addressed this concern by introducing the Communications Decency Act (CDA).<sup>9</sup> The CDA sought to extend protections traditionally afforded to common carriers. Specifically, immunity from publisher liability when “act[ing] in good faith to restrict obscene material” to internet platforms.<sup>10</sup> Congressmen Christopher Cox and Ron Wyden solidified this protection with an amendment to the CDA, codified as 47 U.S.C. § 230, providing in part: “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>11</sup>

Section 230, however, includes five exceptions to immunity for internet platforms.<sup>12</sup> One is subsection (e)(2), which preserves liability for “any law pertaining to intellectual property.”<sup>13</sup> Courts have struggled to determine whether “any law” includes state law or is limited to federal law.<sup>14</sup> This question is particularly relevant in assessing whether “right to publicity” claims, which arise under state law and “allow plaintiffs to sue for the improper commercial use of their identity,” are included in the exception.<sup>15</sup>

In 2007, the United States Court of Appeals for the First Circuit touched on this ambiguity in *Universal Communication Systems, Inc. v. Lycos, Inc.*, which involved both federal and Florida state intellectual property claims.<sup>16</sup> When examining the plaintiff’s claim of trademark dilution under Florida state law, the First Circuit determined that, although

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6. *Stratton Oakmont, Inc., v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 404-05 (2017).

7. *Stratton*, 1995 WL 323710 at \*5-6.

8. *See* Citron & Wittes, *supra* note 6 at 403-05 (citing 141 *CONG. REC.* H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

9. *See* Communications Decency Act of 1995, S. 314, 104th Cong. (1995).

10. *See id.*; Citron & Wittes, *supra* note 6 at 405.

11. 47 U.S.C. § 230(c)(1).

12. VALERIE C. BRANNON & ERIC N. HOLMES, *CONG. RSCH. SERV.*, R46751, SECTION 230: AN OVERVIEW, at 24 (2021).

13. 47 U.S.C. § 230(e)(2).

14. BRANNON & HOLMES, *supra* note 12, at 26-27.

15. *Id.* at 26.

16. *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 416 (1st Cir. 2007).

dismissal on the merits was proper for First Amendment reasons, the claim potentially fit § 230(e)(2) exception.<sup>17</sup>

Only months later, the United States Court of Appeals for the Ninth Circuit substantively addressed the issue in *Perfect 10, Inc. v. CCBill LLC*.<sup>18</sup> The court held that “intellectual property [law]” within § 230 (e)(2) is limited to “federal intellectual property [law].”<sup>19</sup> Taking a policy approach to interpret subsection (e)(2)’s ambiguity, the court reasoned that while federal intellectual property law is well-established, state intellectual property law is inconsistent and “by no means uniform.”<sup>20</sup> Further, because internet content is viewed across state lines, forcing internet platforms to conform to a state’s particular intellectual property laws would be unworkable and contrary to “Congress’s expressed goal [for § 230] of insulating the development of the Internet from the various state-law regimes.”<sup>21</sup>

Conversely in *Atlantic Recording Corp. v. Project Playlist, Inc.*, the United States District Court for the Southern District of New York held that the subsection (e)(2) exception indeed applied to New York state intellectual property law.<sup>22</sup> Decided nearly two years after *Perfect 10*, the New York district court set forth a textual, rather than policy-based, approach to interpreting the statute.<sup>23</sup> The court noted that in four other areas of subsection (e), Congress was explicit as to whether the exception applied to federal and/or state law.<sup>24</sup> Subsection (1) specifies “any other Federal criminal statute,” subsection (3) specifies “any State law” and “any State or local law,” and subsection (4) specifies “any similar State law.”<sup>25</sup> Therefore, the court reasoned that if Congress wanted subsection (2) to refer only to federal law, it would have added language to that effect.<sup>26</sup> Because Congress did not include limiters, and instead used the modifier “any,” the court determined that “the plain language of the CDA is clear, as ‘any law’ means both state and federal law.”<sup>27</sup>

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17. *Id.* at 423.

18. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1107 (9th Cir. 2007).

19. *Id.* at 1119.

20. *Id.* at 1118.

21. *Id.*

22. *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (involving both federal and state intellectual property claims).

23. *See id.* at 703-04; *see Perfect 10*, 488 F.3d at 1102.

24. *Atl. Recording Corp.*, 603 F. Supp. 2d at 703.

25. *Id.* (quoting 47 U.S.C. § 230) (emphasis omitted).

26. *Id.*

27. *Id.* at 704.

Courts historically differ as to whether “right of publicity” claims, which arise explicitly under state law, should be treated as intellectual property claims.<sup>28</sup> While some courts view a right of publicity as intellectual property under either copyright or trademark law, others interpret the right as arising solely under privacy law.<sup>29</sup>

In the 1907 case *Edison v. Edison Polyform Manufacturing Co.*, the New Jersey Court of Chancery, under a theory of property law, enjoined a pain medication manufacturer from using a famous inventor’s name and likeness on its packaging.<sup>30</sup> While the court did not recognize clear precedent on the issue, it reasoned that “[i]t is difficult to imagine a case in which preventive relief would be more appropriate than the present.”<sup>31</sup> That same year, the Circuit Court for the Eastern District of Pennsylvania reached a similar decision in *Von Thodorovich v. Franz Josef Beneficial Ass’n*, enjoining an association from using the name and likeness of an Austro-Hungarian emperor without his authorization.<sup>32</sup>

In 1997, the United States Supreme Court addressed the issue for the first and only time in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>33</sup> There, the defendant television broadcasting company videotaped the plaintiff’s “human cannonball” performance and replayed the video, in its entirety, during a news programs.<sup>34</sup> The Court held that the plaintiff’s interest in his performance was “closely analogous to . . . patent and copyright law” and that because the performance was a product of the plaintiff’s “time, effort, and expense[,] [m]uch of its economic value lies in the right of exclusive control over the publicity to given to his performance.”<sup>35</sup> Of note, the Court’s decision relied heavily upon the facts that the broadcaster replayed the plaintiff’s performance in its entirety and that the plaintiff did not seek an injunction, only compensation.<sup>36</sup>

More recently, in *Tyne v. Time Warner Entertainment Co., L.P.*, the Supreme Court of Florida dealt with a similar but likely distinguishable case.<sup>37</sup> After a movie studio produced a film that used the names and

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28. Cameron Verbeke, *The Right of Publicity’s Place in Intellectual Property Law*, CHI.-KENT J. INTELL. PROP. (July 5, 2020), <http://studentorgs.kentlaw.iit.edu/ckjip/the-right-of-publicitys-place-in-intellectual-property-law>.

29. *Id.*

30. *See* *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392 (N.J. Ch. 1907).

31. *Id.* at 395.

32. *See* *Von Thodorovich v. Franz Josef Beneficial Ass’n*, 154 F. 911 (C.C.E.D. Pa. 1907).

33. *See* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

34. *Id.* at 562.

35. *Id.* at 573, 575 (internal quotations omitted).

36. *See id.* at 578.

37. *See* *Tyne v. Time Warner Entm’t Co., L.P.*, 901 So. 2d 802 (Fla. 2005).

likenesses of fishermen who died at sea, surviving family members sued for compensation.<sup>38</sup> The court held that “publications, including motion pictures” do not infringe on one’s commercial rights in their name and likeness if the publication “do[es] not directly promote a product or service.”<sup>39</sup> The court cautioned that its holding was narrowly tailored and only dealt with Florida commercial misappropriation law.<sup>40</sup>

### III. COURT’S DECISION

In the noted case, the Third Circuit split with the Ninth Circuit’s holding in *Perfect 10* and followed the framework of *Atlantic* in determining whether state intellectual property laws are included in Section 230’s (e)(2) exception.<sup>41</sup> The Court held that (1) the Section 230(e)(2) exception applies to both federal and state intellectual property laws; and (2) that a statutory “right to publicity” claim arises out of intellectual property law.<sup>42</sup>

The court first addresses the issue of whether subsection (e)(2)’s intellectual property exception applies to both federal and state intellectual property laws.<sup>43</sup> Beginning with a broad overview of Section 230, the court discusses Congress’s intent in crafting the statute.<sup>44</sup> Quoting § 230(b), the court frames Congress’s goals as preserving the internet’s “vibrant and competitive free market” and insulating it from “Federal or State regulation.”<sup>45</sup> The court then describes § 230(c), in which Congress grants internet platforms “Good Samaritan” protection, which allows and encourages internet platforms to host and moderate user-generated content without treatment as the publisher.<sup>46</sup>

Turning to the immunity exceptions of § 230(e), the court focuses on the wording of each exception to illustrate that all, except one, include language specifying whether federal and/or state law is at issue.<sup>47</sup> The outlier is, of course, the intellectual property exception in subsection (e)(2), which simply reads “any law.”<sup>48</sup> Here, the court takes a

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38. *Id.* at 804.

39. *Id.* at 810.

40. *Id.*

41. *Hepp v. Facebook*, 14 F.4th 204, 210 (3d Cir. 2021).

42. *Id.* at 212-14.

43. *Id.* at 208.

44. *Id.*

45. *Id.*; *see* 47 U.S.C. § 230(b)(2).

46. *Hepp*, 14 F.4th at 209.

47. *Id.*

48. *Id.*

textual/contextual approach to interpreting the statute, similar to that employed by the *Atlantic Recording* court.<sup>49</sup>

Further examining subsection (e)(2), the court turns to the relevant case law beginning with *Lycos*.<sup>50</sup> After a brief recitation of the facts, the court notes that the *Lycos* decision, by stating “Section 230 immunity [did] not apply,” implies that subsection (e)(2) encompasses state law as well as federal.<sup>51</sup>

Next, the court discusses the Ninth Circuit’s contrasting holding in *Perfect 10*.<sup>52</sup> The court briefly describes the Ninth Circuit’s approach as focusing on Congress’s intent behind Section 230 (“insulat[ing] the internet from regulation”), which would be thwarted if Internet platforms were forced to adhere to a state’s individual intellectual property laws.<sup>53</sup>

Finally, the court references the most recent holding on the issue, *Atlantic Recording*.<sup>54</sup> Here, the court outlines the New York district court’s textual approach (contrasting subsection (e)(2)’s “any law” language with the other subsection (e) exceptions that explicitly specify whether federal and/or state applies), resulting in the court arriving at a clear, unambiguous determination that subsection (e)(2) applies to both federal and state law.<sup>55</sup>

The court then moves to its summary and discussion of Facebook’s three central arguments regarding interpretation of subsection (e)(2).<sup>56</sup> First, Facebook avers that a textual and structural interpretation of subsection (e) is, in fact, favorable to its case.<sup>57</sup> Facebook notes that of the 230(e) exceptions that include state law, those state laws are “coextensive” with applicable federal law.<sup>58</sup> It reasons that, when state intellectual property laws are not directly analogous to federal intellectual property law, subsection (e)(2) can only be interpreted as applying to federal law.<sup>59</sup> While the court agrees that the other 230(e) exceptions refer only to state laws consistent with federal laws, it ultimately rejects this argument as

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49. *Id.* at 210-11; *see Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704-05 (S.D.N.Y. 2009).

50. *Hepp*, 14 F.4th 204, 209 (3d Cir. 2021); *see Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (noting that the plaintiff’s Florida state law intellectual property claim failed on the merits).

51. *Hepp*, 14 F.4th at 209-10.

52. *Id.* at 210; *see Perfect 10, Inc. v. CCBill LLC.*, 488 F.3d 1102 (9th Cir. 2007).

53. *Hepp*, 14 F.4th at 210 (citation omitted).

54. *Id.*; *see Atl. Recording Corp.*, 603 F. Supp. 2d 690.

55. *Hepp*, 14 F.4th at 210.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 210-11.

“stray[ing] too far from the natural reading of § 230(e)(2).”<sup>60</sup> The court assumes the *Atlantic Recording* view that if Congress intended to limit subsection (e)(2) to only federal law, it would have expressly done so as in the other subsections.<sup>61</sup>

Second, the court evaluates Facebook’s argument that the policy goal of Section 230 requires that subsection (e)(2) be read as applying only to federal law.<sup>62</sup> Facebook argues that Congress enacted Section 230 to prevent internet companies from being hampered by inconsistent state laws, pointing to the language of subsection (b)(2), which defines the policy of Section 230 as “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”<sup>63</sup> The court agrees that Section 230 was meant to be “a pro-free-market policy,” but disagrees with Facebook’s apparent assertion that state intellectual property laws are incompatible with the free market.<sup>64</sup> The court points to the recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, in which the Supreme Court submitted that state property laws help enable “the resulting formation of effective markets.”<sup>65</sup> The Third Circuit draws a parallel with state intellectual property laws, believing that they “can facilitate market exchange” by protecting against infringement, thus concluding that these laws are in line with Section 230’s pro-free-market policy.<sup>66</sup>

Facebook’s third and final argument urges the court to consider the “real world” implications of interpreting subsection (e)(2) as incorporating state laws.<sup>67</sup> Echoing the *Perfect 10* court’s concerns, Facebook believes that this interpretation will lead to increased uncertainty for internet companies in determining when immunity applies.<sup>68</sup> The court quickly dismisses this argument, stating that “policy considerations cannot displace the text,” and notes that, while *Lycos* and *Atlantic Recording* were decided over a decade ago using a policy-based interpretation, “neither Facebook nor its amici provide evidence that the rulings created the disarray they now predict.”<sup>69</sup>

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60. *Id.*

61. *Id.* at 211.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1029 (2021); *Hepp*, 14 F.4th at 211.

66. *Hepp*, 14 F.4th at 211.

67. *Id.*

68. *Id.*

69. *Id.*

Deciding in Hepp's favor on the issue of whether subsection (e)(2) applies to state intellectual property laws, the court turns to the second question presented: whether statutory right of publicity claims are, in fact, intellectual property claims.<sup>70</sup>

Facebook and amici curiae ask the court to adhere to intellectual property's "traditional" definition, which they aver is limited to copyright and patent law, and treat right of publicity as a privacy right.<sup>71</sup> Including right of publicity claims within intellectual property law, amici curiae argue, will lead to a "parade of horrors" and limit free speech.<sup>72</sup>

In her brief, citing *Edison*, Hepp argues that state courts have historically treated the right of publicity as analogous to trademark claims.<sup>73</sup> Hepp asserts that the "considerable time, effort and money" spent on cultivating a public image indicates a clear intellectual property right akin to trademark per *Edison*.<sup>74</sup>

The court again utilizes a textual approach in deciding the issue, beginning with a legal definitions of intellectual property.<sup>75</sup> "Publicity rights" is explicitly included in definitions of intellectual property found in *Black's Law Dictionary*.<sup>76</sup>

Next, the court looks to relevant case law, beginning with *Zacchini*, in which the Supreme Court defined the right of publicity as "closely analogous to . . . patent and copyright."<sup>77</sup> In *Zacchini*, the Court also finds support for their earlier assertion that enforcement of right of publicity law promotes a free-market by preventing "unjust enrichment by the theft of goodwill."<sup>78</sup> Echoing Hepp's argument that the right of publicity has long been analogized with intellectual property (generally as trademark law), the court points again to *Edison* as well as *Van Thodorovich* and *Tyne*.

Finding strong evidence from both legal definitions and state court precedent, the court again held in Hepp's favor, confirming that the right of publicity falls within the ambit of intellectual property for subsection

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70. *Id.* at 212.

71. *Id.* (quoting Br. for Elec. Frontier Found. et al. as Amici Curiae Supp. Appellees at 8 & n.5, *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021) [hereinafter EFF Br.] (omitting "trademark law" from the definition of intellectual property)).

72. *Id.* (quoting EFF Br. at 19).

73. *Id.*

74. *Id.* (quoting Am. Br. and Am. App. for Pl.-Appellant Vol. 1 of II at 17, *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021)).

75. *Id.* at 212-13.

76. *Id.*; *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

77. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977); *Hepp*, 14 F.4th at 213.

78. *Zacchini*, 433 U.S. at 575-76.



(e)(2).<sup>79</sup> In its closing, the court is careful to stress the narrowness of its holding.<sup>80</sup> The court explains that its decision does not pose a threat to free speech but addresses only “misleading commercial speech,” again equating Hepp’s right of publicity claim to traditional trademark claims.<sup>81</sup>

Lastly, the court addresses the concern that its holding will “open the floodgates” to right of publicity claims, noting the limitations of the Pennsylvania statute in question.<sup>82</sup> The court recognizes that the statute only applies to individuals who have cultivated public personas “through the investment of time, effort, and money.”<sup>83</sup> The court makes it clear that it does not substantively address Pennsylvania law and will leave such analysis for the district court on remand.<sup>84</sup>

In his dissent, in part, Judge Cowen agrees with Facebook that subsection (e)(2) should be limited to federal law.<sup>85</sup> Cowen first argues that the majority wrongly identifies an existing circuit split between the Ninth Circuit’s holding in *Perfect 10* and the First Circuit’s holding in *Lycos*.<sup>86</sup> Cowen believes the Ninth Circuit was clear in its *Perfect 10* holding that subsection (e)(2) applies only to federal law, and argues that the majority’s strained reading of the First Circuit’s *Lycos* holding merely manufactures this alleged split.<sup>87</sup> Citing a subsequent First Circuit decision in *Jane Doe No. 1 v. Backpage.com, LLC*, Cowen notes that the court concedes “application of . . . state law claims . . . is not free from doubt.”<sup>88</sup>

Judge Cowen then addresses the policy issues raised in the majority’s decision.<sup>89</sup> He again sides with Facebook, believing that the majority’s interpretation will erode Section 230 immunity and frustrate Congress’s stated goals.<sup>90</sup> Citing *Perfect 10*, and the amicus brief of Electronic Frontier Foundation in particular, Cowen warns that despite the majority’s promise that its holding is narrow, allowing application of various and

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79. *Hepp*, 14 F.4th at 214.

80. *Id.*

81. *Id.*

82. *Id.*

83. 42 PA. CONST. STAT. § 8316(e)(2002); *Hepp*, 14 F.4th at 214.

84. *Hepp*, 14 F.4th at 214.

85. *Id.* at 216 (Cowen, J., concurring in part and dissenting in part).

86. *Id.* at 217.

87. *Id.* at 217-18 (noting that the First Circuit did not meaningfully address the issues).

88. *Id.* at 218-19; *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 n.9 (1st Cir. 2016)).

89. *Hepp*, 14 F.4th at 219-20.

90. *Id.*

inconsistent state laws will create debilitating confusion in the marketplace and hinder the Internet's further growth and development.<sup>91</sup>

#### IV. ANALYSIS

The Third Circuit's reasoning in the noted case appears generally sound, and the court provides a helpful analysis of the three approaches to examining the questions presented: analyzing (1) the text of subsection (e), (2) Congress's policy goals in enacting Section 230, and (3) the relevant case law.

Beginning with the court's textual analysis of subsection (e)(2), it is difficult to argue with its logic. If Congress intended to limit subsection (e)(2) to federal law, "it knew how to make that clear, but chose not to."<sup>92</sup> Indeed, Congress knew, for example, how to limit subsection (e)(1), by explicitly including the language "any other Federal criminal statute."<sup>93</sup> Subsection (e)(2)'s "any law" language seems to quite clearly indicate that both federal and state laws apply, and it belies belief that Congress intended for the courts to infer otherwise.

The policy arguments, however, are more convincing. Certainly, opening the subsection (e)(2) exception to state laws will create confusion in the market and for litigants. As Judge Cowen's dissent rightly notes, "no litigant will know if he is entitled to immunity for a state claim until a court decides."<sup>94</sup> This criticism is well-taken, but it seems better directed at Congress. The fact that the CDA has not been amended since 1996 is problematic for a myriad of reasons. Back then, Congress was presumably aware that states had various and inconsistent laws related to intellectual property, and yet still chose not to explicitly limit subsection (e)(2) to federal law.<sup>95</sup> It is perfectly reasonable to believe that Congress *should* have done so for the policy reasons identified by Facebook and amici curiae, but as the majority correctly concludes "policy considerations cannot displace the text."<sup>96</sup>

Finally, the majority adequately discusses the scant case law on the issue, with one exception—Judge Cowen rightly criticizes the majority for its lacking analysis of First Circuit precedent. The majority eagerly asserts

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91. *Id.* at 221-26.

92. *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009).

93. 47 U.S.C. § 230(e)(1).

94. *Hepp*, 14 F.4th at 218 (3d Cir. 2021) (Cowen, J., concurring in part and dissenting in part).

95. *Atl. Recording Corp.*, 603 F. Supp. 2d at 703.

96. *Hepp*, 14 F. 4th at 211.

that its holding is consistent with *Lycos*, but a close reading of that decision reveals at least two issues with the assertion. First, the First Circuit hardly dealt with the issue, only addressing it briefly in a footnote. Second, if we are to infer, as the majority does, that the First Circuit concluded that the exception applies to state law, a further issue arises. The Florida law in question was trademark law, and trademark is explicitly recognized in federal intellectual property law. This lends credence to Facebook's arguments that, if (e)(2) were to apply to state law, it would only apply when state law is "coextensive" with federal law. Further, Judge Cowen correctly points to the First Circuit's subsequent decision in *Backpage.com*, in which the court makes clear that "appl[ying] . . . the exemption to . . . state law claims . . . is not free from doubt," to illustrate that the issue had hardly been settled in the First Circuit through *Lycos*.<sup>97</sup>

In conclusion, the majority was, at best, lacking in its analysis of First Circuit precedent. This is confounding as the court already had ample textualist support for its holding, as per the *Atlantic Recording* rationale.

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97. Jane Doe No. 1 v. Backpage.com, 817 F.3d 12, 26 n.9 (1st Cir. 2016).

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