Sixth Annual Media & Entertainment Law Symposium

Tuesday, February 18, 2020
9:30 a.m. – 2:30 p.m.
Costantino Room

CLE COURSE MATERIALS
Panel 1: Welcome to the Streaming Age:
Acquisitions, Competition, and the Digital Future
Greenfield, Richard; Ross, Brandon; Piecyk, Walter; Kelley, Mark; Galone, Joe. LightShed's Top 20 TMT Predictions and Events to Watch for in 2020 #Top20for20.
(View in document)

Panel 2: Follow You Until You Love Me: Paparazzi and the Law
Graham v. James, 144 F.3d 229 (1998). (View in document)
United States District Court Eastern District Of New York. Xclusive-Lee, Inc. V. Jelena Noura “Gigi” Hadid. No. 19 Civ. 520 (View in document)
Congress.gov. H.R.2426 - Copyright Alternative in Small-Claims Enforcement Act of 2019 (View in document)
The Senate Twenty-Seventh Legislature, 2013 State of Hawaii S.B. No. 465 (View in document)
United States Court of Appeals for the Seventh Circuit. No. 10-cv-520. Xclusive-Lee, Inc. V. Jelena Noura “Gigi” Hadid (View in document)

Panel 3: Enemy of The People?: Fake News and the Media’s Legal Challenges
47 U.S. Code § 230. Protection for private blocking and screening of offensive material. (View in document)
Keats Citron, Danielle; Franks, Mary Anne. University of Chicago Legal Forum (forthcoming 2020). The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform Abstract. (View in document)
Jouvenal, Justin. The Washington Post. Devin Nunes, Johnny Depp lawsuits seen as threats to free speech and press. (View in document)
Wu, Tim. Is the first amendment obsolete? (View in document)
Reflections on: Is the first amendment obsolete? (View in document)
Lat, David; Shemtob, Zach. PUBLIC FIGUREHOOD IN THE DIGITAL AGE. (View in document)
Katherine M. Bolger  
Adjunct Professor, Fordham Law School  
Partner, Davis Wright Tremaine, LLP  
Kate is an experienced First Amendment and media litigator who has represented news and entertainment companies in a broad spectrum of content-related matters, ranging from investigative journalism to coverage of celebrities. In addition to defending media clients in court, Kate regularly counsels newspapers, magazines, and book publishers about prepublication issues, and advises authors on contract, electronic publishing, and intellectual property matters. Chambers USA reports that clients have described Kate as "incredibly bright, very strategic, and an exceptionally strong writer" who is "a very effective litigator" and "the lawyer I would want the most in a New York state court street fight." Before joining DWT, Kate was a partner at Levine Sullivan Koch & Schulz LLP.

Drew Cohen '93  
President & CEO  
Music Theatre International (MTI)  
Drew Cohen is the President and CEO of Music Theatre International (“MTI”). MTI is the world’s leading licensor of Broadway musicals, representing the dramatic performing rights to shows such as “West Side Story,” “Fiddler on the Roof,” “Les Miserables,” “Come From Away,” “The Book of Mormon,” “The Producers,” “Beetlejuice,” “Mean Girls,” and the works of Stephen Sondheim. MTI licenses over 100,000 performances a year in 50 countries around the world. MTI created the Broadway Junior® collection of abridged musicals for middle and elementary schools to perform. MTI is also the leading provider of theatrical resources that employ new technologies to eliminate production and pre-production obstacles that MTI’s licensees/producers face in mounting their productions. Cohen is also a member of the Recording Academy’s Musical Theatre Grammy Task Force and a Mentor in the Broadway Tech Accelerator.

Cohen’s early career included four years as an attorney in New York with the law firm Akin, Gump, Strauss, Hauer & Feld, after which he joined GlassNote Records and served as its V.P./General Manager. Subsequently, he earned a master’s degree from Harvard Business School and was then Director of Investments for a private family fund overseeing a portfolio of investments in hedge funds, private equity funds and direct investments in early stage ventures. He is a graduate of Tufts University and Fordham Law School.

Derek Dessler  
Adjunct Professor, Fordham Law School  
Founder and Principal, Dessler, P.C.  
Derek Dessler is an attorney with over 20 years of experience focusing on entertainment and media, new technology, the arts, and related intellectual property and corporate matters.

His work routinely includes matters at the intersection of intellectual property rights and new technology, and he regularly advises clients on issues relating to the ongoing convergence of technology and content, including new technologies for distributing and monetizing content.
Over the past 20 years he has successfully negotiated and closed hundreds of transactions, big and small, ranging from customary industry agreements, to joint ventures, to strategic corporate transactions (such as mergers, acquisitions, divestitures, investments, and related due diligence reviews), and involving parties from around the world, including the United States, China, and Europe.

Before founding his own firm he served for 14 years as a legal and business affairs executive at the Universal Music Group (UMG), where his roles included: Vice President, Legal and Business Affairs, of UMG’s worldwide corporate unit; General Counsel and Senior Vice President, Business Affairs, of Universal’s start-up “music video” cable and satellite television network, branded IMF – International Music Feed; and Vice President, Legal and Business Affairs, of UMG’s Universal Motown Records Group (now the East Coast Labels Group).

Derek represents companies and individuals, established and emerging, including: recording artists, songwriters, DJs, producers, and other entertainers and creative talent; personal managers; promoters of live events; the “major” recorded music companies; music publishers; cable television networks; software developers and publishers; filmmakers; visual artists; and galleries. These clients are based around the world and range from global corporations and other established businesses, to small, entrepreneurial startups, to investors. He also often serves as outside general counsel for many of his clients.

Scott Jaffee ’98
Senior Vice President, Legal Affairs
WarnerMedia Entertainment
Scott Jaffee is the Senior Vice President, Legal Affairs for WarnerMedia Entertainment. He oversees the business and legal affairs teams tasked with acquiring major studio theatrical releases, independent films, Spanish-language content and international programming for HBO, Cinemax and their channels and platforms. For the past year, he has advised the management team for HBO Max, Warner Media’s new streaming platform launching in May of this year. He also oversees legal entity management and other general corporate matters across WarnerMedia’s legacy HBO, Turner and CNN network groups.

Prior to joining HBO, Scott worked at Morgan, Lewis & Bockius LLP in New York, where he was a senior associate in the Business & Finance group. His practice focused on secured and unsecured lending, private equity and bankruptcy and restructuring, specializing in the production, finance and distribution of motion pictures and television programming.

Scott received his BA from Binghamton University and his JD from Fordham University. He was the Business Editor of the Intellectual Property, Media and Entertainment Law Journal, as well as one of the founding members of the Fordham Sports Law Society & Symposium.

Samantha Katze ’07
Partner
Manatt, Phelps & Phillips, LLP
Samantha Katze is a commercial and intellectual property litigator in the New York office of Manatt, Phelps & Phillips. Samantha has experience in a broad range of complex commercial and intellectual property disputes.

As part of her commercial litigation practice, Samantha handles matters involving claims of breach of contract, breach of fiduciary duty, tortious interference, breach of restrictive covenants,
misappropriation of trade secrets, unfair competition, defamation, and securities fraud, as well as trusts and estates issues. In addition, Samantha litigates direct and derivative claims involving disputes among business owners such as shareholders, LLC members and partners, and defends against class actions.

With respect to intellectual property, Samantha handles matters involving copyright, trademark and trade dress infringement, dilution, unfair competition and false advertising claims. In addition, she represents clients in opposition and cancellation proceedings before the United States Patent and Trademark Office’s Trademark Trial and Appeal Board (TTAB).

Samantha has also litigated issues concerning the Communications Decency Act, the Stored Communications Act, the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act.

She represents clients across a wide range of industries, including real estate, financial services, retail and consumer products, media, entertainment, healthcare and energy.

Samantha has represented clients in a variety of forums, including the New York state and federal courts; federal courts in California, New Jersey, Texas and Wisconsin; the TTAB; mediations; and arbitral proceedings before the American Arbitration Association and the International Chamber of Commerce.

Samantha received her law degree from Fordham University School of Law where she was the Notes and Articles Editor of the Intellectual Property, Media and Entertainment Law Journal. Samantha also received an A.B., with distinction, from Cornell University.

Ramya Krishnan
Staff Attorney
Knight First Amendment Institute at Columbia University

Ramya Krishnan is a staff attorney at the Knight First Amendment Institute at Columbia University, where she works on issues related to government transparency, surveillance, and social media. Ramya joined the Knight Institute as its inaugural legal fellow. She is a graduate of Columbia Law School and the University of Sydney, where she served as an editor of the Sydney Law Review. She previously worked at Australia’s Attorney-General’s Department, where she litigated several high-profile constitutional and administrative law cases, including in the High Court of Australia. From 2013-2014, she served as law clerk for the Hon. Robert Beech Jones of the Supreme Court of New South Wales. She has been published or quoted in the Washington Post, NBC News, The Intercept, The Columbia Journalism Review, and Just Security.

David Lat
Founding Editor
Above the Law

David Lat is founding editor of Above the Law, an award-winning website about the legal profession that reaches more than 1 million unique visitors a month. David’s writing has also appeared in the New York Times, the Wall Street Journal, and the Washington Post, among other publications. Prior to Above the Law, he launched Underneath Their Robes, a blog about federal judges.
Before entering the media world, David worked as a federal prosecutor in Newark, New Jersey; a litigation associate at Wachtell, Lipton, Rosen & Katz, in New York; and a law clerk to Judge Diarmuid F. O’Scannlain of the U.S. Court of Appeals for the Ninth Circuit. David graduated from Harvard College and Yale Law School, where he served as an editor of the Yale Law Journal.


Libby Locke  
**Founding Partner**  
**Clare Locke LLP**

Libby is one of the country’s most sought-after libel lawyers. She is a trusted counselor and fierce advocate for Fortune 100 companies and high-profile individuals facing existential reputational attacks from the national media and other influential publishers, achieving remarkable results for her clients both in and outside of the courtroom.

After co-founding Clare Locke LLP in 2014, Libby rapidly rose to national prominence for a highly-publicized multi-million dollar trial victory against *Rolling Stone* magazine about a fictional portrayal of a gang rape at a University of Virginia fraternity. In 2019, she was lead trial counsel and won a $22.35 million jury verdict on behalf of a successful businessman who was defamed by a public company in the course of a proxy fight. A skilled appellate advocate and former federal circuit clerk, in 2019 Libby achieved a rare win against *The New York Times* on behalf of former Gov. Sarah Palin in the U.S. Court of Appeals for the Second Circuit arising out of a false and defamatory editorial. She is actively litigating matters against a variety of other mainstream news outlets, including CNN and Bloomberg.

Libby’s success in the courtroom gets her results in the newsroom. She regularly advises clients and their PR counsel in dealing with the national media in crisis situations, and some of her biggest wins are the false stories the public will never hear about. She has killed flawed articles, storylines, and broadcast segments in outlets including in *The New York Times*, *The Washington Post*, *Vanity Fair*, *The National Enquirer*, and on Bloomberg, CBS and *The Dr. Oz Show*. Libby has also vindicated her clients’ reputations by obtaining retractions of false publications, including by securing a $3.375 million settlement and video apology from the Southern Poverty Law Center, a complete retraction of a Bloomberg podcast, and a multi-article correction from *The Chicago Tribune*.

Recognized as an expert in libel law and the First Amendment, Libby has been ranked as a Band 1 global defamation / reputation management provider in *Chambers & Partners HNW* directory every year since its inception in 2016, and she has numerous national awards and accolades from the National Law Journal, including being named as one of D.C.’s 40 Under 40 in 2019. She is regularly asked to speak on issues involving the First Amendment, media, and reputation, including publishing multiple op-eds in *The Wall Street Journal* and appearing as a guest on Fox News, CNN, and ABC’s 20/20.

Libby graduated from NYU’s College of Arts and Science with a degree in Politics and Economics, and she received her J.D. from Georgetown University Law Center. After law school, she clerked on the U.S. Court of Appeals for the Fifth Circuit, and then began her career in private practice at Kirkland & Ellis. Perhaps the accomplishment of which she is most proud,
Libby is a mom of five. She lives in Alexandria, Virginia with her husband and law partner, Tom Clare, their children, and the world’s most spoiled Labrador Retriever, Gipper.

David E. McCraw  
Senior Vice President & Deputy General Counsel  
The New York Times Company  
David McCraw serves as the principal newsroom lawyer for The New York Times. He is the author of the book “Truth in Our Times: Inside the Fight for Press Freedom in the Age of Alternative Facts” (St. Martin’s 2019), a first-person account of the legal battles that helped shape The Times’s coverage of Donald Trump, Harvey Weinstein, national security, and the rise of political partisanship in America. Mr. McCraw has been at The Times for 17 years and currently holds the position of Deputy General Counsel.

In addition to advising the newsroom on libel and other legal issues, he is one of the nation’s most prolific litigators of Freedom of Information cases, having brought more than 60 suits against the federal government. He also oversees international security for Times journalists and has worked as the crisis response manager when reporters and photographers have been kidnapped or detained abroad.

He is a visiting lecturer at Harvard Law School and an adjunct professor at the NYU Law School. He previously was deputy general counsel at the New York Daily News and a litigation associate at Clifford Chance and Rogers & Wells. Mr. McCraw is a graduate of the University of Illinois, Cornell University, and Albany Law School.

Bradley Mullins  
Partner  
Mitchell Silberberg & Knupp LLP  
Bradley J. Mullins is a partner and member of the Entertainment and IP Litigation practice group in the firm’s Los Angeles office. Brad’s practice focuses on Entertainment and Intellectual Property Litigation, representing many leading businesses and individuals in the music, video game, and film and television industries, as well as emerging and established technology businesses. Brad has a wealth of experience litigating in both state and federal courts across the country, with a concentration on copyright, trademark, and contract and commercial disputes. He received his J.D. from Columbia Law School and a B.A. from University of Wisconsin, Madison.

John Quinn  
Partner  
Kaplan Hecker & Fink LLP  
John Quinn is a partner at Kaplan Hecker & Fink LLP, a cutting-edge boutique litigation firm based in New York City. John was one of the co-founders of the firm in 2017, along with Roberta Kaplan, who is best known for her Supreme Court victory U.S. v. Windsor, which paved the way for same-sex marriage nationwide. John represents businesses and individuals in high-profile civil litigation matters and leads the firm’s efforts in a number of progressive public interest matters. Last year, John successfully defended Gigi Hadid when she was sued for copyright infringement by a paparazzo based on allegations that she posted a photograph of herself to Instagram. John also represents Jennifer Lopez, Ariana Grande, Amber Heard, and a number of other public figures, as well as large tech companies including Airbnb and Uber, a global hedge fund, a prominent real estate developer, a popular theater producer, and a wide range of other commercial and individual clients. John has also spearheaded the development of
a massive RICO case against President Trump and his family and businesses, worked on multiple amicus briefs filed in the U.S. Supreme Court in cases challenging various executive actions by the Trump administration, and represented a student-led LGBTQ+ pride organization in Starkville, Mississippi, in a successful constitutional challenge to the city’s denial of a parade permit—and then flew to Starkville to help lead the parade. John was selected by Super Lawyers as a 2018 and 2019 New York Rising Star in Business Litigation and was named one of the Best LGBT Lawyers Under 40 by the National LGBT Bar Association.

Paul M. Robinson ’83  
Executive Vice President & General Counsel  
Warner Music Group
Paul M. Robinson is Warner Music Group’s Executive Vice President & General Counsel, responsible for WMG’s legal, business affairs and public policy strategy around the world. Paul joined WMG’s legal department in 1995, and was named to his current position in 2006. Before joining WMG, Paul was a partner in the New York City law firm Mayer, Katz, Baker, Leibowitz & Roberts.

Paul has a B.A. in English from Williams College. He earned his J.D. from Fordham University School of Law.

Khadijah Sharif-Drinkard ’97  
Senior Vice President, Business and Legal Affairs  
ViacomCBS Media Networks/BET Networks
Khadijah Sharif-Drinkard serves as Senior Vice President, Business and Legal Affairs, ViacomCBS, where she oversees unscripted programming, music programming, tent poles, specials and news across BET Networks. She is a strong business partner with broad expertise and over 20 years of practicing law in the media and entertainment field. Khadijah structures and negotiates a wide variety of transactions in connection with the development, production, acquisition and distribution of content across platforms. Her experience as a skilled business executive and deal maker has been paramount in bringing deals to closure for a number of high profile projects. Prior to working at BET Networks, Khadijah served as Vice President, Senior Counsel at Nickelodeon where she helped to launch “Dora the Explorer”, “Diego” and “The Backyardigans” and worked on shows like “Spongebob Squarepants” along with other hits.

Khadijah serves as Chairwoman of the Board of Directors for the Black Entertainment & Sports Lawyers Association (BESLA) and as President of the Board for Columbia College Women (CCW). She received the inaugural Medal of Honor from the New Jersey Muslim Lawyers Association in 2019, the inaugural Corporate Counsel of the Year Award from the Muslim Bar Association of New York (MuBANY) in 2018 and the Luminary Award for her business acumen and her commitment to diversity and inclusion from the National Association of Multi-Ethnicity in Communications (NAMIC).

Khadijah has traveled and served on delegations to South Africa, Rome, Russia, China, the United Kingdom and has worked with the United Nations to assist aspiring business women from Iraq. She contributed to a book entitled Living Islam Out Loud: American Muslim Women Speak (Beacon Press) where she chronicles her journey as an activist and a Muslim American. Khadijah earned her Bachelor of Arts degree from Columbia University and her Juris Doctor from Fordham University School of Law. She lives in New Jersey with her husband and two daughters.
Olivier Sylvain  
Professor, Fordham Law School  
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Olivier Sylvain is a Professor of Law at Fordham University School of Law. His academic interests are chiefly in information and communications law and policy. He teaches and writes about current controversies in communications policy, online intermediary liability, and privacy. At Fordham, Olivier teaches Legislation & Regulation, Administrative Law, Information Law, and information law related courses. He is the Director of the McGannon Center for Communications Research. He is also affiliated with the Center for Law and Information Policy and the Center on Race, Law, and Justice. Before entering academia, Olivier was a Karpatkin Fellow in the National Legal Office of the American Civil Liberties Union in New York City and a litigation associate at Jenner & Block, LLC, in Washington, D.C. He is on the board of directors for the New York affiliate of the American Civil Liberties Union and teaches a class on modern American literature for local incarcerated men.

Nancy Wolff  
Partner  
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Nancy Wolff is a partner at the intellectual property, media and entertainment law firm of Cowan, DeBaets, Abrahams & Sheppard, LLP located in New York, New York and Beverly Hills, CA. She represents a wide range of creative individuals and companies in all areas of digital media, art law, licensing and publishing and serves as counsel to the Digital Media Licensing Association. Nancy is co-chair of the firm’s litigation department and handles pre-pub review as well as transactional matters involving copyright and licensing. Nancy is a frequent speaker throughout the United States and Europe on copyright, digital media, and licensing and has received significant recognition for her expertise in copyright law. She is the Immediate Past President of the Copyright Society of the USA (CSUSA) and a member of the ABA IP Task Force on Copyright Reform. She was named Best Lawyers® 2020 “Lawyer of the Year” in Trademark Law (New York City), ranked in Chambers and Partners USA for Intellectual Property: Trade Mark & Copyright (New York) and was selected to Managing IP’s “Top 250 Women in IP” 2018/19 list. She has also been named to the Super Lawyers Intellectual Property top 250 lawyers, Top 50 Female Lawyers (New York Metro) and Top 100 Lawyers (New York Metro) lists.
Happy New Year! As always, we are kicking off TMT coverage in the new year by laying out our top predictions and events to watch for in 2020 – what we call our #Top20for20. To see what we got right and wrong in last year’s Top 19 list for 2019, it can be found here.

The TMT landscape is rapidly evolving with meaningful changes to how people communicate, consume content, play games and travel, with scale and focus increasingly important factors for success. Our #Top20for20 list encompasses:

- Major M&A predictions
- Building competition across wireless and video streaming
- Subscriber targets for new and existing direct-to-consumer SVOD/AVOD services
- The future of sports programming as the legacy multichannel video bundle that supported the economic model of sports continues to collapse
- Surging interest in streaming audio

**LightShed’s Top 20 for 2020**

1. NFL Extends Season, CBS Loses NFL, YouTube TV Takes Sunday Ticket, Facebook Takes Mobile, and Amazon Takes New Package
Current NFL media deals expire at the end of the 2021 (Monday Night Football) and 2022 (all other packages) seasons. However, we expect the NFL will negotiate all media rights packages together, with new deals likely to be announced before the end of 2020.

Ahead of the NFL media rights negotiations, we expect the NFL to finalize a new labor deal with the NFLPA. As part of the new agreement, we expect the NFL to increase the length of the season starting with the 2023 season, enabling the league to create a new package of games that would be sold exclusively to a streaming platform (the extra game/package might include games played at neutral sites), enabling the league to bring in a new linear rights bidder without diminishing the reach it currently achieves via television (digital bidders have only simulcasted games to-date).

We expect Amazon Prime Video will be the initial buyer of the new streaming package.

For its core packages, we expect the NFL to lean even more heavily on broadcast TV and create Sunday packages that are less AFC vs. NFC focused. We expect the NFL will only allow ESPN to renew Monday Night Football with Disney agreeing to simulcast on ABC to increase the programming’s reach (and value). Bringing in ABC enables the NFL to offer ESPN/ABC a Super Bowl in rotation with other NFL broadcast TV partners (prior ESPN package did not have a Super Bowl), further increasing the value of the MNF package.

We believe CBS will lose Sunday afternoon NFL rights to either NBC or ABC, who are both keenly interested in having two packages (despite CBS’ long history with the NFL, its balance sheet does not give it enough firepower). We believe Fox would be interested in a combo of Sunday afternoon and Sunday or Monday Night, which will drive NBC and ESPN/ABC to pay up meaningfully to retain their primetime rights. In turn, Fox will settle on retaining Thursday Night and Sunday afternoon NFL games. For the other Sunday package (currently held by CBS), NBC would appear to be in a superior bidding position to ABC given it has nine O&O stations in NFL markets compared to ABC’s six O&O’s (whereas CBS and Fox both have 14 O&O stations in NFL markets), and weakening CBS has a direct benefit to NBC’s parent company, Comcast (lessening retrans fees to CBS). That said, both ABC and NBC are pursuing two packages aggressively and have the firepower to pay up meaningfully.

We expect YouTube TV to take over rights for Sunday Ticket, despite higher bids from ESPN+ and Amazon. The NFL will take the lower bid in an effort to keep the television ecosystem intact (supporting the NFL’s broadcast distribution partners); an MVPD subscription would still be required for the premium Sunday Ticket product, whereas selling it to Amazon or ESPN+ actually helps accelerate cordcutting, hurting the NFL’s key distribution partners. YouTube TV is effectively using the DirecTV playbook from the past two decades. We expect robust competition for the NFL’s mobile rights currently controlled by Verizon and would not be surprised to see Facebook win this time after coming in second the last time mobile rights were licensed by the NFL (we sense Verizon/Yahoo Sports has not created the mobile exposure that the NFL had hoped as Yahoo Sports is not an app consumers use on mobile devices).

With NFL regular season viewership up the past two seasons (link) in the face of collapsing linear live TV viewing, we believe rights fees (including mobile) could nearly double (from $7.7 billion to over $14 billion) aided by the creation of a new digital package, increased competition for packages, and the expansion of MNF to broadcast.

Note: if CBS does, in fact, lose out on NFL rights (even if it does not take effect until 2023), it could put ViacomCBS in a difficult position as it enters carriage/retrans negotiations later this year, especially with DISH as we highlighted in our recent post (link).

2. AT&T and Dish Merge their Pay TV Businesses
The rising cost of content and the proliferation of OTT services make it challenging for Dish to remain more than a niche competitor in the Pay TV market or for AT&T to sustain profitability at current levels. Dish has already been scaling back its content offering in an attempt to sustain free cash flow (link) and AT&T has increased pricing as its focus shifts to its direct-to-consumer HBO Max offering. Meanwhile, the content owners themselves are increasingly expanding distribution, enabling AT&T and Dish customers to source content elsewhere. We believe regulators are not blind to these market realities and would be open to consolidation in the Pay TV space. In addition, freeing up investment capital would better enable Dish to execute on what the market needs, 5G networks and more broadband competition.

The relative size of DirecTV’s assets mean it should maintain a greater than 70% equity stake in the combined entity, but we believe the deal can be structured to enable Dish to maintain control and to allow the combined entity to take advantage of Dish’s NOLs. We believe the deal would also enable AT&T to push a material amount of its debt to the new entity, thereby further deleveraging AT&T’s balance sheet, a primary concern of investors. While the pending Presidential election might impact the timing of the decision, we do not believe it is a limiting factor. Critics that continue to believe Charlie Ergen is incapable of negotiating any deal are now simply willfully ignoring the deal that he struck with Deutsche Telekom, T-Mobile, SoftBank, Sprint and two federal regulators.

3. Disney+ Hits 50 Million Subscribers Enabling Disney to Collapse Windows.

Driven by a massive cross-company marketing campaign, affinity group discounted pre-sales, and a $12.99 bundle (with Hulu and ESPN+), in addition to a Verizon Wireless first-year free promo offer, Disney+ achieved 10 million gross adds on launch day. Disney’s aggressive marketing has continued throughout Q4 2019 aided by #babyyoda. We believe Disney+ captured its TAM far faster than we and investors expected. In turn, we would not be surprised to see Disney+ end 2019 with 25 million subscribers (overwhelming majority in the US, on top of Canada, the Netherlands and Australia).

With an array of international launches throughout 2020, aided by numerous biz dev deals/partnerships similar to the U.S. Verizon deal (such as Canal+ in France, link), we believe the stage is set for Disney+ to reach 50 million global subs by end of 2020, split relatively evenly between the US and International, with the implication being that US sub growth will slow materially after the initial launch surge (we believe the vast majority of families with young kids will have signed up by the end of 2019, with churn eating into growth in 2020).

We vocally criticized Disney Chairman and CEO, Bob Iger, for not going far enough to disrupt Disney’s legacy windowing strategy as part of the Disney+ launch. However, much like Netflix did not move aggressively into direct-to-streaming feature films until its subscriber base was large enough, we believe Disney is simply waiting for Disney+ to reach scale. We believe windows will be the primary way Disney reaccelerates US subscriber growth and enables them to raise Disney+ pricing. While we do not know what the magic number is subscriber-wise, as Disney+ passes 50 million global subs, we suspect they will fully collapse the home entertainment to SVOD window and then look to shrink the theatrical to home entertainment window. We remain confident that there is a tremendous financial opportunity from Disney shrinking windows substantially (link).

4. Dish Launches Wireless service, Builds a 5G network in One Market, and Partners with Comcast
For over a year, we had been skeptical about the ability of T-Mobile to prevail in its attempt to purchase Sprint. However, after sitting through 2 weeks of court testimony, it’s hard not come to the conclusion that this deal is destined to close. This clearly would be a game changer for T-Mobile, Sprint and tower companies to name a few. But our bigger takeaway from the trial has been the value and flexibility of the MVNO deal that Dish was able to negotiate as part of the DOJ approval process and the preparations already underway at Dish to execute on this plan.

Charlie Ergen was widely mocked following his court testimony at the T-Mobile trial. (Primarily by those not at trial.) Ergen stated that Dish not only planned on launching the wireless MVNO in 2020, but that he also expected to construct a 5G network in one city. There is no doubt that this would be a challenging task, as it relies on the closing of the Sprint deal, but we believe they will execute on this plan in 2020, setting the stage for material disruption to the US wireless industry.

Comcast could emerge as an unlikely new partner for Dish. Court testimony by Comcast executive Sam Schwartz revealed that Comcast has;

- material challenges with is Verizon MVNO relationship,
- failed in attempts to partner with T-Mobile, and
- a significant and growing number of customers gravitating to unlimited rate plans despite paying Verizon per Gigabyte

We believe this makes Comcast an obvious partner for Dish, based on the flexible structure of Dish’s MVNO relationship, which was revealed at trial. What is perhaps more exciting, however, are other unnamed (and likely Big Tech) partners that Charlie Ergen discussed with the Judge Victor Marrero in closed door testimony.

### 5. Netflix Global Net Adds Reaccelerate

2019 proved to be a more challenging subscriber growth year for Netflix than we and management expected. While all eyes were on the impact of building competition, the primary pressure slowing subscriber growth in the US was the company’s 18% price increase (announced in January 2019 and implemented through Q2) and a programming slate that did not catch “fire” as much as anticipated. Global subs net adds, if Netflix hits Q4 guidance, would be down about 7% in 2019 (26.7 vs. 28.6 million), albeit, international subs would be up 4%. Worth noting that while subscribers fell short of our expectations heading into 2019, total revenues were greater than expected thanks to the price increase.

In 2020, we believe Netflix will reaccelerate net additions and could reach a new global peak high, with 30 million subs achievable as Europe is now in the sweet spot of the growth curve (47 million subs with a TAM of over 200 million) and Asia begins to scale (14 million subs with a TAM of over 200 million, ex-China), see our recent global analysis. We also would not be surprised to see US growth reaccelerate given the lack of an expected price increase in 2020. Three primary drivers give us confidence in Netflix reaccelerating subscriber additions in 2020: (1) surge in SVOD competition fueling cordcutting and the further collapse of linear TV viewership (2) significant increase in international original programming with 130 series set to roll-out in 2020 (such as the Indian original Baahubali: Before the Beginning, teaser embedded above) and (3) regular cadence of direct-to-streaming movie releases increasing the price/value perception of a Netflix subscription.

### 6. Cable Network Subs Fall Below 80 Million – 1st Time Since 2000

Fully-distributed cable network subscribers broke through the 100 million barrier in 2009-2011, effectively 20 years after surpassing the 50 million barrier. Over the past decade cord-cutting and cord-
nevering have grown rapidly in popularity, with the most compelling entertainment content now on streaming platforms that do not require a multichannel video subscription. Increasingly, the only reason consumers need the bundle is for live sports/events and news. That said, we believe that universe of sports/news fan households is in the 40-50 million range, well below the low-to-mid 80 million range that most fully-distributed cable networks have today.

With all the major media companies finally embracing direct-to-consumer streaming as we enter 2020, we expect cable network subscribers declines to continue to accelerate (from 1-2% levels in 2019 to upwards of 5% exiting 2019). During 2020, we expect most major fully-distributed cable networks will fall below 80 million subscribers, a level that they have not seen since 2000/2001 (TBS was the first to reach 80 million subs, link).

As subscribers fall below 80 million, it means that the advertising reach of cable television will have fallen below 2/3 of total TV households. While that may not matter in what is sure to be a hotly contested Presidential Election year, it sets the stage for a television advertising meltdown across cable television in 2021 and beyond. Falling subscribers will also make it harder and harder for cable networks to justify their programming spend, with content creators increasingly choosing to put their most exciting programming on streaming rather than linear multichannel TV. This will accelerate viewership declines and in turn lead to even more cord-cutting (with the aforementioned bottom still well below the 80 million subscriber level).

The question becomes what is the economic model for cable networks as subscribers are in rapid secular decline – especially networks with sports rights exposure (long-term fixed contracts that keep escalating)?

7. EA Buys Bethesda or Warner Interactive Entertainment

EA has created a significant cash flow generating business out of its sports franchises. Investors can count on ~30mm units annually and over $1bn of Ultimate Team revenue per year (still growing) from FIFA and Madden. The well documented trouble at EA has been on expanding beyond these franchises, with uncertain outcomes year to year, from its non-sports and mobile titles.

The company appears to have helped right the ship in its non-sports arena by bringing Respawn in-house. Vince Zampella has Apex settled in as a decent franchise with potential international growth ahead and Star Wars Jedi: Fallen Order proving to be a strong showing. Still, we believe EA would like to expand its non-sports portfolio (which also makes sense given its subscription ambitions).

We believe 2020 could be the year EA makes a substantial acquisition. EA certainly has the balance sheet for accretive M&A – even as it needs to improve its game engine and other tech. In all, EA has $3bn in cash, and could certainly support leverage given its FCF profile. And publisher / studio deals create massive synergies.

The video games M&A speculation du jour (link) has been Sony buying ZeniMax (Bethesda). However, we believe EA was engaged in discussions with ZeniMax just over a year ago – a deal which fell apart as publisher valuations rapidly reset. With EA on steadier ground and multiples re-inflating some, we could see these discussions revisited. We presume Providence Equity is eager for an exit, with its original investment coming in 2007. ZeniMax would expand EA’s portfolio into new genres with Elder Scrolls, Fallout etc.
Warner Interactive Entertainment would be another logical acquisition and is an asset that could be for sale. We get the sense that AT&T management views their gaming asset as subscale and would be open to owning less of a larger entity; WarnerMedia’s sole focus appears to be building out HBO Max. Given that much of the game portfolio is Warner-owned IP, we believe EA would be a good fit – as it is used to licensing and working with third party IP. One problem is we believe Warner may want to contribute assets for an equity stake in an acquirer. However, a cash heavy deal probably makes more sense for EA.

8. Spotify Completes Label Deals Fueling Growth & Family Plan Price Increase

When you look at the dramatic increase in value ascribed to Universal Music over the past seven years (up over 300% based on Tencent’s recent investment vs. Softbank’s 2013 bid, link), it is hard not to view Spotify as the savior of the music industry. We remember back to our very first meeting with Spotify founder Daniel Ek back in 2007 (link):

“I was tapped on the shoulder by a young entrepreneur named Daniel Ek, who asked me if I was the person who had just put a SELL rating on Warner Music. When I responded that was indeed me, he told me that he and his co-founder, Martin Lorentzon, had a solution to the music industry’s troubles”

While there is lots of competition in streaming music, the only pure-play that is obsessed with audio excellence is Spotify. Apple has devoted far more time and money to video than audio/podcasts, Amazon has many distractions and has completely ignored podcasting, Google has rebooted music streaming three times and while YouTube Music has made real progress overseas, it is certainly not a core focus for Google, not to mention a complete lack of focus on podcasting.

Bottom Line: Spotify needs the labels’ content and the labels need Spotify’s subscriber growth, revenue share and data/analytics. In turn, we expect Spotify to finish new deals with Universal Music and Sony Music first, before completing Warner Music, setting a framework to be paid for portions of a two-sided marketplace and enabling robust Spotify subscriber growth.

“As label deals are completed, we would also expect Spotify to start to move prices up domestically, particularly on its family plan, which has been at $14.99/month since launch (dramatically lower churn than Spotify’s single user plan with a customer life that is over 2x higher).

9. Diamond Sports (Regional Sports Networks) Move Toward Bankruptcy

We have not understood the “math” behind Sinclair’s acquisition of the former FOX RSNs from the day they announced the transaction (link). What was $1.6 bn of EBITDA has already fallen to $1.1 billion (due to the DISH drop) and is set to go materially lower over
the next 12-18 months. We do not believe distributors should carry RSNs unless they are tiered, enabling only the consumers who want to pay for local sports to have to pay for them.

With cord-cutting accelerating and no carriage on Dish/Sling, Diamond Sports is already in serious trouble, and this is before adding in a likely drop by Comcast in the fall of 2020 as Comcast is increasingly focused on video profitability over subscriber growth; not to mention the recent drop of Diamond Sports by Fubo TV (link). Dish illustrated that any MVPD/vMVPD can meaningfully improve profitability by dropping the Diamond Sports RSNs in 2019 (link). If Comcast drops Diamond Sports in 2020, it will push Diamond Sports toward bankruptcy.

We wonder if a bankruptcy could enable a new owner of the RSNs to achieve what Liberty and private equity buyers had hoped to achieve during last year’s FOX RSN sale process — meaning substantially reduced affiliate fees in return for long-term MVPD deals. It will also be interesting to see if the NBA begins to push more games into national/digital vs. cable/RSNs, as NBA Commissioner Adam Silver has been quite vocal about the challenges facing the legacy TV ecosystem (via Sports Biz Journal, link):

“Especially for the NBA, which is primarily a cable-satellite sport, that system is broken to a certain extent… It’s not just in terms of the loss of homes, but our young viewers, in particular, are tuning out cable, traditional cable. You’re really pushing a rock up a hill if you’ve lost 20% of your audience over the last four years… especially when that young audience we attract is disproportionately represented by that 20%.”

As content shifts away from the RSNs, Diamond Sports’ future grows even more bleak.#goodluckRSNs

10. No 5G Supercycle, but Smartphone Upgrade Rates Bottom

There has only ever been one smartphone Supercycle. It occurred in 2014/2015 following the launch of the iPhone 6 and 6+ and was largely driven by a latent demand for larger phones and intense competition among wireless operators. The replacement cycle has been lengthening ever since, driving device upgrade rates and customer churn rates to new lows every year.

Since the iPhone 6 induced Supercycle, peers and pundits have been predicting the next Supercycle on theories ranging from augmented reality to wireless charging and everything in between. Yet, no new Supercycle has materialized. This year, the expected launch of a 5G iPhone will undoubtedly revitalize the Supercycle prognosticators. We believe they will end up foiled, once again.

Early experiences with 5G networks have been predictably marred with limited 5G service areas (mmWave), marginal speed improvements (<20 MHz of downlink), and no new killer applications. (Link) We do not expect this to change in 2020 ahead of Apple’s Fall launch. We believe the 5G hype and Supercycle predictions at the start of 2020 will end up resulting in a string of “5G is doomed” media headlines by year end.

Being a 5G-truther doesn’t mean we are bearish on Apple. We have noted on many occasions in the past that Apple doesn’t need a Supercycle to succeed, although it would be very helpful to the company if device upgrade rates did not drop to new lows each year. We believe 2020 is the year that finally happens.

Wireless operators have record levels of legacy smartphones in their subscriber bases, with many customers now holding phones that are more than 4 years old. Yet data usage continues to rise, increasing the perceived value of newer phones that are faster, have better battery life, and enable better video streaming (speeds and screens) just as the Streaming Wars kick in. While 5G might not generate a Supercycle, it will increase advertising and competitive actions...
by operators. There are already early signs of this. ([Link] Stabilization in the upgrade cycle, let alone an inversion, could deliver the unit growth that Apple needs, as it becomes harder to layer on higher prices to end users.

11. Liberty and Sirius XM Pause iHeart Pursuit and Acquire Digital Assets

Sirius XM continues to be a free cash machine on the back of a superior in-car business model. However, the company is running out of growth. The company added around a million subscribers in 2019, with new cars being close to fully penetrated and the used car opportunity slowing. With digital competitors finding a greater home in the car, and listening time expanding out of car, the company has turned to M&A to add growth and protect its future – starting with its acquisition of Pandora.

The company, along with its majority holder, Liberty, do not seem content to stop with Pandora – especially as that acquisition has been a bigger project than expected. Audio was the focus of Liberty President and CEO, Greg Maffei’s investor presentation at Liberty’s recent investor day. He expounded on Liberty’s ambition to capture more of an expanding pie of audio hours and how it is spending “time and dollars” to that end.

Shortly after the Liberty Investor Day, the WSJ reported that SIRI and Liberty had renewed interest in a large stake in iHeart – a deal with great industrial logic. However, such a deal is unlikely to occur anytime soon, and we believe Liberty and SIRI have backed off. It has been reported that Liberty was waiting for DOJ go ahead before making a move. We believe that now is likely not the time for Liberty or SIRI to ask for government approval on a deal which would strengthen its grip on radio or the music industry period, especially as Live Nation (1/3 owned by Liberty) has recently faced its own DOJ and congressional scrutiny. Not to mention, we sense iHeart would like a couple of years to execute post-bankruptcy, before pursuing strategic alternatives.

Instead, we expect Liberty and SIRI to look elsewhere for audio assets, with a focus on digital. We believe platform companies with differentiated content from streamers such as Spotify (which Liberty views as a commodity) would be first choice. Assets such as Wondery, Soundcloud, Luminary and similar digital audio companies could be of interest as Liberty and Sirius seek acquisitions.

12. Box Office Falls Double-Digits; Talent Embraces D2C Movies

Domestic box office fell almost 5% in 2019, albeit it was essentially in-line with 2016 levels. More concerning was how few films drove the totals, with the top 10 grossing movies representing nearly 39% of box office in 2019 compared to 32% in 2016 ([Note: the top ten films were sub 30% back in 2010]). With so much amazing content available in the home thanks to an increasing array of streaming services that will only grow in number and content quality in 2020 (including direct-to-streaming films or very short windows), consumers are becoming increasingly selective as to what movies warrant a trip to the movie theater (with the instant feedback loop of social media only adding to the challenge). As consumers grow more selective, it puts increased pressure on the top 10 films of the year. As we look at the overall film slate for 2020, we simply do not see the excitement that will drive top 10 attendance. In turn, it does not appear hard to envision domestic box office dropping double-digits in 2020, falling back to levels last seen in the early 2010s.

With fewer and fewer films creating real must-see in-theater consumer demand (theatricality), talent is increasingly recognizing that movie profit participations are becoming scarce. In turn, talent is embracing direct-to-consumer movies that are released with a short theatrical window or go direct-to-streaming (day-and-date releasing) as they are being paid
a guaranteed profit participation without risk. With talent on-board, look for more and more streaming platforms to replicate the Netflix movie strategy in 2020 (Amazon has already shifted toward Netflix’s model, with Apple set to follow in 2020). As more and more feature films come to streaming platforms, it will create a virtuous circle that creates an even higher bar to warrant a trip to the cinema. Theater chains are in deep trouble as we enter a new decade – with far too many screens (exhibitor bankruptcies will likely be needed to shrink their footprints meaningfully).

13. Uber Consolidates the US Food Delivery Market

The pressure on Uber to reach profitability continues to mount and its food delivery business is a major hurdle in reaching that goal. Competition has clearly intensified. Google has now entered and Amazon, which delivers groceries, looms large, attracting the attention of UK regulators. (Link) Uber was initially willing to sustain years of cash-burn in food delivery in order to establish the leading market share it believes it needs to leverage profitability. However, investors are no longer patient and the margin benefits of autonomy are not imminent. We believe Uber will move to consolidate the US food delivery market in 2020.

Mega scale is clearly important in 2020 and that is true for Uber, as well. Food delivery can further leverage and grow Uber’s >4.0 million drivers and >103 million active users. More importantly, Google, Amazon, and even possibly Apple are inevitable competitors across all of Uber’s business verticals. Each of those companies have the resources to reach scale quickly, given the opportunity. We also believe food delivery provides an opportunity to show early returns on Uber autonomy investments, given the lower hurdles for autonomous food delivery versus ride-share. Showing some progress on self-driving vehicles would provide management with some needed investor support and help justify the more than $500 million it invests in autonomous technology each year.

“Our strategy for Eats is simple; invest aggressively into markets where we’re confident we can establish or defend a number one or number two position over the next 18 months.”

Dara Khosrowshahi, Uber CEO, 11/4/19

Uber has several opportunities for consolidation and could pursue more than one. GrubHub and Postmates are the most obvious targets, but an acquisition of DoorDash, which is also a SoftBank investment, might be the most attractive given its scale/leading market share and the potential impact it would have on Google’s partnership. Taking DoorDash out of the market would also foreclose an opportunity for Amazon, an inevitable competitor. Overseas, the obvious targets include Deliveroo, Delivery Hero and Just Eat/Takeaway.com, but we believe the initial focus will be in the United States.

If CEO Dara Khosrowshahi does not lead consolidation in the US, others will threaten Uber’s ability to achieve the leading market share/scale it desires. Investors would appreciate a return to some of the positive competitive aspects of Uber’s founding culture even if that effectively means going head to head against Amazon and Google. It’s hard to see
Uber exiting 2020 without either having consolidated at least one of these food delivery companies. Conversely, if Dara dumps the US food delivery business, as the company has done in other markets that have struggled to achieve scale, it would further threaten Uber’s growth trajectory and raise questions about his tenure at the company.

“And just as you have seen and continue to see in the rideshare side of our business, in the US and really almost all around the world, there is a rationalization of behavior happening. And competitors are consolidating and we’ve driven some of that consolidation and the spend — and the profitable spend is coming down, the profitability profile of the rideshare sector is improving. And we think that food is a couple of quarters or year behind that.”

Dara Khosrowshahi, Uber CEO, 12/11/19

14. The One About HBO Hitting an All-Time High of 40 Million Subscribers

Last October, WarnerMedia held an investor day to lay out the strategy behind the coming launch of HBO Max in May 2020 (key takeaways here). We believe the breadth and diversity of programming beyond the legacy HBO offering will drive rapid consumer uptake. If current distributors do not reach agreements with WarnerMedia, we believe consumers will simply shift toward direct-to-consumer options (direct sign-up or via a channel platform such as Amazon, Roku or Apple). We believe at least half of HBO’s current base of 34 million subscribers domestically will be HBO Max subscribers by the end of 2020. In addition, we expect HBO Max to drive gross additions and mitigate churn, with HBO subscribers set to exceed 40 million by the end of 2020 (a new high for HBO).

The faster HBO converts subscribers to HBO Max, the faster it can sunset HBO GO and HBO Now apps, which are likely to be confusing to consumers initially. We expect a very aggressive marketing campaign from HBO Max to begin at the start of Q2 to build excitement for the launch in May (taking a page out of the Disney+ playbook) highlighting key titles such as Friends, The Big Bang Theory, Rick and Morty, South Park, etc…

15. Snapchat Revenue Growth Reacceleration Continues

After a challenging 2018, Snapchat refound its strategic focus in 2019, determined to be the must-have mobile communications app for every new 13-year old anywhere on earth outside of China, layering in more and more localized content to give those young consumers more to do (increasing engagement, time spent and in turn, revenues). We expect these trends to continue throughout 2020, with particularly easy first half 2020 comparisons for Snapchat as shown in the exhibit embedded above. With proper execution, Snapchat should be able to re-accelerate full-year revenue growth in 2020 vs. 2019, even as TikTok slows mobile ad spending (we sense TikTok has reached enough scale where virality is driving it more so than the need for paid acquisition).

With Snapchat revenue still well less than half of Twitter’s over the past 12 months, the growth opportunity ahead for Snapchat is substantial as it increases the number of advertisers on the platform, offers more compelling advertising units (Snap Select, extended play ads, dynamic product ads and actions in commercials), increases games offered that
monetize through advertising, and improve the AR experience of lenses/filters that offer unique advertising opportunities inside of messaging.

16. MSG London Sphere Plan Takes New Shape

MSG’s sports and entertainment assets will trade as separate companies later this quarter. At the center of MSG Entertainment’s growth story are new venues in Las Vegas and London – the MSG Spheres. The globe shaped venues are planned to be wrapped inside and outside in LED screens. Las Vegas Sphere is well underway, with four stories already built and visible to CES attendees this week. However, the future of the London venue is less certain, as the London Legacy Development Corporation (LLDC) has yet to approve plans for a Sphere in the planned Stratford location. We expect MSG’s London plans to be finalized in 2020. While MSG appears determined to construct a similar venue to the Vegas Sphere, we believe the London venue could be materially different.

LLDC must approve MSG’s applications for both the building plans and for advertising on the Sphere’s exterior, gates and the bridges connected to the building. Unfortunately, there were objections to the original design, especially from the London Borough of Newham. The biggest issue appears to be the LED exterior of the building and advertising on the LED exterior. Transportation congestion was another issue.

MSG answered a request for more information with design changes, specifically removing some incremental LED billboards and adding another train station entrance, as well as offering plans to dim the exterior overnight and cut non-naming rights advertising on the exterior to 50% of its time illuminated.

It is unclear if these changes will be enough for Sphere approval. A final public meeting will take place this week and the Planning Authority website says it will not have a decision until later this calendar quarter. In the case that the revised plans are not approved, we believe MSG will take one of two courses of action. Most likely they will build a less ambitious large scale venue on the site without an exterior display. Or, we could see MSG joining forces with Tim Leiweke’s Oak View Group and/or Live Nation, who have become active in Europe, to build an arena elsewhere in London.

Neither would be a bad outcome for MSG. One of the biggest opportunities for the London Sphere is building any arena-sized music venue in London. London is notoriously under-venued and the London live music market will expand dramatically with a competitor to the O2. We believe MSG Entertainment investors would applaud a lower capex project given the impressive ROI on the Forum project.

17. Disney’s #TriplePlayBundle Could Push ESPN+ Subs to 10 Million

In November 2019, Disney announced that ESPN+ had achieved 3.5 million subscribers (link), up over 1 million in the past four months fueled by the return of college football. That said, at only $5/month, 3.5 million subscribers does not even cover the cost of ESPN+’s UFC contract, let alone all the other licensed sports and original programming, marketing and tech/infrastructure expense. We believe ESPN+’s break-even has moved closer to 10 million paid subscribers due to continued spending on sports content.
When Disney launched Disney+ in November, it launched its own version of the triple play bundle, offering Disney+, Hulu with ads and ESPN+ together for $12.99/month. Given that Disney+ costs $6.99 and Hulu with ads $5.99, it is quite clear that Disney is essentially giving away ESPN Plus at no additional cost. While one could say that a discount is being applied to Disney+ and Hulu with ads, given the lack of uptake in ESPN+ subscribers, that viewpoint is hard to believe. All that said, thanks to the value perception of the Disney triple play bundle, we would expect ESPN+ will exceed 7 million subscribers early in 2020 and could reach 10 million by the end of 2020.

However, it remains quite unclear how much revenue will be attributed to these subscribers as we doubt many are signing up for the Disney bundle to get ESPN+. In turn, ESPN+ is likely to remain far underwater profitability-wise, even if it gets to 10 million subscribers via bundling. Growing the ESPN+ subscriber base, even without revenue, does better prepare ESPN for the inevitable shift they will have to make with their linear network as subscribers keep falling, as we discussed in prediction #6 above (also ties to the conclusion of our October 2019 post on the challenges facing ESPN+, link).

18. Quibi Reaches 8 Million Subscribers By Year-End 2020

Jeffrey Katzenberg and Meg Whitman are set to launch the first all-premium mobile-focused video streaming service in the US on April 6, 2020. We sense investors’ confidence in Quibi has grown dramatically over the past year as large chunks of its coming content slate have been revealed – the content looks pretty awesome with something for everyone and a lot of it with a regular cadence to keep you coming back for more, while layering on what appears to be unique, proprietary technology that allows for viewing in both vertical and horizontal mobile environments.

Quibi is truly starting from scratch with no embedded brand equity or library content, in turn, it will not have the explosive growth that Disney+ has exhibited. However, Quibi’s price point at just $4.99 for the ad-supported version and $7.99 for the ad-free version should enable it to find a meaningful product market fit. Worth noting that the ad-load will be quite modest with a 10-second pre-roll for content under 5 mins in length and a 15 sec ad for content over 5 minutes in length. In turn, we expect the vast majority of users to opt for the ad-supported plan. With launch advertising partners already set including P&G, Walmart, Google, Pepsico, General Mills, Discover, Taco Bell, etc. and T-Mobile set to offer Quibi On Us (akin to Netflix on US), we expect Quibi and its partners’ marketing spend to support the launch to be quite “loud” driving awareness and subscriber acquisition.

With consumer thirst for content increasing by the day as the legacy multichannel collapses and time spent on mobile increases, we believe uptake of Quibi will be rapid. We believe Quibi should be able to get to 10 million subscribers within its first full-year and could even exceed 8 million by the end of calendar 2020 (aided by T-Mobile’s Quibi on Us promo).

19: Blizzard Makes Overwatch Free-to-Play Ahead of Overwatch 2 Launch
ATVI investors and the Blizzard community finally got announcements for Overwatch 2 and Diablo 4 (a year later) at BlizzCon 2019. ATVI has given no release dates on either title, and has encouraged conservatism for analysts. We expect release dates to be announced for both by BlizzCon 2020. After checks, which in the Blizzard world can mean very little, we currently believe Overwatch 2 is slated for Spring 2021. Meanwhile, we have heard Diablo 4’s release could come much sooner than expectations, which have pushed to 2022 and beyond (albeit this does not align with director Luis Barriga’s assertion that Diablo 4 would not come soon – “not even Blizzard soon”).

We believe that the original Overwatch will become free-to-play by the end of the year, ahead of the launch of Overwatch 2. Blizzard has spoken to Overwatch players having access to the new heroes and maps that come in Overwatch 2. We believe this will also apply to any new PvP game modes. Thus, the paid Overwatch 2 will essentially be only PvE modes. Every new and existing PvP competition will be free-to-play. In all, this strategy will serve the purpose of expanding the Overwatch community ahead of OW2’s launch, reinvigorating PvP and keeping the competitive community together.

20. Rajeev Misra “Departs” SoftBank

The Vision Fund, which is run by Rajeev Misra, has been a source of bad press for SoftBank nearly every day since the WeWork IPO blew up. (Link) His unorthodox management and investment style has been the focus of press stories that have attracted unflattering attention as SoftBank attempts to raise capital for a second Vision Fund. (Link) Misra was instrumental in forming the first Vision Fund, but investors now question its structure, which pays priority returns to third party investors. The Vision Fund has recently written down several high profile investments, which could continue in upcoming quarters. (Link) As a reminder, we estimate that two-thirds of the Vision Fund investments are still being valued by SoftBank based on SoftBank’s purchase price as its most recent investor. (Link) The media has finally picked up on this and has been merciless in their coverage.

SoftBank’s two largest opportunities for positive news in 2020 are the closing of the sale of Sprint to T-Mobile and a stabilization at WeWork. These would both be a direct result of SoftBank COO Marcelo Claure’s efforts and further elevate his relative position at SoftBank at a time when the Vision Fund, run by Misra, continues to generate bad press and potentially book additional losses. SoftBank has an army of capable executives that could take over the reigns at the Vision Fund. We believe a change at the helm would offer some rare positive news for investors. Masa isn’t going anywhere, as his most vocal critic on the Board, Tadashi Yanai, just announced his resignation on the Friday after Christmas. But it is time for Misra to depart.

What Else in 2020?

- **Biggest Movie of the Year:** Marvel’s Black Widow or James Bond’s No Time to Die
- **Biggest Movie Flop of the Year:** Godzilla vs. Kong or Artemis Fowl
- **Biggest Upside Surprise Movie:** Top Gun Maverick or Ghostbusters Afterlife

**IPOs Expected in Our Coverage Universe**

- DraftKings (already announced)
- Warner Music (feels like the right time)
- DoorDash (potential)
- Unity (potential)
**Other Topics Everyone Will Be Talking About in 2020**

- Live Nation has its biggest organic and inorganic growth year since the merger with massive concert supply and OCESA, as well as competitors retreating despite the consent decree extension.
- Mid Tier Media Consolidation: Does MGM Finally Sell? Does ViacomCBS Buy Starz from Lionsgate now that Comcast renewal has been completed?
- Internet Regulation – Lots of noise around CCPA and US Elections, but we continue to believe risk to “Big Tech” is not material beyond headline risk and likely entrenches the major tech giants rather than threatening them.
- Synthetic Media Becomes Buzz Worthy (if you do not know who Lil Miquela is, you should)
- Scramble for Advertisers to Find Scaled, Engaged Audiences especially on connected TV devices (keep an eye on Roku, Pluto, Tubi, Xumo and Peacock)
- Sports Betting Momentum Grows With New States Approved, Potentially NY
- Podcasting – Race for Exclusivity and Further Consolidation
- New Console Cycle Which Sees No Real Shift in Market Share
- YouTube TV Becomes the Only vMVPD That Is Still “Committed” as Hulu Shifts Resources from Live toward International Expansion
- VR Gaming Content With Valve’s Half Life: Alyx Success
- Game Streaming Noise With New Entrants but Lack of Gamer Participation
- What Company Does John Legere Take Over?
- Shopping on Social Platforms Becomes Much More Frictionless Leading to a Convergence of Advertising and Commerce
- The Election – Let’s Not Speculate

**Have a Great 2020 !**

Rich, Walt, Brandon, Joe and Mark

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DIVISION 3. OBLIGATIONS [1427 - 3273]  (Heading of Division 3 amended by Stats. 1988, Ch. 160, Sec. 14.)

PART 3. OBLIGATIONS IMPOSED BY LAW [1708 - 1725]  (Part 3 enacted 1872.)

1708.7.  (a) A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort:

(1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, place under surveillance, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.

(2) As a result of that pattern of conduct, either of the following occurred:

(A) The plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this subparagraph, “immediate family” means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff’s household.

(B) The plaintiff suffered substantial emotional distress, and the pattern of conduct would cause a reasonable person to suffer substantial emotional distress.

(3) One of the following:

(A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with either (i) the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member, or (ii) reckless disregard for the safety of the plaintiff or that of an immediate family member. In addition, the plaintiff must have, on at least one occasion, clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct unless exigent circumstances make the plaintiff’s communication of the demand impractical or unsafe.

(B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to Section 527.6 of the Code of Civil Procedure, prohibiting any act described in subdivision (a).

(b) For the purposes of this section:

(1) “Pattern of conduct” means conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “pattern of conduct.”

(2) “Credible threat” means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct, including, but not limited to, acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means, follows, harasses, monitors, surveils, threatens, or interferes with or damages the plaintiff’s property, or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(3) “Electronic communication device” includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. “Electronic communication” has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

(4) “Follows” means to move in relative proximity to a person as that person moves from place to place or to remain in relative proximity to a person who is stationary or whose movements are confined to a small area but does not include following the plaintiff within the residence of the defendant. For purposes of the liability created by subdivision (a), “follows” does not include any lawful activity of private investigators licensed pursuant to Article 3 (commencing with Section 7520) of Chapter 11.3 of Division 3 of the Business and Professions Code, or of law enforcement personnel or employees of agencies, either public or private, who, in the course and scope of their employment, encourage or attempt to engage in any conduct or activity to obtain evidence of suspected illegal activity or other misconduct, suspected violation of any administrative rule or regulation, suspected fraudulent
conduct, or any suspected activity involving a violation of law or business practice or conduct of a public official that adversely affects public welfare, health, or safety. For purposes of the liability created by subdivision (a), “follows” also does not include any newsgathering conduct connected to a newsworthy event.

(5) “Harass” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

(6) “Place under surveillance” means remaining present outside of the plaintiff’s school, place of employment, vehicle, residence, other than the residence of the defendant, or other place occupied by the plaintiff. For purposes of the liability created by subdivision (a), “place under surveillance” does not include any lawful activity of private investigators licensed pursuant to Article 3 (commencing with Section 7520) of Chapter 11.3 of Division 3 of the Business and Professions Code, or of law enforcement personnel or employees of agencies, either public or private, who, in the course and scope of their employment, encourage or attempt to engage in any conduct or activity to obtain evidence of suspected illegal activity or other misconduct, suspected violation of any administrative rule or regulation, suspected fraudulent conduct, or any suspected activity involving a violation of law or business practice or conduct of a public official that adversely affects public welfare, health, or safety. For purposes of the liability created by subdivision (a), “place under surveillance” also does not include any newsgathering conduct connected to a newsworthy event.

(7) “Substantial emotional distress” shall not be construed to have the same meaning as the “severe emotional distress” requirement for intentional infliction of emotional distress. “Substantial emotional distress” does not require a showing of physical manifestations of emotional distress; rather, it requires the evaluation of the totality of the circumstances to determine whether the defendant reasonably caused the plaintiff substantial fear, anxiety, or emotional torment.

(c) A person who commits the tort of stalking upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.

(d) In an action pursuant to this section, the court may grant equitable relief, including, but not limited to, an injunction.

(e) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.

(f) This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly.

(g) This act is an exercise of the police power of the state for the protection of the health, safety, and welfare of the people of the State of California, and shall be liberally construed to effectuate those purposes.

(Amended by Stats. 2014, Ch. 853, Sec. 1. (AB 1356) Effective January 1, 2015.)
Publisher of CD–ROM disks containing compilations of computer programs brought action against computer programmer who created file-retrieval program for disks, alleging that programmer’s sale of program was copyright infringement. Programmer brought counterclaims alleging copyright infringement, breach of licensing agreement, unfair competition, defamation, and tortious interference with contractual relations. The United States District Court for the Western District of New York, Elfvin, J., 1996 WL 484369, rejected publisher’s infringement claim and awarded damages to programmer on his counterclaims for infringement and breach of contract. Publisher appealed, and programmer cross-appealed. The Court of Appeals, Jacobs, Circuit Judge, held that: (1) programmer was independent contractor, so program was not work for hire; (2) programmer’s failure to plead license as affirmative defense to infringement claim did not waive that defense; (3) publisher’s alleged obligation to pay royalties and include notice of programmer’s authorship on disks were covenants, not conditions, of contract; (4) factual issues underlying copyright infringement claim as to materiality of breach and purported rescission of license had to be resolved on remand; (5) programmer was not entitled to prejudgment interest; (6) dismissal of defamation counterclaim was proper; and (7) programmer was not entitled to reopening of evidentiary record.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

*232 Denis A. Kitchen, Jr., Williamsville, NY, for Plaintiff–Appellant–Cross–Appellee.

James Ostrowski, Buffalo, NY, for Defendant–Appellee–Cross–Appellant.

Before: WALKER and JACOBS, Circuit Judges, and MISHLER*, Senior District Judge.

Opinion

JACOBS, Circuit Judge.

Plaintiff Richard E. Graham (dba Night Owl Computer Service and then through a corporate entity, Night Owl’s Publisher, Inc.) marketed CD–ROM disks containing compilations of computer programs; defendant Larry D. James created file-retrieval programs that allowed users to access particular programs on Graham’s products or (presumably) other CD–ROM disks. In this case, the parties assert conflicting rights to James’s work product.

Graham now appeals, and James cross-appeals, from a judgment of the United States District Court for the Western District of New York (Elfvin, J.), following a bench trial, awarding James $137,258 in damages on his copyright infringement and breach of contract counterclaims.

On appeal, Graham claims principally that the district court erred: (i) in finding that the program was not a work for hire developed while James was in Graham’s employ and therefore that James owned the copyright for the CD–ROM file-retrieval program; and (ii) in finding copyright infringement even though James granted Graham a license to use the program. James cross-appeals, claiming that the district court erred: (i) in failing to award pre-judgment interest; (ii) in dismissing James’s defamation action based on the common interest privilege; (iii) in failing to enter judgment against Night Owl’s Publisher, Inc., the alleged successor to Graham’s sole proprietorship; and (iv) in denying James’s request
for a continuance to obtain expert testimony.

We affirm the district court’s finding that the file-retrieval program was not a work for hire and its award of breach of contract damages (as well as its denial of pre-judgment interest thereon). We also affirm the district court’s dismissal of James’s defamation counterclaim. However, we vacate the judgment and remand to permit the district court to determine whether Graham’s license to use the file-retrieval program was rescinded, and thus whether Graham infringed James’s copyright. On remand, the district court should reconsider whether judgment should be entered against Graham’s successor, Night Owl’s Publisher, Inc.

**BACKGROUND**

The facts, as found by the district court after a bench trial, are as follows: Graham, until recently doing business as Night Owl Computer Service, markets CD-ROM disks containing compilations of computer programs known as “Shareware,” “Freeware,” and “Public Domain software.” “Shareware” are programs that are created and released to the public to sample, with the understanding that anyone using the software will register with the author and remit a fee. “Freeware” is software available for free use. “Public Domain software” is software unprotected by copyright. Each of Graham’s CD-ROM disk releases contains 5,000 to 10,000 such programs.

Graham’s first CD-ROM disk release, called PDSI–001, was unwieldy because it lacked a file-retrieval program. So before releasing his second CD–ROM product, Graham asked Jeffrey Anderson, a student, to compose a file-retrieval program. Anderson developed a program called NIGHT.EXE in the Quic kBASIC programming language; that program was then incorporated into Graham’s second CD–ROM disk release, PDSI–002. Anderson’s program provided a table of contents for the programs on the disk, but did not allow for actual file retrieval, or for decompression of the files. Because of the number of programs on each disk, the programs had to be compressed prior to placement on the disk and thus decompression was necessary prior to using a program. Although Graham claimed to have participated in the development of NIGHT.EXE, he is not a computer programmer and the trial court found that his role in the program’s development was “negligible.”

Dissatisfied with Anderson’s program, Graham purchased a license for FOLIO, a file-retrieval program with retrieval and decompression capabilities, that Graham used for his next two releases.

In March 1991, he contacted James, a self-taught computer programmer, part-time taxi driver, and computer equipment salesman, and explained to him in general terms what was needed. James agreed to create a file-retrieval program in exchange for a CD–ROM disk drive and credit on the final product. He then created a different QuickBASIC version of NIGHT.EXE, which was included on PDSI–004; unlike Anderson’s program, James’s had retrieval and decompression capabilities. Neither party asserts any claim relating to this version of NIGHT.EXE.

Using “Borland’s C++” language (said to be a superior programming language), James then developed a new version of NIGHT.EXE, which we will call the “C version.” The C version was included in PDSI–004–1, released on August 2, 1991. This was an entirely new program, and Graham’s contribution was limited to communicating the general requirements of the program and collaborating on the organization of the files that the program retrieved.

In composing the C version, James built into it a notice attributing authorship and copyright to himself. In September 1991, Graham and James argued over the copyright notice, with Graham claiming the copyright under the work-for-hire doctrine. At trial, Graham introduced a tape recording of a late-night telephone conversation between himself and James, in which they argued over copyright ownership and their compensation arrangement; the conversation ended without any resolution.

At trial, the parties presented conflicting testimony regarding their compensation and licensing arrangement. Graham claimed that he made several payments to James for developing the C version, including $200 payments in July and August 1991, and three $250 payments in September 1991; Graham claimed that the last three payments were pursuant to a newly-instituted “monthly” salary. James claimed that Graham orally agreed to a licensing arrangement under which Graham would pay
James $1,000 for each CD–ROM release containing the program and $1 for each disk sold, that the five payments evidenced Graham’s partial performance of the licensing agreement, and that Graham promised further payments pursuant to the agreement after he built up his cash reserve. The district court found that “the parties had orally agreed that James would provide Graham with a file retrieval program written in Borland’s C++” and “that Graham would pay James $1,000 for each version provided thereof and one dollar for each disk sold.”

*234 After the late-night telephone conversation, Graham removed James’s copyright notice, repaired a “bug” in the program, and proceeded to release a new version of PDSI–004–1. In October 1991, Graham released PDSI–005, PDSI–006, PDSI–006–1 and PDSI006–2 followed in early- to mid–1992, and NOPV–6 in the summer of 1992. All of these releases contained the C version of NIGHT.EXE (or a slight modification of it).

Variants of the C version were used in NOPV 7,8 and 9; but Graham alleged that these variants were created by other programmers, and the district court concluded that these later programs were not substantially similar to James’s C version.

In September or October 1991, James sold the C version of NIGHT.EXE to another CD–ROM publisher. Graham sued and moved for a preliminary injunction, claiming ownership of the copyright in the C version under the work-for-hire doctrine and asserting that James had infringed Graham’s copyright by selling the program. James counterclaimed, alleging that he owned the copyright and that Graham had infringed his copyright by installing the C version on his CD–ROM releases and removing James’s copyright notice. James also asserted counterclaims for breach of the licensing agreement, unfair competition, defamation, and tortious interference with contractual relations. The district court granted a preliminary injunction enjoining James from “publishing, copying, selling, marketing or otherwise disposing” of programs substantially similar to the C version.

After a bench trial, however, the district court found for James on his breach of contract and copyright infringement counterclaims. It concluded that James owned the C version copyright because he was an independent contractor when he developed the program, and that Graham’s CD–ROM releases from PDSI–004–1 through NOPV–6 contained file-retrieval programs substantially similar to the C version, thereby infringing James’s copyright. The court also rejected Graham’s copyright infringement claim, permanently enjoined Graham from using the program, and dismissed James’s common law counterclaims. On James’s contract counterclaim, the court found that Graham had breached the agreement by failing to pay James $1,000 for each release containing the C version and one dollar for each disk sold.

Damages were awarded as follows: (i) actual damages for breach of contract of $17,716, representing six CD–ROM releases at $1000 per release, and 12,866 disks at $1 per disk, for a total of $18,866, minus the $1,150 already paid to James; and (ii) actual damages and profits for copyright infringement of $119,542, representing: (a) $25,000 for Graham’s failure to credit James with authorship; and (b) $112,258 of profits and actual damages on the six relevant CD–ROM releases, reduced by $17,716 (the amount awarded for breach of contract to avoid double counting).

Later, the court denied James’s motion pursuant to Fed.R.Civ.P. 59 to amend the judgment to add Graham’s successor corporation, Night Owl’s Publisher, Inc. as a judgment debtor, and James’s motion pursuant to Fed.R.Civ.P. 60 to amend the judgment to include pre-judgment interest.

**DISCUSSION**

I

Graham challenges the finding—on which rests the conclusion that the C version was not a work for hire—that James developed the C version as an independent contractor rather than as an employee. We agree with the district court’s analysis and conclusion.

The Copyright Act provides, *inter alia*, that “a work prepared by an employee within the scope of his or her employment” is a work for hire. 17 U.S.C. § 101 (1994). “[T]he employer or other person for whom the work [for hire] was prepared is considered the author” and the employer owns the copyright, absent a written agreement
to the contrary. 17 U.S.C. § 201(b).

For this purpose, “the term ‘employee’ should be understood in light of the general common law of agency.” Community for Creative Non–Violence v. Reid, 490 U.S. 730, 741, 109 S.Ct. 2166, 2173, 104 L.Ed.2d 811 (1989). The Supreme Court in Reid *235 listed factors to be considered in the inquiry, none of which are dispositive:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 751, 109 S.Ct. at 2178–79 (citations omitted).

“The court’s factual findings as to the presence or absence of the Reid factors cannot be disturbed unless clearly erroneous .... [b]ut the ultimate determination of whether [the allegedly infringing product] was a work for hire is reviewed de novo.” Aymes v. Bonelli, 980 F.2d 857, 860–61 (2d Cir.1992). We give greater weight to certain of the Reid factors: (i) the hiring party’s right to control the manner and means of creation; (ii) the skill required; (iii) the provision of employee benefits; (iv) the tax treatment of the hired party; and (v) whether the hiring party had the right to assign additional projects to the hired party. Aymes, 980 F.2d at 861. So in Aymes, although a business directed the creation of the computer program to maintain its financial and inventory records, the program was held not to be a work for hire, because—among other factors—the nonpayment of benefits or payroll taxes to or on behalf of the creator supported the conclusion that the creator was an independent contractor rather than an employee. Id. at 864.

We are persuaded by the district court’s conclusion that James was an independent contractor. Almost all of the Aymes factors line up in favor of that conclusion: James is a skilled computer programmer, he was paid no benefits, no payroll taxes were withheld, and his engagement by Graham was project-by-project. The only Aymes factor arguably favoring Graham is his general control over the work; but the district court has found, plausibly, that Graham’s participation in the development of the C version was minimal and that his instructions to James were very general. We affirm the district court’s determination that the C version was not a work for hire, and that consequently James owns the copyright.

II

Graham claims that even if James owns the copyright in the C version, Graham was licensed to use the copyright under a licensing agreement, and that the district court therefore erred in finding that Graham was an infringer. According to Graham, James was entitled at most to recover for Graham’s breach of the licensing agreement.

Under federal law, “nonexclusive licenses may ... be granted orally, or may even be implied from conduct.” 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 10.03[A][7], at 10–43; see also I.A.E., Inc. v. Shaver, 74 F.3d 768, 775–76 (7th Cir.1996). The district court found that Graham and James had entered into a licensing agreement under which Graham promised to pay James $1,000 for each CD–ROM release containing the C version and one dollar for each disk sold. Graham does not contest on appeal that he breached this agreement by failing to make the required payments, and therefore we affirm the district court’s award of breach of
contract damages.  

*236 However, the award of copyright damages in this case is problematic. A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement. See Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 753 (11th Cir.1997); Peer Int’l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1338–39 (9th Cir.1990); see also United States Naval Inst. v. Charter Communications, Inc., 936 F.2d 692, 695 (2d Cir.1991) (“[A]n exclusive licensee of any of the rights comprised in the copyright, though it is capable of breaching the contractual obligations imposed on it by the license, cannot be liable for infringing the rights conveyed to it.”). Moreover, Graham’s failure to credit James with the copyright on the C version did not itself amount to copyright infringement. According to Nimmer, “The generally prevailing view in this country under copyright law has been that an author who sells or licenses her work does not have an inherent right to be credited as author of the work. In line with that general rule, it has been held not to infringe an author’s copyright for one who is licensed to reproduce the work to omit the author’s name.” 3 Nimmer on Copyright, supra, § 8D.03[A][1], at 8D–32 (citations omitted). Thus, as James concedes, the district court could not have found that Graham infringed James’s copyright unless the licensing agreement already had been rescinded; the problem is that the district court made no such finding. James endeavors to overcome that problem in four ways, but without success.

First, James argues that Graham failed to plead the license as an affirmative defense to infringement, and thereby waived it. See Bourne v. Walt Disney Co., 68 F.3d 621, 631 (2d Cir.1995) (noting that burden of proving existence of license is on licensee), cert. denied, 517 U.S. 1240, 116 S.Ct. 1890, 135 L.Ed.2d 184 (1996). But the existence of a license was essentially uncontested in this case. James affirmatively alleged in his answer and counterclaim (in support of his breach of contract action) that “[o]n or about May 1991, defendant orally agreed to grant plaintiff the right to use his computer program on CD–ROM disks in exchange for a fee of $1,000 for each CD–ROM version issued and a $1.00 fee for each copy of such version sold by plaintiff.” What is disputed here is the scope of the license and how long the license lasted. As we said in Bourne, when the contested issue is the scope of a license, rather than the existence of one, the copyright owner bears the burden of proving that the defendant’s copying was unauthorized under the license and the license need not be pleaded as an affirmative defense. Id. So the burden was on James as the copyright owner to show that the allegedly infringing acts were not allowed by the license; Graham’s reply pleading did not amount to a waiver of his present position.

Second, James argues that Graham’s license permitted use of the C version only on the PDSI–004–1 CD–ROM, and not on any subsequent release. The short answer is that the district court implicitly found otherwise in awarding James breach of contract damages on all six CD–ROM releases which used the C version, because the contract Graham breached was the license.

Third, James argues that the license was voided when Graham breached its conditions by nonpayment of royalties and removal of James’s copyright notice. This argument turns—and fails—on the distinction in contract between a condition and a covenant. Generally, “[i]f the [licensee’s] improper conduct constitutes a breach of a covenant undertaken by the [licensee] ... and if such covenant constitutes an enforceable contractual obligation, then the [licensor] will have a cause of action for breach of contract,” not copyright infringement. 3 Nimmer on Copyright, supra, § 10.15[A], at 10–120. However, “[i]f the nature of a licensee’s violation consists of a failure to satisfy a condition to the license ... it follows that the rights dependant upon satisfaction of such condition have not been effectively licensed, and therefore, any use by the licensee is without authority from the licensor and may therefore, constitute an infringement of copyright.” Id. at 10–121 (citations omitted); see also Fantastic Fakes, Inc. v. Pickwick Int’l, Inc., 661 F.2d 479, 483–84 (5th Cir.1981). A condition has been defined as “any fact or event which qualifies a duty to perform.” Costello Publ’g Co. v. Rotelle, 670 F.2d 1035, 1045 n. 15 (D.C.Cir.1981) (citing Corbin, Conditions in the Law of Contract, 28 Yale L.J. 739 (1919)).

We think that the payment of royalties and the inclusion of a notice crediting James’s authorship are to be considered covenants, not conditions. The construction of the licensing agreement is governed by New York law. See Bartsch v. Metro–Goldwyn–Mayer, Inc., 391 F.2d 150, 153 (2d Cir.1968). Generally speaking, New York respects a presumption that terms of a contract are covenants rather than conditions. See Grand Union Co. v. Cord Meyer Dev. Co., 761 F.2d 141, 147 (2d Cir.1985) (“In the absence of more compelling evidence that the
Graham v. James, 144 F.3d 229 (1998)

parties intended to create a condition, the negotiation provision must be construed as a promise or covenant.”); Warth v. Greif, 121 A.D. 434, 106 N.Y.S. 163, 165 (2d Dep’t 1907) (“The law favors covenants, rather than conditions precedent.”), aff’d, 193 N.Y. 661, 87 N.E. 1129 (1908). Graham and James orally agreed to the licensing agreement and did not clearly delineate its conditions and covenants. Further, it is important that James turned over the C version for use before any royalties were paid, and that the first version of PDSI–004–1 was published with the proper notice of authorship, because contract obligations that are to be performed after partial performance by the other party are not treated as conditions. 22 N.Y. Jur.2d Contracts § 265 (1996); see also Jacob Maxwell, Inc., 110 F.3d at 754 (holding that payment of royalties and crediting of author were covenants because “[the composer] expressly granted [the licensee] permission to play the song before payment was tendered or recognition received”); I.A.E., Inc., 74 F.3d at 778 (holding that full payment was not a condition precedent when the licensee received the copyrighted drawings after tendering only half the required payment).

Guided by that analysis, together with New York’s presumption favoring covenants over conditions and the district court’s clear finding that a licensing agreement came into existence, we conclude that the notice and royalty obligations would likely be considered covenants, and cannot be relied upon by James as conditions.

Finally, James argues that even if the nonpayment of royalties and the removal of James’s authorship credit amount to no more than breaches of covenants, these breaches terminated the license. A material breach of a covenant will allow the licensor to rescind the license and hold the licensee liable for infringement for uses of the work thereafter. See Rano v. Sipa Press, Inc., 987 F.2d 294, 300–301, 586 (9th Cir.1993) (“[A] material breach of a licensing agreement gives rise to a right of rescission which allows the nonbreaching party to terminate the agreement.”); Costello Publish’g Co., 670 F.2d at 1045 (“[E]ven if the counterclaims asserted merely constitute a breach of contract, an action for copyright infringement would lie if the breach is so material that it allows the grantor power to recapture the rights granted so that any further use of the work was without authority.”); 3 Nimmer on Copyright, supra, § 10.15[A], at 10–123–10–125; see also Laliram Ltd. v. Acess Broad. Servs., Inc., 128 F.3d 872, 882–83 (5th Cir.1997) (holding that non-exclusive license is not revocable at will of licensor). Under New York law, rescission is permitted if the breach is “material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.” Septembertide Publish’g B.V. v. Stein and Day, Inc., 884 F.2d 675, 678 (2d Cir.1989) (internal quotation marks and citation omitted).

Even assuming Graham materially breached the licensing agreement and that James was entitled to rescission, such rescission did not occur automatically without *238 some affirmative steps on James’s part. 22A N.Y. Jur.2d Contracts § 497 (1996) (“The failure of a party to perform his part of a contract does not per se rescind it. The other party must manifest his intention to rescind within a reasonable time.”); see also Jacob Maxwell, Inc., 110 F.3d at 753 (“Such a breach would do no more than entitle [the composer] to rescind the agreement and revoke its permission to play the song in the future, actions [the composer] did not take during the relevant period. One party’s breach does not automatically cause [rescission] of a bilateral contract.”) (emphasis omitted). Similarly, although James sometimes characterizes the licensing agreement as abandoned, abandonment of a contract can be accomplished only through mutual assent of the parties, as demonstrated by positive and unequivocal conduct inconsistent with an intent to be bound. See Armour & Co. v. Celic, 294 F.2d 432, 435–36 (2d Cir.1961). New York law does not presume the rescission or abandonment of a contract and the party asserting rescission or abandonment has the burden of proving it. See id. at 436.

We vacate the copyright infringement award because: (i) the record does not show that James was permitted to and did rescind the license or that Graham and James agreed to abandon the licensing agreement; (ii) the district court made no finding on this issue; and (iii) it does not appear that the district court recognized this defect in its decision. We remand for determinations as to whether Graham materially breached the licensing agreement and whether the agreement was actually rescinded or abandoned prior to the allegedly infringing acts, and for any further proceedings needed to make those determinations.

Even though we remand to the district court to resolve this factual issue, we think it useful to decide the other issues raised by the parties.
Graham argues that the district court insufficiently justified the $25,000 damages award for Graham’s omission of a notice of James’s authorship. There is authority for awarding such damages. See Stodart v. Mutual Film Corp., 249 F. 507, 511 (S.D.N.Y.1917) (L.Hand, J.), aff’d, 249 F. 513 (2d Cir.1918); 4 Nimmer on Copyright, supra, § 14.02[B], at 14–19 (noting that “the plaintiff may be able to recover certain additional items of actual damages .... [including] loss of the value of being credited as the author of the work”); see also Sunset Lamp Corp. v. Alsy Corp., 749 F.Supp. 520, 524–25 (S.D.N.Y.1990) (permitting award of actual damages for loss of sales of non-infringed products resulting from infringement of product which plaintiff considered “door opener” to market if plaintiff demonstrated causal connection). But if the owner of a copyright may win an infringement award representing lost opportunity, the amount of actual damages must be based on more than speculation. See Business Trends Analysts, Inc. v. Freedonia Group, Inc., 887 F.2d 399, 407 (2d Cir.1989) (“Where there is no evidence at all allowing an assessment of the value of ["enhanced good will" or “market recognition”], establishment of the fact of *239 enhancement will not support an award.”); Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 470 (2d Cir.1985).

The district court noted that the $25,000 award was “uncontested,” and cited no record evidence to support it. But Graham clearly opposed this award of damages, even if he did not address the amount specifically. And James candidly conceded at oral argument that, as far as counsel could tell, the $25,000 amount was arbitrary. In the absence of any stated basis for this award, we must vacate it. However, because we remand on other grounds, we do not foreclose the possibility that this kind of damages, or even this amount, may be supported on remand by evidence of nonspeculative damages traceable to Graham’s failure to credit James’s authorship. Alternatively (given sufficient proof), the same loss might be recompensed as breach of contract damages if the failure to credit James’s authorship amounted to a breach of the licensing agreement.

James cross-appeals on several grounds.

First, James argues that the district court erred in failing to award him pre-judgment interest on his contract and copyright damages. James failed to request pre-judgment interest prior to entry of judgment, and first moved for that relief in his motion to amend the judgment pursuant to Fed.R.Civ.P. 60, which the district court denied.

Under New York law, “prejudgment interest is normally recoverable as a matter of right in an action at law for breach of contract.” Adams v. Lindblad Travel, Inc., 730 F.2d 89, 93 (2d Cir.1984); see N.Y. C.P.L.R. § 5001 (McKinney 1992). However, relying on Paddington Partners v. Bouchard, 34 F.3d 1132, 1142–44 (2d Cir.1994), the district court properly denied the post-judgment motion for an award of pre-judgment interest pursuant to Rule 60(a), and did not abuse its discretion in denying such relief pursuant to Rule 60(b).

Further, although Paddington noted that “a district court may add pre-decision interest to a judgment when the question of damages is reversed on appeal and the entire question of damages is remanded for reconsideration or recalculation,” id. at 1144, this exception does not apply here because we have affirmed the damage award on the contract claim, and the parties’ expectation of finality relating to this award has not been disturbed. Cf. Adams, 730 F.2d at 93 (permitting district court award of pre-judgment interest on contract damages on remand for redetermination of contract damage award); Newburger, Loeb & Co. v. Gross, 611 F.2d 423, 432–33 (2d Cir.1979) (upholding district court’s sua sponte award of pre-judgment interest on damages on remand for redetermination of several aspects of that damages award).²

Second, as to the defamation counterclaim, James argues that Graham waived his defense under the common interest privilege by failing to plead it in his reply. However, James’s counterclaim failed to identify the persons to whom Graham had made the allegedly libelous statements, so it cannot be deemed that Graham was aware at the time of his reply that he shared a common interest with them. Once the allegations became more focused, Graham timely asserted this privilege, albeit in his post-trial brief. We therefore affirm the district court’s dismissal of James’s defamation counterclaim.

Third, James argues that the district court erred in denying
his Rule 59 motion to amend the judgment to hold Night Owl’s Publisher, Inc. (“Owl’s Inc.”) liable for the award. During the trial, James moved orally to amend his complaint to add Owl’s Inc. as a plaintiff. In its findings of fact and law, the district court granted this motion, finding that “Graham was an individual doing business under an assumed name and has, since the commencement of this action, incorporated such business as Night Owl’s Publisher, Inc., a New York Subchapter S corporation,” that Graham was the sole officer, director and shareholder of the corporation, and that “Night Owl’s has stepped into the shoes of Graham’s former sole proprietorship.” But *240 the district court’s final judgment does not list Owl’s Inc. as a judgment debtor.

Following the trial, James made a timely motion pursuant to Rule 59(e) to amend the judgment to include Owl’s Inc. as a judgment debtor. The district court denied the motion, having found no evidence that Graham was trying to evade the judgment by transferring assets to Owl’s Inc., and noting that James could just as well seize Graham’s ownership interest in Owl’s Inc. to enforce the judgment against Graham.

There does seem to be no evidence that Graham was attempting to evade the judgment through Owl’s Inc., but the district court failed to consider the other theory of successor liability proposed by James: the “mere continuation” theory. Under both New York state and federal law, the general rule is that a corporation that acquires the assets of another corporation is not liable for the torts of its predecessor. See B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir.1996); Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 244–45, 464 N.Y.S.2d 437, 440, 451 N.E.2d 195 (1983). An exception arises when, *inter alia*, the “purchasing corporation was a mere continuation of the selling corporation.” Id.; see also B.F. Goodrich, 99 F.3d at 519. Under the common law mere continuation theory, successor liability attaches when the plaintiff demonstrates “the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations.” B.F. Goodrich, 99 F.3d at 519; see also Ladjevardian v. Laidlaw–Coggeshall, Inc., 431 F.Supp. 834, 839 (S.D.N.Y.1977) (holding that “mere continuation” exception applies when there is “something in the nature of a corporate reorganization, rather than a mere sale”). “The traditional rule of corporate successor liability and the exceptions to the rule are generally applied regardless of whether the predecessor or successor organization was a corporation or some other form of business organization.” 63 Am.Jur.2d Products Liability § 117 (1984).

On remand, the district court should consider the applicability of the mere continuation theory, especially in light of the district court’s finding that Graham is the sole officer, director and shareholder of the corporation, and in light of Graham’s testimony that he transferred all of his business assets from his sole proprietorship to Owl’s Inc., including the customer lists, stock, and machinery. Fourth, James argues that the district court abused its discretion in preventing him from reopening the evidentiary record to view the source code of the file-retrieval programs used on NOPV–7, 8 & 9, and to present evidence of substantial similarity to the C version.

We see no abuse of discretion: (i) James presented no credible evidence of substantial similarity between the C version and the file-retrieval program on these later CD–ROM releases; (ii) the court’s own comparison found a lack of the same obvious similarity found in the file-retrieval programs on the earlier CD–ROM releases; (iii) Graham’s expert testified that the two programs were not substantially similar; and (iv) James made no commitment to retain an expert to make the necessary comparison.

**CONCLUSION**

We affirm the district court’s finding that the file-retrieval program was not a work for hire and its award of breach of contract damages (as well as its denial of pre-judgment interest thereon). We also affirm the district court’s dismissal of James’s defamation counterclaim. However, we vacate the judgment and remand to permit the district court to determine whether Graham’s license to use the file-retrieval program was rescinded, and the related question of whether Graham infringed James’s copyright. On remand, the district court should reconsider whether judgment should be entered against Graham’s successor, Night Owl’s Publisher, Inc.

**All Citations**

Graham v. James, 144 F.3d 229 (1998)

Footnotes

* Honorable Jacob Mishler, of the United States District Court for the Eastern District of New York, sitting by designation.

1 Although the parties sometimes refer to the corporation as “Night Owl Publisher, Inc.,” we will use the district court’s designation of the corporation, i.e., “Night Owl’s Publisher, Inc.”

2 It is undisputed that the final copy of the C version contained a “bug.” Graham argues, for that reason, that the district court erred in finding that James had fully performed his contract obligations. However, the district court credited James’s testimony to the effect “that the program with this bug was not intended to be the version released to the public, but a working ‘Beta’ copy and that, hence, [James’s] performance under the contract should not be deemed partial or incomplete.” The conclusion that James fully performed his obligations under the contract was not clearly erroneous.

Graham also challenges the finding that he is contractually bound to pay $1,000 for each CD–ROM release; he claims that the deal was $1,000 for each new version of the C version produced by James, and that James never produced another version. The district court did not clearly err in rejecting this argument: James testified that he was to receive $1,000 for, as he phrased it, “each initial cut,” and James set up a subsequent arrangement for the sale of the C version to another CD–ROM publisher which provided for payment of $1,000 per CD–ROM release.

3 James points to several actions by Graham that he claims terminated the contract, including that “Graham swore at James after James refused to remove his copyright notice,” and that Graham commenced a lawsuit against James asserting copyright infringement. However, it is unclear from the record whether James, the non-breaching party, gave notice of rescission or abandoned the licensing agreement. In fact, when James asserted his counterclaims, he asserted a breach of contract claim arising from the licensing agreement, without alleging that he had rescinded or terminated the agreement. Moreover, although the district court referenced the September 24, 1991 “termination of the parties’ relationship,” it is not clear whether this included a rescission of the licensing agreement as well, or merely involved a termination of their personal relationship.

4 We note that even if the district court finds that the licensing agreement was terminated in September 1991, the contract damages representing subsequent releases and disk sales may still stand because Graham has not contested those damages on appeal and because the contract damages represent James’ expectation damages—i.e., the amount he would have been paid had the contract not been breached. Of course, as the district court realized, any contract damages representing actual copyright damages would have to be subtracted from the final copyright award to avoid double recovery.

5 Although James also seeks prejudgment interest on his copyright infringement damages, that issue is not ripe since it is unclear whether James is entitled to any copyright damages.
Graham v. James, 144 F.3d 229 (1998)
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

XCLUSIVE-LEE, INC.,

Plaintiff,

v.                               No. 19 Civ. 520

JELENA NOURA “GIGI” HADID,

Defendant.

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT’S MOTION TO DISMISS

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May 1, 2019
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Defendant Jelena Noura “Gigi” Hadid, by her attorneys Kaplan Hecker & Fink LLP, respectfully submits this memorandum of law in support of her motion to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**PRELIMINARY STATEMENT**

Ms. Hadid is a famous American supermodel. It is an unfortunate reality of Ms. Hadid’s day-to-day life that paparazzi make a living by exploiting her image and selling it for profit. This lawsuit takes that practice to a new level: the Complaint seeks substantial monetary damages from Ms. Hadid based on allegations that she found a copy of a photograph of herself online and reposted it to her personal Instagram account, where it remained for a matter of days.

The plaintiff in this case, Xclusive-Lee, Inc. (“Xclusive”), did not take the photograph at issue and identifies no harm it suffered on account of the allegedly infringing conduct. Xclusive nevertheless brings claims against Ms. Hadid for direct and contributory copyright infringement. Its Complaint is fatally flawed in multiple respects. Xclusive does not allege that a valid copyright has been registered for the photograph. Nor does it allege the requisite written assignment or licensing agreement that expressly gives Xclusive the right to bring the accrued claims of the unidentified photographer. And the Complaint establishes that Ms. Hadid’s reposting of the photograph was fair use and consistent with an implied license.

In light of these fundamental defects, this lawsuit appears to be nothing more than an effort to extract money from Ms. Hadid, presumably based on a calculation that, even in a meritless case like this one, the anticipated costs of litigation would cause Ms. Hadid to pay out a modest settlement. This sort of misuse of the Copyright Act should not be countenanced. For the reasons set forth below, the Complaint should be dismissed.
BACKGROUND

Being followed and photographed is not an uncommon experience for the 24-year-old Ms. Hadid, and in that respect October 11, 2018, was a day no different than most. As Ms. Hadid exited a non-descript building in New York City, she encountered a photographer waiting for her outside. Compl. ¶ 8 & Ex. 1. Although these encounters are often disruptive or even unsettling, in this particular instance Ms. Hadid decided to indulge the photographer. She stopped and posed for the camera—and in that moment the photographer snapped a photograph. Id., Ex. 1.

The next day, Ms. Hadid allegedly found a copy of the resulting photograph published online and reposted a cropped version of it to her personal Instagram page. Id. ¶¶ 9-11; compare Ex. 1 (original photograph) with Exs. 3-4 (cropped version). The cropped version allegedly remained on Ms. Hadid’s Instagram page for a matter of days. Id. ¶¶ 10, 13.

Months later, Xclusive filed this suit. All the Complaint offers about Xclusive is that it is a domestic business corporation that operates out of Queens, and it claims to be the owner or exclusive licensee of the photograph that the unidentified photographer took of Ms. Hadid last year. Id. ¶¶ 1, 8, 19. Xclusive makes no allegations about how it came to have any rights in the photograph.

Although Xclusive alleges that the photograph is the “subject of a valid and complete application” for registration before the Copyright Office, id. ¶ 19, Xclusive’s name appears nowhere on the copyright registration page attached to the Complaint, id., Ex. 2. Xclusive makes no allegation that the copyright in the photograph has actually been registered.

Based on Ms. Hadid’s reposting of her own image on her own Instagram page, Xclusive brings claims for direct and contributory copyright infringement. Id. ¶¶ 21, 24. Xclusive does not allege any damages actually suffered as the result of the alleged infringement. In its prayer for
relief, however, Xclusive seeks the maximum possible statutory damages permitted for willful infringement—that is, $150,000. See 17 U.S.C. § 504(c)(2).¹

ARGUMENT

In order to state a claim for copyright infringement, a plaintiff must plead “(1) the specific original works [that] are the subject of the copyright claim; (2) that plaintiff owns the copyrights in those works; (3) that the copyrights were registered in accordance with 17 U.S.C. § 411; and (4) the acts by which and the time period during which the defendant infringed the copyright.” Wolo Mfg. Corp. v. ABC Corp., 349 F. Supp. 3d 176, 202 (E.D.N.Y. 2018) (quotation marks omitted). Failure to plead “enough facts to state a claim to relief that is plausible on its face” requires dismissal of a plaintiff’s claim, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and “mere conclusory statements” and “naked assertions devoid of further factual enhancement” will not suffice, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotation marks and brackets omitted).

The Complaint here does not satisfy even the most basic requirements of a copyright claim, failing to allege both registration of the photograph and the ownership of accrued claims necessary to bring this action. The Complaint also makes clear that Ms. Hadid’s reposting of the photograph of herself on her personal Instagram page was fair use and consistent with an implied license. Finally, the claim for contributory infringement suffers from additional defects, most

¹ Xclusive appears to rest its claim of willful infringement on an allegation that Ms. Hadid settled a similar lawsuit brought in the Eastern District of Virginia. Compl. ¶¶ 15-16. A settlement, of course, is not “evidence of wrongdoing.” Morris v. City of New York, No. 12 Civ. 3959, 2013 WL 5781672, at *11 (E.D.N.Y. Oct. 28, 2013), aff’d, 604 F. App’x 22 (2d Cir. 2015). More importantly, nothing on the docket in the lawsuit referenced by the Complaint indicates that that case was settled. See Cepeda v. Hadid, No. 17 Civ. 989 (E.D. Va.). To the extent that David Deal, who served as counsel to the plaintiff in that case and also serves as Xclusive’s counsel here, has disclosed confidential information pertaining to a settlement to Xclusive or to others, Ms. Hadid reserves all rights to seek an appropriate remedy. Despite appearing on the Complaint and communicating with Ms. Hadid’s counsel, Mr. Deal has not filed an application for admission pro hac vice in this case.
notably the failure to allege any instance of primary infringement to which Ms. Hadid contributed. As set forth more fully below, the claims against Ms. Hadid should be dismissed.

I. THE COMPLAINT DOES NOT ALLEGE BASIC ELEMENTS OF A COPYRIGHT INFRINGEMENT CLAIM

First, the Complaint should be dismissed because Xclusive does not allege that it has obtained the copyright registration necessary to bring this action.

The Copyright Act imposes a “statutory condition that requires a party to take some action before filing a lawsuit.” Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010). Specifically, the Act provides that, with exceptions not relevant here, “no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. § 411(a). Registration occurs when the Copyright Office, “after examination, . . . determines that . . . the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met.” Id. § 410(a).

By its own account, Xclusive has not registered the photograph. It alleges only that it has submitted “a valid and complete application” to the Copyright Office. Compl. ¶ 19. But the law is clear that merely submitting “the application, materials, and fee required for registration” is insufficient. Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 888 (2019); accord, e.g., Corbis Corp. v. UGO Networks, Inc., 322 F. Supp. 2d 520, 521 (S.D.N.Y. 2004) (dismissing case “even though [the images at issue were] the subject of pending applications for registration”). Rather, “registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.” Fourth Estate, 139 S. Ct. at 886. Contrary to Xclusive’s suggestion, “individual District Court judges” have no “discretion” to hold otherwise. ECF No. 11 at 1. Because Xclusive filed this action
before registering the photograph, in violation of § 411(a), its Complaint must be dismissed. See Fourth Estate, 139 S. Ct. at 886; Capitol Records, Inc. v. Wings Dig. Corp., 218 F. Supp. 2d 280, 284 (E.D.N.Y. 2002) (dismissing copyright claims based on pending applications).²

Second, the Complaint should be dismissed because Xclusive fails to allege facts demonstrating that it is the proper plaintiff to bring this action.

As a rule, only the “legal or beneficial owner” of a copyright is entitled to claim “infringement of [a] particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b) (emphasis added). Because copyright “vests initially in the author or authors of the work,” id. § 201(a), it is the photographer who might have a basis to sue for infringement that allegedly took place the day after the photograph was taken, see Compl. ¶¶ 8-9.

The question, then, is whether the Complaint alleges “sufficient facts” demonstrating that the unidentified photographer transferred his or her right to sue over the alleged infringement to Xclusive. Iqbal, 556 U.S. at 687. An original author “can assign its copyright but, if the accrued causes of action are not expressly included in the assignment, the assignee will not be able to prosecute them.” ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2d Cir. 1991). The same is true for exclusive licensees, who may bring an action for past infringement only where the document granting the exclusive license “states explicitly that it includes the causes of action . . . accrued prior to the grant.” Getty Images (US) Inc. v. Advernet, Inc., 797 F.

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² Dismissal would be required even if the photograph were registered while this action was pending. Where a statute bars a plaintiff from “bringing—not continuing to prosecute—” a lawsuit, a plaintiff cannot avoid dismissal if circumstances change during litigation. United States ex rel. Wood v. Allergan, Inc., 899 F.3d 163, 172 (2d Cir. 2018) (filing deficiency could not be “cured” because “amended or supplemental pleading cannot change the fact that [plaintiff] brought an action” in violation of statute); see also McNeil v. United States, 508 U.S. 106, 111-13 (1993) (where statute provides that action “shall not be instituted” unless plaintiff has exhausted administrative remedies, dismissal is required even where remedies were exhausted post-filing); Hallstrom v. Tillamook Cty., 493 U.S. 20, 25, 31 (1989) (where statute provides that “no action may be commenced” unless plaintiff has given 60 days’ notice to defendant, dismissal of premature suit is required even if a 60-day stay could serve the same purpose). That rule applies here. Section 411(a) barred Xclusive from “institut[ing]” an action before obtaining registration. Xclusive violated this precondition, and later events cannot save it from the consequences.
Supp. 2d 399, 412-13 (S.D.N.Y. 2011). Without allegations of a written agreement expressly transferring the right to sue for past infringement, a complaint by a transferee plaintiff must be dismissed. See, e.g., Hutson v. Notorious B.I.G., LLC, No. 14 Civ. 2307, 2015 WL 9450623, at *4 (S.D.N.Y. Dec. 22, 2015) (dismissing infringement claims because plaintiff “fail[ed] to plausibly allege that he owned a copyright interest in the Composition at the time of the alleged infringement . . . or was subsequently transferred copyright ownership that expressly included the right to sue for causes of action that accrued prior to his ownership”); Papa’s-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1160 (S.D.N.Y. 1996) (dismissing claims where “complaint does not allege a signed writing as required by” the Copyright Act and thus “there was no transfer of copyright ownership”). Contra ECF No. 11 at 2 (suggesting without any citation that allegations regarding assignment are “not required under the Federal Rule[s] of Civil Procedure”).

The Complaint here fails to make the allegations necessary to show Xclusive’s entitlement to bring the photographer’s accrued claims. The Complaint does not allege any relationship between Xclusive and the photographer, and Xclusive’s name appears nowhere in the copyright application that the Complaint attaches. Instead, the Complaint simply alleges that Xclusive is “the copyright holder” or “the copyright owner or licensee of exclusive rights.” Compl. ¶¶ 8, 19. But these conclusory and inconsistent allegations are insufficient under applicable pleading standards. Iqbal, 556 U.S. at 678. Further, even if Xclusive was an owner or exclusive licensee when this case was filed in January 2019, it does not follow that Xclusive obtained the right to bring claims for infringement allegedly committed in October 2018. See ABKCO Music, Inc., 944 F.2d at 980; Getty Images (US) Inc., 797 F. Supp. 2d at 412. More would be needed to show Xclusive’s entitlement to sue—namely, allegations of a (i) written (ii)
assignment or an exclusive licensing agreement (iii) that expressly gives Xclusive the right to assert the photographer’s accrued claims. Because the Complaint does not contain such allegations, Xclusive’s claims should be dismissed. See Hutson, 2015 WL 9450623, at *4;

Papa’s-June Music, 921 F. Supp. at 1160.

II. THE COMPLAINT SHOWS THAT MS. HADID’S USE OF THE PHOTOGRAPH WAS PERMISSIBLE

Even leaving aside its most obvious deficiencies, the Complaint establishes that Ms. Hadid’s reposting of the photograph on her personal Instagram page was fair use and consistent with an implied license, and therefore not actionable. See Oyewole v. Ora, 291 F. Supp. 3d 422, 436 (S.D.N.Y. 2018) (dismissing infringement claims on fair use grounds).

A. Fair Use

The fair use doctrine espouses an “equitable rule of reason” allowing others to “use the copyrighted material in a reasonable manner without [the author’s] consent.” Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549, 560 (1985) (quotation marks omitted). Fair use requires “an open-ended and context-sensitive inquiry,” Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006), in which courts consider the four statutory factors from 17 U.S.C. § 107, along with “any other relevant considerations,” to determine whether a use was fair. Fox News Network v. Tveyes, Inc., 883 F.3d 169, 180 (2d Cir. 2018). The doctrine has been applied in a wide variety of contexts to “limit an author’s rights to control original and derivative works.” Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 95 (2d Cir. 2014); see, e.g., Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2d Cir. 2015) (Google’s copying of tens of millions of books that could be searched by internet users was fair use); Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 92 (2d Cir. 2014) (Bloomberg’s dissemination to paid subscribers of plaintiff’s entire sound recording of earnings call was fair use).
Here, all four fair use factors favor Ms. Hadid.

The first factor assesses “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). A principal consideration is whether a particular use is “transformative,” and as a general matter, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); see also *Blanch*, 467 F.3d at 253, 256 (first factor “strongly favored the defendants” given transformative nature of use, despite fact that appropriation of photograph earned defendants “substantial profit”). But “transformative use is not absolutely necessary,” *Campbell*, 510 U.S. at 579, and where a use is not transformative, the question of “whether the new use is commercial thus acquires [greater] importance,” *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (recognizing that in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), “the copied work was saved by its private, noncommercial character”). A use will be considered commercial where “a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work.” *Blanch*, 467 F.3d at 253 (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

According to the Complaint, Ms. Hadid merely reposted the photograph to her Instagram page and made no effort to commercially exploit it. Compl. ¶¶ 9-11. Her reposting thus reflected a personal purpose different than the photographer’s purpose in taking the photograph, which was to commercially exploit Ms. Hadid’s popularity. *See Blanch*, 467 F.3d at 252 (first factor favored defendant where defendant’s “purposes in using [image in collage were] sharply different from [plaintiff’s] goals”); *Stern v. Lavender*, 319 F. Supp. 3d 650, 681 (S.D.N.Y. 2018)
(first factor favored defendants where “aim in displaying online a photograph of the works for sale” was different than artist’s original purpose in creating those works). Even if Ms. Hadid’s alleged use is not considered transformative, its noncommercial nature weighs strongly in her favor. Indeed, there is no allegation that Ms. Hadid, by reposting the photograph to her Instagram page, “capture[d] significant revenues as a direct consequence of copying the original work.”

Blanch, 467 F.3d at 253 (quoting Am. Geophysical Union, 60 F.3d 922).

The second factor looks at “the nature of the copyrighted work.” 17 U.S.C. § 107(2). This inquiry into the “value of the materials used” recognizes that “some works are closer to the core of intended copyright protection than others.” Campbell, 510 U.S. at 586 (quotation marks omitted). If a work “is of the creative or instructive type that the copyright laws value and seek to foster,” the second factor will more likely favor an author. HathiTrust, 755 F.3d at 96 (quotation marks omitted). The law gives “greater leeway,” however, to a claim of fair use “where the work is factual or informational,” particularly where the work has already been published. Oyewole, 291 F. Supp. 3d at 435 (quoting Blanch, 467 F.3d at 256).

The published photograph here depicts Ms. Hadid smiling while standing in front of a non-descript building. See Compl., Ex. 1. It is not a studio composition but rather a quick “shot in a public setting,” and there is no allegation that the photographer “attempted to convey ideas, emotions, or in any way influence [the subject’s] pose, expression, or clothing.” Katz v. Google Inc., 802 F.3d 1178, 1183 (11th Cir. 2015). In such circumstances, the photograph is considered a factual work, not a creative one, thus favoring a determination of fair use. See id.; Otto v. Hearst Commc’ns, Inc., 345 F. Supp. 3d 412, 430 (S.D.N.Y. 2018) (second factor favored fair use where photograph at wedding was “spontaneously taken to document its subjects, as they
were in the moment,” and where photographer “did not direct or pose the subjects of the photo, nor control the lighting or the background”).

In fact, the second factor strongly favors Ms. Hadid here because Ms. Hadid posed for the camera and thus herself contributed many of the elements that the copyright law seeks to protect. See Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (elements of originality in photograph include “posing [of] the subjects”); see also Gillespie v. AST Sportswear, Inc., No. 97 Civ. 1911, 2001 WL 180147, at *5 (S.D.N.Y. Feb. 22, 2001) (jury could find defendant was joint author of photographs where defendant contributed to “clothing” and “poses” of models). Where creative features come not from the photographer but rather from the subject, holding the subject liable for infringement does not nothing to “foster” what the Copyright Act values, HathiTrust, 755 F.3d at 96, and may well do the opposite, see Oyewole, 291 F. Supp. 3d at 432-33 (“ultimate test of fair use” is whether copyright’s goals “would be better served by allowing the use than by preventing it” (quotation marks omitted)).

The third factor considers “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). Courts examine both the “quantitative and qualitative aspects of the portion of the copyrighted material taken.” Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006). Generally speaking, “the more of a copyrighted work that is taken, the less likely the use is to be fair.” Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998). However, even “copying the entirety of a work” will not “necessarily weigh against” a fair use determination. Bill Graham Archives, 448 F.3d at 613.

Here, the version of the photograph that Ms. Hadid allegedly posted on Instagram appears to be roughly 50 percent of the original: the bottom half of the photograph is removed,
and the top half is more tightly framed around Ms. Hadid herself. See Compl., Exs. 1, 3-4. The cropped photograph thus focuses more heavily on Ms. Hadid’s contributions to the photograph (her pose, including the positioning of her hand below her chin) and deemphasizes the photographer’s (overall framing of the photograph). See Blanch, 467 F.3d at 258 (third factor favored fair use where, inter alia, cropped image did not reflect photographer’s “key creative decisions”). Because the allegedly infringing image uses just a portion of the original and takes no more than is necessary to capture Ms. Hadid’s own contributions, the third fair use factor weighs in Ms. Hadid’s favor.

The fourth factor looks at “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). It is the most “important element of fair use” and “focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues.” Fox News, 883 F.3d at 179 (quotation marks omitted).

The Complaint does not allege that Ms. Hadid’s use deprived Xclusive of any, much less “significant,” revenue. Id. Nor could it. Ms. Hadid merely posted a cropped version of an already-published photograph on her personal Instagram page. Compl. ¶¶ 9-11 & Exs. 3-4. Ms. Hadid does not claim the right to make her own licenses of the photograph to other publications, and thus any future licenses will need to be obtained from Xclusive. As a result, Ms. Hadid’s Instagram post is hardly the “significantly competing substitute” the fourth fair use factor contemplates. Google, Inc., 804 F.3d at 223. Moreover, there is no risk of “market harm that would result from unrestricted and widespread conduct of the same sort” that Ms. Hadid allegedly committed here. Fox News, 883 F.3d at 179 (quotation marks and brackets omitted). The reasons why fair use protects Ms. Hadid against Xclusive’s claims are unique to her as the
subject of the photograph at issue, and a determination in her favor would not permit anyone else to repost the photograph on Instagram or use it in any other forum.

Finally, the “other relevant considerations” that courts should consider, Fox News, 883 F.3d at 180, also weigh in Ms. Hadid’s favor. Xclusive itself emphasizes Ms. Hadid’s popularity, Compl. ¶ 2, and the potential to profit from paparazzi photographs is indisputably tied to the fame of their subjects. It is one thing for paparazzi to take advantage of Ms. Hadid by surveilling her, taking photographs of her every public movement, and selling them for profit. It is quite another to demand damages based on an Instagram post by the very person whose image the photographer sought to exploit in the first place.

More pointedly still, the photograph here was only possible because of the cooperation of Ms. Hadid in the photograph’s creation. Although it can be disruptive and unsettling to encounter anonymous men with cameras as she goes about her daily life, in this instance Ms. Hadid indulged the photographer and posed as he captured her image. Only by permitting subjects to make minimal personal use of the paparazzi photographs in which they appear will such subjects remain willing to facilitate the creation of such photographs in the first place. Accordingly, to the extent copyright law seeks to promote the creation of photographs like the one at issue here, that goal “would be better served by allowing [Ms. Hadid’s] use than by preventing it.” Blanch, 467 F.3d at 251 (quotation marks omitted).

These considerations, in combination with the four statutory factors, warrant dismissal of the Complaint on fair use grounds. See Oyewole, 291 F. Supp. 3d at 436.

B. Implied License

Xclusive’s claims also fail because the Complaint shows that Ms. Hadid had an implied license permitting her to repost the photograph on Instagram.
Under federal law, “nonexclusive licenses may be granted orally, or may even be implied from conduct.” *Graham v. James*, 144 F.3d 229, 235 (2d Cir. 1998) (quotation marks and ellipses omitted). Although the law on implied licenses “shows a measure of conflict,” courts generally look to parties’ conduct to determine whether there “was a ‘meeting of the minds’ between the parties to permit the particular usage at issue.” *Psihoyos v. Pearson Educ., Inc.*, 855 F. Supp. 2d 103, 119, 124 (S.D.N.Y. 2012) (citation omitted). An implied license arises out of “objective conduct that would permit a reasonable person to conclude that an agreement had been reached.” *Joe Hand Promotions, Inc. v. Maupin*, No. 15 Civ. 6355, 2018 WL 2417840, at *5 (E.D.N.Y. May 25, 2018) (quoting *Design Options, Inc. v. BellePointe, Inc.*, 940 F. Supp. 86, 92 (S.D.N.Y. 1996)).

Such objective conduct is present here. As the Complaint’s exhibits show, Ms. Hadid encountered the photographer as she exited a building. She stopped to permit the photographer to take her picture and, by posing, contributed to the photograph’s protectable elements. See *Rogers*, 960 F.2d at 307; *Gillespie*, 2001 WL 180147, at *5. And in that moment, the photographer elected to take a photograph, which was indisputably made more valuable through Ms. Hadid’s participation in its creation. In other words, only as a result of the mutual actions of Ms. Hadid and the photographer was a photograph of a smiling Ms. Hadid even possible. See ECF No. 11 at 3 (admitting that “well-executed photographs of [Ms. Hadid] are extremely valuable”). In these circumstances, a license can, and should, be implied permitting Ms. Hadid to use the photograph—at least in ways that do not interfere with the photographer’s ability to profit.
III. THE COMPLAINT FAILS TO ALLEGE ANY OF THE ELEMENTS OF CONTRIBUTORY INFRINGEMENT

Xclusive’s claim for contributory copyright infringement fails for a host of independent reasons.

A person may have contributory liability for copyright infringement only where he, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Faulkner v. Nat’l Geographic Enters. Inc.*, 409 F.3d 26, 40 (2d Cir. 2005).

The law makes clear—and the word “contributory” does too—that “there can be no contributory infringement absent actual infringement.” *Id.* Thus, where the complaint fails to “alleg[e] a primary copyright infringement,” a secondary infringement claim is “deficient” and must be dismissed. *Reis, Inc. v. Lennar Corp.*, No. 15 Civ. 7905, 2016 WL 3702736, at *4 (S.D.N.Y. July 5, 2016) (dismissing secondary infringement claims where complaint offered “no information or facts alleging that [unidentified persons who downloaded real estate reports] were primary infringers”).

The Complaint fails to satisfy this most basic requirement. Xclusive alleges, without more, that it “is informed and believes that Hadid, without the permission or consent of Xclusive, knowingly made available Copyrighted Photograph to innumerable individuals and media outlets by posting Copyrighted Photograph to Hadid’s 43 million (43,000,000) Instagram followers.” Compl. ¶ 24. But Xclusive nowhere identifies an instance where any of these “innumerable” persons actually violated the copyright in the photograph. *Cf. Wolo Mfg. Corp.*, 349 F. Supp. 3d at 202 (primary infringement requires plaintiff to plead, *inter alia*, “the acts by which and the time period during which the [other person] infringed the copyright”). Because the Complaint contains no allegations of direct infringement by another person, Xclusive’s contributory infringement against Ms. Hadid must be dismissed. *Reis, Inc.*, 2016 WL 3702736, at *4.
This claim fails for other reasons as well. Even if Xclusive were able to allege another person’s direct infringement, Ms. Hadid would be liable only if she both had “knowledge of the underlying direct infringement” and took “substantial” steps to “encourage[] or assist[] the infringement.” Stanacard, LLC v. Rubard, LLC, No. 12 Civ. 5176, 2016 WL 462508, at *14 (S.D.N.Y. Feb. 3, 2016) (quotation marks omitted). The Complaint alleges neither. Instead, it rests on speculation that someone might copy the photograph from Ms. Hadid’s Instagram page and reproduce it elsewhere. Compl. ¶ 24. Such hypothesizing will not suffice, and Xclusive’s failure to plead facts supporting an inference that Ms. Hadid “acted in concert with [a] direct infringer” provides additional grounds on which to dismiss Xclusive’s contributory infringement claim. Gym Door Repairs, Inc. v. Young Equip. Sales, Inc., 206 F. Supp. 3d 869, 898 (S.D.N.Y. 2016) (quotation marks omitted).

CONCLUSION

For the foregoing reasons, Ms. Hadid’s motion to dismiss should be granted.

Dated: New York, New York
May 1, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

XCLUSIVE-LEE, INC.,
Plaintiff,
v. JELENA NOURA “GIGI” HADID,
Defendant.

PLAINTIFF’S OPPOSITION AND ACCOMPANYING MEMORANDUM OF LAW TO DEFENDANT’S MOTION TO DISMISS

Plaintiff, XCLUSIVE-LEE, INC. (“Xclusive” or “Plaintiff”), by and through his undersigned counsel, respectfully opposes Defendant’s Motion to Dismiss. In support of this opposition, Plaintiff submits the following Memorandum in Support of Plaintiff’s Opposition to Motion to Dismiss:

INTRODUCTION

Defendant JELENA NOURA “GIGI” HADID (“Hadid” or “Defendant”) is indeed a famous American supermodel. Hadid is also a brand. Hadid is estimated to be the world’s highest paid model with a net worth of twenty million dollars ($20,000,000.00). Hadid receives significant income from modeling, as well as by serving as pitchwoman for various advertising companies with global reach, including but not limited to the following: Prada, Sunglasses Hut, Reebok, Tommy Hilfiger, Missoni, Stuart Weitzman, Moschino, Tom Ford, and Fendi.
Hadid maintains and supports her brand by keeping herself in the news by chronicling her exploits on social media, including Instagram. As of the date of this filing, Hadid claims more than forty-seven million (47,000,000) Instagram followers. Hadid regularly posts photographs of herself to her Instagram account that are not her intellectual property and for which she has not properly received permission nor license from the copyright holder. Prior to the current lawsuit, Hadid was the subject of a nearly-identical suit that claimed she infringed on a photographer’s copyrighted work by posting the image to her Instagram and Twitter accounts. Since Hadid settled the previous case, Hadid has continued to exploit the intellectual property of others, improperly claiming she is entitled to exploit the images because she is the subject, while simultaneously decrying the actions of the photographers who capture the images she appropriates for her financial gain.

ARGUMENT

I. THE COMPLAINT ALLEGES THE REQUIRED ELEMENTS OF A COPYRIGHT INFRINGEMENT CLAIM

Plaintiff Xclusive-Lee, Inc. (“Xclusive”) filed the Complaint in this case January 28, 2019. Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC was decided March 4, 2019. Prior to Fourth Estate, the Second Circuit had expressly refused to decide on the application/registration rule debate, leaving the issue to the discretion of individual District Court judges.

Copyright infringement is a strict liability cause of action and occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner. To demonstrate a prima facie case of copyright infringement in a complaint, a plaintiff must allege two elements: 1) ownership of a valid

Xclusive has identified itself as the owner of the copyrighted photograph at issue in this case (“Photograph”). Xclusive has alleged Hadid copied the Photograph without license or permission from Xclusive.

Additionally, the assignment between the Assignor (and author of the Photograph) and Xclusive explicitly states Assignor sold and assigned Xclusive “full right to sue for and recover all profits and damages recoverable for past infringement of the same.” Xclusive did not include a copy of the assignment with its complaint because it was not required under the Rule 8(a)(2) of the Federal Rules of Civil Procedure: “a short and plain statement of the claim showing that the pleader is entitled to relief;”

II. THE COMPAINT DOES NOT SHOW THAT MS. HADID’S USE OF THE PHOTOGRAPH WAS PERMISSIBLE

A. Fair Use

Under Section 107(1) of the U.S. Copyright Act, whether or not Hadid’s use weighs in favor of fair use under the first fair use factor requires an inquiry as to “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes[.]” 17 U.S.C. § 107(1).

The 1994 landmark U.S. Supreme Court decision of Campbell v. Acuff-Rose Music, Inc. is largely responsible for the consideration of “transformative” use by the courts under the first fair use factor. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). In Campbell, the Court held that, because parody is a form of criticism, and thus can provide a “social benefit, by shedding light on an earlier work, and, in the process, creating a new one[,]” and thus “has an
obvious claim to transformative value,” a parodic work properly falls within the enumerated fair uses within the preamble of Section 107. Id.

Since Campbell, many courts have widely recognized two sub-factors as being particularly relevant to the first factor analysis: (1) “whether the new work is transformative”; and (2) “the extent to which the use serves a commercial purpose.” Importantly, not every use that is merely different in purpose from the original qualifies as a transformative use; rather, there has developed a number of criteria that courts look to in the analysis, all of which require a significant justification for the secondary use. See Campbell, 510 U.S. at 580 (“If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.” (emphasis added)). Hadid has not transformed whatsoever the photograph at issue in this case.

Hadid stated the incorrect legal standard of what qualifies as a transformative use. To begin with, it is useful to review what the Supreme Court actually stated in Campbell, where the Court explained that if the secondary work “has no critical bearing on the substance or style of the original . . . the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish)[.]” Campbell, 510 U.S. at 580. Accordingly, “[t]he central purpose of this investigation is to see . . . whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” Id. at 579 (emphasis added) (citations omitted).
The purported purpose of Hadid in using the Photograph here is not even close to being transformative. Accordingly, under the language of Campbell itself, the second work must actually either make some critical use of, or change to, the original work to qualify as transformative. Hadid’s use of the Photograph here does nothing of the sort. The Photograph is a well-executed, candid, street photograph of Ms. Hadid. Hadid posted it in its original, barely-cropped form for the purpose of depicting exactly that. Hadid has not claimed she copied and posted the Photograph for any of the established albeit narrowly defined statutory allowances, including commentary, criticism, reporting, or research.

Hadid also improperly asserts the improper legal standard for commercial use. Generally, “[c]onsideration of the purpose and character of the use includes an examination of ‘whether [the] use is of a commercial nature or is for nonprofit educational purpose.’” Bouchat v. Balt. Ravens Ltd. P’ship, 619 F.3d 301, 310 (4th Cir. 2010) (quoting 17 U.S.C. § 107(1)). Additionally, the United States Supreme Court has opined, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” Harper & Row v. Nation Enters., 471 U.S. 539, 562 (1985).

The broad legal standard for commerciality recognizes two types of for-profit endeavors, each of which may be considered a commercial purpose: “direct profits (generated by selling an infringing product) and indirect profits (revenue earned from operations enhanced by the infringement).” TD Bank, N.A. v. Hill, No. 12-7188 (RBK/JS), 2015 U.S. Dist. LEXIS 97409, at *63 (D.N.J. July 27, 2015); see also Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 921 (2d Cir. 1994) (recognizing this distinction); L.A. Times v. Free Republic, No. CV 98-7840 MMM (AJWx), 2000 U.S. Dist. LEXIS 5669, at *48-49 (C.D. Cal. Mar. 31, 2000).
Therefore, the question of commerciality is not a question of whether Hadid did or did not use the Photograph to “capture significant revenue.” Rather, the question is whether Hadid gained a commercial advantage, either directly or indirectly, as a consequence of using the Photograph without paying the customary licensing fee. See *Compaq Comput. Corp. v. Ergonome Inc.*, 387 F.3d 403, 409 (5th Cir. 2004) (“While Compaq did not produce the SCG for individual sale or profit, the Supreme Court has noted that ‘the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.’ Thus, the inclusion of the SCG with each Compaq computer constitutes a commercial use of the copied material.”) (quoting *Harper & Row*, 471 U.S. at 562).

In summary, the Hadid’s reasoning under the first fair use factor is based on erroneous factual and legal assertions. As detailed above, this factor weighs in favor of Plaintiff.

The second statutory fair use factor is focused on the nature of the original work. The Photograph in this case is undoubtedly a highly creative and expressive, not factual, work. It is not just a mere snapshot of an individual on a street corner taken on a cellphone; the Photograph in this case is a highly creative work, involving a number of creative choices including timing, lighting, angle, composition, and others. Taken to its logical conclusion, the Hadid’s position would deem any photograph of a real-world location or individual to be a factual, thinly-protected work.

The Photograph therefore should not be analyzed based solely on the identity or location of its subject; rather, the focus should be on the various creative and original elements comprising the work itself. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884). In short, this was not a conventional shot of Ms. Hadid, and in fact, Brammer had to
obtain special permission to photograph the street from his particular shooting location; seeRentmeester v. Nike, Inc., 883 F.3d 1111, 1120 (9th Cir. 2018) (“Rentmeester’s photo isundoubtedly entitled to broad rather than thin protection. The range of creative choices open toRentmeester in producing his photo was exceptionally broad; very few of those choices were dictated by convention or subject matter.”). As such, this factor should weigh in favor ofBrammer.

Concerning Hadid’s assertion that she somehow maintains joint copyright in the Photograph because she noticed the photographer and smiled at the moment the photographer chose to snap the shutter is preposterous. Ms. Hadid is as much a joint copyright holder in the Photograph as the subject of a biography is joint copyright holder to the words used by the author to describe her life.

Hadid’s assertion tests the limits of cynicism because Hadid has gone out of her way to criticize photographers like the author of the Photograph as a necessary evil of the publicity she receives. []. Also, it is well worth pointing out Hadid makes a point of regularly copying these same street photographs (to be fair, Hadid regularly copies and posts runway images of her without license or permission of the copyright holders) of herself to her Instagram page [], which contribute to her online presence, popularity, and most importantly her marketability. If Hadid were genuinely interested in accomplishing the same thing but without being a serial copyright infringer, she could properly license the images or hire someone to take similar photographs of her liking. Instead, Hadid wants to have it both ways. She derides the individuals who capture photographs of her, then turns around and appropriates their work.

When weighed with the highly creative nature of the Photograph in this case, the second factor should be weighed in Plaintiff’s favor.
The third fair use factor requires consideration of “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). Regarding the “amount” taken, “as the amount of the copyrighted material that is used increases, the likelihood that the use will constitute a ‘fair use’ decreases.” A. V. Ex Rel. Vanderhye v. iParadigms, LLC, 562 F.3d at 642.

As to substantiality, “this statutory factor also requires courts to consider, in addition to quantity, the ‘quality and importance’ of the copyrighted materials used, that is, whether the portion of the copyrighted material was ‘the heart of the copyrighted work.’” Id. (internal citations and quotations omitted); see Campbell, 510 U.S. at 587.

Further, “the extent of permissible copying varies with the purpose and character of the use.” Campbell, 510 U.S. at 586-87 (1994). In other words, whether or not the use is commercial and transformative bears on how much of the first work can be taken in order to be considered a fair use.

As argued more fully above, with respect to aesthetic alterations of the Photograph, Hadid’s unauthorized copying involved minimal cropping of the Photograph. Two cases involving the alleged infringement of photographic works by appropriation artist Richard Prince are particularly instructive on how such alterations should be viewed under the third fair use factor.

In Cariou v. Prince, the Second Circuit determined that all but five works created by Prince were fair uses as a matter of law, because extensive physical alterations served to render the originally works barely recognizable and thus they were visually transformed. Cariou v. Prince, 714 F.3d 694, 710-11 (2d Cir. 2013). The Court declined to make a fair use determination on the five other works, remanding them to the district court, as they did “not
sufficiently differ from the photographs of Cariou’s that they incorporate for [the court] confidently to make a determination about their transformative nature as a matter of law.” Id.

For the five remanded works, the Court noted that they began as “classical portraiture and landscape photos,” but contained key differences when viewed in the context of defendant’s work, including: lozenges painted over the subject’s eyes and mouth, the addition of “cartoonish appendages” and enlarged hands, an electric guitar pasted onto the canvas, and cutting the subject out and taping it onto a blank canvas. Id. Nevertheless, despite the number of alterations which the Court admitted “unarguably change the tenor of the piece,” the Court stated that “it is unclear whether these alterations amount to a sufficient transformation of the original work of art such that the new work is transformative.” Id. Thus, it could not determine whether there was fair use as a matter of law.

In another case involving Richard Prince, the district court more recently held again that a complete reproduction of a plaintiff’s photograph where the only changes made to the original were comments added by the defendant below the photograph, did not render the second work transformative as a matter of law, and therefore could not weigh the third factor in favor of the defendant. Graham v. Prince, 265 F. Supp. 3d 366, 382 (S.D.N.Y. 2017).

In each case, defendant’s use of plaintiff’s work involved more than “cropping,” yet even still the courts declined to hold that the third factor weighed in favor of the defendant. In light of these cases, it cannot seriously be doubted that the minimal cropping employed by Hadid here is insufficient to render its use fair under the third factor.

Under the third factor, regardless of the quantity of the copyrighted work taken by the VH, “[w]hat matters is whether the alleged infringer used the ‘heart’ of the material; in other words, superficial editing or cropping does not impact the Court’s consideration.” Fitzgerald v.
Here, Hadid’s slight cropping of the Photograph does not assist its fair use argument. The heart of the Photograph remains intact in Hadid’s unauthorized use. In fact, Hadid’s cropping likely is the result not of any conscious choice by Hadid but by the automatic square cropping employed by Instagram.

For the foregoing reasons, the third fair use factor should weigh against a finding of fair use.

The fourth fair use factor asks whether the infringing use impacts the “potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Hadid’s use of the Photograph serves as a market substitute for the Photograph, and that alone tips the balance of this factor in favor of Plaintiff. As set forth in Campbell, the key inquiry under the fourth factor is whether the defendant’s version of the photo can serve as a “market substitute” for the original. See Campbell, 510 U.S. at 587.

Here, it could not be clearer that that is the case. In its relatively unaltered form, the cropping employed by Hadid still displays what is the heart of the original work. Taken to its logical conclusion, Hadid’s position would mean that potential licensees of the Photograph will no longer be incentivized to pay a licensing fee to use the Photograph. Instead, they could simply copy the version published by Hadid for free. Therefore, Hadid’s use presents the possibility of entirely usurping Plaintiff’s licensing market. See TCA Television, 839 F.3d 168, 186 (2d Cir. 2016) (“[T]he district court disregarded the possibility of defendants’ use adversely affecting the licensing market for the Routine.” (citations omitted)); House of Bryant Publs, LLC, No. 3:09-0502, 2009 U.S. Dist. LEXIS 101878, at *25-27 (“[T]he court must accept as true the plaintiff’s
allegations that it regularly licenses ‘Rocky Top’ and that allowing this type of infringement to go unpunished would harm the plaintiff’s licensing market. Moreover, the plaintiff responds that the defendant was not attempting to enter new, fair use markets through this clip; rather the defendant used the clip of ‘Rocky Top’ in precisely the same manner HOB would seek to license it. . . . The plaintiff contends that ‘if every potential licensee could use ‘Rocky Top’ any time the state of Tennessee, Knoxville or UT were mentioned,’ on a theory that the potential licensee was somehow exploiting a new ‘fair use’ market, ‘HOB's licensing ability would be completely eroded.’

); see also Richard Anderson Photography v. Brown, Civil Action No. 85-0373-R, 1990 U.S. Dist. LEXIS 19846, at *5 (W.D. Va. Apr. 16, 1990) (“Assuming that the plaintiff is the owner of the copyright, I find that the defendant’s use of photographic images used without license was not fair because such use denied the plaintiff licensing fees which clearly affects the value of the copyrighted work.”).

Here, the potential for an adverse impact on Brammer’s licensing market is clear. Therefore, this factor should weigh against a finding of fair use.

B. Implied License

In Hadid’s imaginary world of make-believe contracts, individuals who capture photographs that depict Hadid looking at the camera or acknowledging the photographer’s existence are somehow different than all others, notably because they represent a “meeting of the minds” between her and the photographer. Hadid’s convenient, novel legal approach runs counter to all prior established legal holdings on the subject matter and is the result of dramatic oversimplification of what may or may not have transpired between Hadid and the photographer.

Did Hadid know the photographer? How far away was the photographer from Hadid when the Photograph was captured? Did Hadid and the photographer exchange words? Did
Hadid ask about using the Photograph? We do not know because Hadid’s assertion is without facts with the exception that she smiled at the camera.

If a model poses for a sculptor, does she possess an implied license to appropriate the work? If an individual provides a quote to reporter for a story, does she possess an implied license to appropriate the work? If an individual cooperates with an author on a biography, does she possess an implied license to appropriate the work. Of course not. If Hadid’s approach to the issue of an implied license were adopted, the copyrights of the majority of the world’s authors would be obliterated because the only requirement for an implied license would be for the subject of a work of original art would be to claim (not very convincingly) that she winked, smiled, nodded, or otherwise communicated her acceptance to the author.

Hadid’s legal approach is alarming for its blatant attempt to rewrite established legal doctrine. The Court should reject Hadid’s assertion that the author of the Photograph granted Hadid an implied license to exploit the work.

III. THE COMPLAINT PROPERLY ALLEGES THE ELEMENTS OF CONTRIBUTORY INFRINGEMENT

Hadid commands forty-seven million (47,000,000) Instagram followers. It is fact that her followers copy and disseminate the information, both visual and text, Hadid posts to her Instagram page. In fact, the ability to copy and share Hadid’s posts is built in to Instagram. Each Instagram post provides the viewer to share in a variety of ways, to Facebook, messenger, Twitter, or Email. By the time Hadid removed the infringing post containing the Photograph, 1,607,211 followers had “liked” the post. It is safe to assume that a percentage of the followers that “liked” the infringing post also took the time to “share” the post.
CONCLUSION

For the foregoing reasons, Defendant’s Motion to Dismiss should be denied.

Dated: May 22, 2019

Respectfully submitted,

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EASTERN DISTRICT OF NEW YORK

XCLUSIVE-LEE, INC.,

Plaintiff,

v.

JELENA NOURA “GIGI” HADID,

Defendant.

No. 19 Civ. 520

REPLY MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANT’S MOTION TO DISMISS

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June 5, 2019
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PRELIMINARY STATEMENT

Xclusive’s opposition makes no effort to deny the twisted dynamic at the heart of this case. A paparazzo followed Ms. Hadid so he could take her picture and exploit her image for profit. When Ms. Hadid came upon the photographer outside a Manhattan building, she stopped and posed for the camera. In that moment, the paparazzo snapped a photograph, undoubtedly made more valuable by Ms. Hadid’s participation. Xclusive vaguely alleges that it later became an owner or exclusive licensee of that photograph, and Xclusive apparently decided that capitalizing on Ms. Hadid’s fame through licensing her image was not enough. So Xclusive sued Ms. Hadid, seeking significant monetary damages based on allegations that she reposted a cropped version of the photograph of herself to her personal Instagram page.

Xclusive’s opposition leaves no doubt that the Complaint fails to state a claim upon which relief may be granted. Xclusive asks the Court to ignore a binding Supreme Court decision that requires a plaintiff in a copyright suit to have the registration in hand at the time of filing. Xclusive also suggests, contrary to precedent, that it can bring the photographer’s accrued claims without alleging facts that show it has a right to do so. Further, Xclusive exaggerates the scope of Ms. Hadid’s fair use and implied license arguments, which are unique to Ms. Hadid and would permit only her narrow use of the photograph. And, faced with an unambiguous rule that contributory infringement claims require allegations of primary infringement that someone else committed, Xclusive asks the Court to just “assume” someone did.

The opposition’s failure to address the fundamental defects in the Complaint underscores what this case really is: an effort to extract a settlement through the mere pendency of litigation, with little concern for basic requirements of copyright law or for the waste of judicial resources that this suit engenders. The Court should put an end to this abuse of the Copyright Act.
ARGUMENT

I. XCLUSIVE CONFIRMS THAT THE COMPLAINT DOES NOT SATISFY BASIC REQUIREMENTS FOR BRINGING A COPYRIGHT SUIT

Xclusive attempts to evade two basic requirements that a plaintiff must satisfy to bring a copyright claim. Xclusive’s half-baked opposition only confirms that dismissal is appropriate.¹

Xclusive first asks the Court to ignore binding precedent on the requirement that a plaintiff not sue for infringement until “registration of the copyright claim has been made.” 17 U.S.C. § 411(a). A unanimous Supreme Court recently held that “the only satisfactory reading” of this provision is that registration occurs “when the Copyright Office grants registration,” not when a copyright holder submits an application. Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 888 (2019). Submitting an application is all that Xclusive claims to have done here. Compl. ¶ 19.

Xclusive seems to believe that just because it filed its Complaint before Fourth Estate was decided, this Court is free to ignore that decision and craft its own interpretation of § 411(a) as a matter of “discretion.” Opp’n at 2. That is not how statutory interpretation works. See In re Picard, 917 F.3d 85, 101 (2d Cir. 2019) (interpretation of statutes is a matter of law, not “a matter of judicial discretion”). Nor is it how stare decisis works. See In re Am. Express Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324, 337 (E.D.N.Y. 2019) (“The doctrine of stare decisis compels a district court to abide by the legal decisions of higher courts in the same jurisdiction.”). When a higher court hands down a definitive interpretation of a statutory

¹ In addition to its more substantive shortcomings, Xclusive’s opposition includes unfilled placeholders and passages lifted from other briefs with the names of other parties from other cases. Opp’n at 6, 7, 11. The brief also makes further reference to a purported settlement in another case whose existence is not confirmed by the public record. Opp’n at 2. Ms. Hadid previously noted that David Deal was counsel to the plaintiff in that case, and reserved all rights to seek an appropriate remedy if Mr. Deal “disclosed confidential information pertaining to a settlement to Xclusive or to others.” MTD at 3 n.1 In its opposition, Xclusive offers no response to this concern and instead doubles down by referencing the purported settlement again. Ms. Hadid continues to reserve all rights.
provision, that interpretation is binding in pending litigation. See, e.g., United States ex rel. 

(dissing ase based on statutory filing bar, even though Second Circuit rendered the relevant 
interpretation of that bar eight years after Hanks filed his suit).

Simply put, Fourth Estate binds this Court. And even if it didn’t, Xclusive offers no 
reason for the Court to depart from an interpretation compelled by the statutory text, adopted by 
all nine justices, and consistent with longstanding authority in this Circuit. See, e.g., Corbis 
Corp. v. UGO Networks, Inc., 322 F. Supp. 2d 520, 521-22 (S.D.N.Y. 2004); Capitol Records, 
Hadid was not registered at the time of filing as § 411(a) plainly requires, and the Complaint 
should be dismissed as matter of law on that basis.

Xclusive next argues that its Complaint need not include any allegations demonstrating 
its right to sue. Opp’n at 3. Besides a cursory reference to Rule 8, Xclusive identifies no 
authority for its position and ignores clear caselaw holding that even where a photographer 
assigns or exclusively licenses his copyright, the assignee or exclusive licensee may bring the 
photographer’s accrued causes of action only where the right to do so is “expressly included” in 
the assignment or licensing agreement. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 
971, 980 (2d Cir. 1991). Xclusive makes no allegations about whether and how it obtained the 
right to bring the photographer’s accrued claims. See MTD at 6. The Complaint should therefore 
(S.D.N.Y. Dec. 22, 2015) (dismissing complaint that lacked allegations of an agreement that 
“expressly included the right to sue for causes of action that accrued prior to [plaintiff’s] 
II. XCLUSIVE FAILS TO OVERCOME ADDITIONAL GROUNDS FOR DISMISSAL BASED ON THE FAIR USE AND IMPLIED LICENSE DOCTRINES

A. Fair Use

Fair use analysis requires “an open-ended and context-sensitive inquiry.” Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006). Xclusive fails to heed this directive, and instead overstates the narrow fair use argument that Ms. Hadid has made and ignores the significant authorities that support it.

First factor. Xclusive’s argument on the first fair use factor is a red herring. Xclusive dedicates pages of its brief to the claim that Hadid “stated the incorrect legal standard of what qualifies as a transformative use,” and concludes that Ms. Hadid’s alleged use is “not even close to being transformative.” Opp’n at 5.

Ms. Hadid has not claimed that her alleged use has the transformative character of, say, Matthew Lombardo’s comedic play featuring a “rather down-and-out 45 year-old version of Cindy–Lou Who” from Dr. Seuss’s well-known book How the Grinch Stole Christmas. See Lombardo v. Dr. Seuss Enters., L.P., 279 F. Supp. 3d 497, 503, 515 (S.D.N.Y. 2017), aff’d, 729 F. App’x 131 (2d Cir. 2018) (finding Lombardo’s play to constitute fair use of Seuss’s book). But, as Ms. Hadid explained in her opening brief, MTD at 8, such “transformative use is not absolutely necessary,” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994), and where a use is not transformative, the question of “whether the new use is commercial thus acquires [greater] importance,” On Davis v. The Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001). On that question, Xclusive acknowledges but simply rejects language from the Second Circuit’s decision in Blanch v. Koons, and instead offers its own formulation, purportedly based on an

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2 The Second Circuit said the following: “The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct
older decision of the Fifth Circuit, and then ends its analysis there. The simple fact is that Xclusive does not dispute that the Complaint alleges only that Ms. Hadid reposted an image to her personal Instagram page and made no effort to commercially exploit it. Compl. ¶¶ 9-11; see MTD 8. The first factor thus weighs in Ms. Hadid’s favor.

Second factor. Xclusive claims that the paparazzi photograph here is a “highly creative and expressive” work because it required decisions about “timing, lighting, angle, composition, and others,” and that the second factor therefore weighs in its favor. Opp’n at 6. But the photograph simply places Ms. Hadid in the center of the frame and relies on lighting and background elements over which the photographer had no control. Compl., Ex. A. If this photograph qualifies as “highly creative and expressive,” so too would nearly every other photograph ever snapped on the street. Xclusive’s argument cannot be squared with the distinction between factual and creative works that courts have consistently drawn, including in connection with photographs like the one here. See, e.g., Katz v. Google Inc., 802 F.3d 1178, 1183 (11th Cir. 2015) (second factor favored fair use where photograph was “merely a candid shot in public setting” and photographer did not attempt to “convey ideas, emotions, or in any way influence [the subject’s] pose, expression, or clothing”); Otto v. Hearst Commc’ns, Inc., 345 F. Supp. 3d 412, 430 (S.D.N.Y. 2018) (second factor favored fair use where photograph was a candid shot at wedding and photographer “did not direct or pose the subjects of the photo, nor control the lighting or the background”).

3 After rejecting the Second Circuit’s formulation, the opposition simply asserts the following: “Rather, the question is whether Hadid gained a commercial advantage, either directly or indirectly, as a consequence of using the Photograph without paying the customary licensing fee.” Opp’n at 6 (citing Compaq Comput. Corp. v. Ergonome Inc., 387 F.3d 403, 409 (5th Cir. 2004)).
Xclusive does not grapple with these authorities, and the two cases on which Xclusive attempts to rely, see Opp’n at 6-7, do nothing to advance its argument. *Burrow-Giles Lithographic Co. v. Sarony* established that Congress had the power to extend copyright protection to photographs, and has nothing to do with fair use. 111 U.S. 53, 60 (1884).

*Rentmeester v. Nike, Inc.* is not a fair use case either, although it did find that a photograph of Michael Jordan exhibited a high degree of creativity where the photographer inserted a basketball hoop as a “prop” in a “whimsical[]” setting, and captured Jordan in a pose “inspired more by ballet’s *grand jeté* than by any pose a basketball player might naturally adopt.” 883 F.3d 1111, 1120-21 (9th Cir. 2018). If anything, Rentmeester’s famous image of Jordan illustrates what “highly creative and expressive” truly means—and confirms that the photograph at issue here is undeserving of the label.

Finally, Xclusive denounces Ms. Hadid’s “preposterous” claim that she “somehow maintains joint copyright” in the photograph. Opp’n at 7. But that misstates Ms. Hadid’s position. See MTD at 9-10. Ms. Hadid has simply pointed out that because she is responsible for certain creative elements that “the copyright laws value and seek to foster” (e.g., her pose), Xclusive cannot rely on those elements to swing the second fair use factor in its favor. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (quotation marks omitted).

**Third factor.** Xclusive next argues that it “cannot seriously be doubted that the minimal cropping employed by Hadid here is insufficient to render [her] use fair under the third factor.” Opp’n at 9. Xclusive’s characterization of the cropping here as “minimal” finds no basis in the Complaint or in the cases on which Xclusive relies. A comparison of the images Xclusive submitted to the Court reveals that Ms. Hadid is alleged to have reposted about half of the original image. See Compl., Exs. 1, 3-4. Moreover, in both of the cases that Xclusive cites in its
opposition, see Opp’n at 8-9, the defendant had used all or nearly all of the work in question, and even that did not necessarily preclude a fair use finding. See Cariou v. Prince, 714 F.3d 694, 710-11 (2d Cir. 2013); Graham v. Prince, 265 F. Supp. 3d 366, 382 (S.D.N.Y. 2017).

Xclusive’s further suggestion that the “heart” of the photograph “remains intact” only doubles down on the fundamental error that undermines Xclusive’s argument on the second factor. Opp’n at 10. The cropping here resulted in an image that emphasizes Ms. Hadid’s unique pose and deemphasizes any independent decisions made by the photographer, such as the framing of the original image. Because the cropped version takes no more than is necessary to capture Ms. Hadid’s contributions, the third fair use factor weighs in Ms. Hadid’s favor.

Fourth factor. Xclusive’s argument on the “most important” fair use factor rests on an error of law and a misunderstanding of Ms. Hadid’s claim. Fox News Network v. Tveyes, Inc., 883 F.3d 169, 179 (2d Cir. 2018).

Xclusive contends that Ms. Hadid’s “use of the Photograph serves as a market substitute for the Photograph, and that alone tips the balance of this factor in favor of Plaintiff.” Opp’n at 10. But a defendant’s use in itself is insufficient to make the fourth factor weigh in a plaintiff’s favor. Indeed, the Second Circuit has roundly rejected efforts to focus “on possible lost licensing fees from [a defendant’s] challenged use” because doing so would mean that the fourth factor would “always favor [a] copyright owner.” TCA Television Corp. v. McCollum, 839 F.3d 168, 186 (2d Cir. 2016) (citing Am. Geophysical Union, 60 F.3d at 929 n.17).4

4 It is true that the Western District of Virginia’s unpublished 1990 decision in Richard Anderson Photography v. Brown apparently considered the loss of licensing fees from the defendant in its fair use analysis. No. 85 Civ. 373, 1990 WL 538929, at *2 (W.D. Va. Apr. 16, 1990); see Opp’n at 10. But that case, which concerned images used without permission in a fundraising brochure, is easily distinguished from the instant one, and, in any event, the language that Xclusive quotes runs counter to the authorities that bind this Court.
Xclusive further contends that if Ms. Hadid’s fair use argument is accepted, “potential licensees of the Photograph will no longer be incentivized to pay a licensing fee to use the Photograph” and instead “could simply copy the version published by Hadid for free.” Opp’n at 10. That argument mistakes Ms. Hadid’s claim. The fair use argument here is unique to Ms. Hadid and confined by the facts that (1) Ms. Hadid is the subject of the photograph (2) who participated in its creation and (3) whose celebrity the photographer sought to exploit in the first place. Unlike the cases on which Xclusive relies, see id. at 10-11, this is not a case where deeming Ms. Hadid’s use fair would obviate the need for other potential licensees to seek a license from Xclusive to use the photograph. Cf. TCA Television Corp., 839 F.3d at 186 (accepting plaintiff’s allegation that permitting play’s verbatim incorporation of Abbott and Costello routine could affect the active market for licensing similar derivative works); House of Bryant Publications, LLC v. A & E Television Networks, No. 09 Civ. 502, 2009 WL 3673055, at *9 (M.D. Tenn. Oct. 30, 2009) (agreeing with plaintiff’s argument that if every potential licensee could rely on defendant’s theory to make unlicensed use of “Rocky Top” song, plaintiff’s licensing ability would be eroded). Thus, finding fair use in these circumstances would not deprive Xclusive of any, let alone significant, revenue.

Other considerations. Xclusive fails altogether to address the “other relevant considerations” that Ms. Hadid set forth in her brief and that cases like Fox News instruct courts to consider. MTD at 7, 12. At bottom, this dispute exists only because the photographer sought to exploit Ms. Hadid’s fame and image, and the photograph at issue was possible only because of Ms. Hadid’s participation in its creation. Id. at 12. Taking these considerations and the four statutory factors together, the Court should dismiss the Complaint on fair use grounds. See Oyewole v. Ora, 291 F. Supp. 3d 422, 436 (S.D.N.Y. 2018).
B. Implied License

The implied license doctrine provides a similarly narrow basis on which to dismiss the Complaint. Xclusive howls that Ms. Hadid’s implied license argument “runs counter to all prior established legal holdings” and is a “blatant attempt to rewrite established legal doctrine.” Opp’n at 11-12. Tellingly, Xclusive cites not a single case to back up its melodramatic argument and fails to identify a single error in any of the cases on which Ms. Hadid relies. See MTD at 13.

Xclusive similarly overreaches with its claim that acknowledging Ms. Hadid’s implied license here would “obliterate[]” the copyrights of “the majority of the world’s authors.” Opp’n at 12. The license that this Court should imply is premised on the undisputed “objective conduct” that enabled this particular photograph to be taken. Joe Hand Promotions, Inc. v. Maupin, No. 15 Civ. 6355, 2018 WL 2417840, at *5 (E.D.N.Y. May 25, 2018) (quotation marks omitted). The implied license here would be narrow, allowing use of the already published photograph only “in ways that do not interfere with the photographer’s ability to profit.” MTD at 13. Given the contours of this license, and the unique circumstances in which such a license could be implied, dismissing on implied license grounds would hardly have the “obliterating” effect of which Xclusive warns.

III. XCLUSIVE’S SPECULATION IS INSUFFICIENT TO SAVE ITS CLAIM FOR CONTRIBUTORY INFRINGEMENT

Xclusive all but concedes that its contributory infringement claim is insufficient as a matter of law. To state such a claim, a plaintiff must allege an instance of primary infringement,

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5 Xclusive offers up four factual questions about circumstances surrounding the photograph’s creation in an effort to suggest that Ms. Hadid’s implied license argument is best decided after discovery. Opp’n at 11-12. Two of Xclusive’s questions (“How far was the photographer from Hadid when the Photograph was captured?” and “Did Hadid know the photographer?”) have no apparent relevance to whether Ms. Hadid has an implied license. The other two (“Did Hadid and the photographer exchange words?” and “Did Hadid ask about using the Photograph?”) are pure speculation without any basis. In any event, the Complaint, together with its exhibits, is sufficient to establish the existence of an implied license.
Faulkner v. Nat’l Geographic Enters. Inc., 409 F.3d 26, 40 (2d Cir. 2005), and that the defendant had “knowledge of the underlying direct infringement” and took “substantial” steps to “encourage[] or assist[]” it, Stanacard, LLC v. Rubard, LLC, No. 12 Civ. 5176, 2016 WL 462508, at *14 (S.D.N.Y. Feb. 3, 2016) (quotation marks omitted). The Complaint here pleads no facts that would satisfy these requirements, and the opposition makes no effort to contend otherwise. See Opp’n at 12. Instead, Xclusive muses that it is “safe to assume that a percentage of the followers that ‘liked’ the infringing [Instagram] post also took the time to ‘share’ the post.” Id. But Xclusive has filed a Complaint in a federal court, where the law requires a plaintiff to plead “enough facts to state a claim to relief that is plausible on its face,” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and provides that “mere conclusory statements” and “naked assertions devoid of further factual enhancement” will not suffice, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotation marks and brackets omitted). Xclusive’s “assum[ption]” is insufficient to state a claim, and the contributory infringement claim, therefore, must be dismissed. See, e.g., Wolo Mfg. Corp. v. ABC Corp., 349 F. Supp. 3d 176, 202 (E.D.N.Y. 2018); Reis, Inc. v. Lennar Corp., No. 15 Civ. 7905, 2016 WL 3702736, at *4 (S.D.N.Y. July 5, 2016).
CONCLUSION

For the reasons set forth above, as well as those set forth in Ms. Hadid’s opening brief, the Court should grant Ms. Hadid’s motion to dismiss.

Dated: New York, New York
June 5, 2019

Respectfully submitted,

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Copyright Alternative in Small-Claims Enforcement Act of 2019

This bill creates the Copyright Claims Board, a body within the U.S. Copyright Office, to decide copyright disputes. Damages awarded by the board are capped at $30,000.

Participation in board proceedings is voluntary with an opt-out procedure for defendants, and parties may choose instead to have a dispute heard in court. If the parties agree to have their dispute heard by the board, they shall forego the right to be heard before a court and the right to a jury trial. Board proceedings shall have no effect on class actions.

The board shall be authorized to hear copyright infringement claims, actions for a declaration of noninfringement, claims that a party knowingly sent false takedown notices, and related counterclaims.

The board provides for various procedures, including with respect to requests for information from the other party and requests for the board to reconsider a decision.

The board may issue monetary awards based on actual or statutory damages.

The parties shall bear their own attorneys’ fees and costs except where there is bad faith misconduct.

A board's final determination precludes relitigating the claims in court or at the board. Parties may challenge a board decision in federal district court only if (1) the decision was a result of fraud, corruption, or other misconduct; (2) the board exceeded its authority or failed to render a final determination; or (3) in a default ruling or failure to prosecute, the default or failure was excusable.
Meanith Huon sued the website Above the Law for implying that he was a rapist in an article published on the same day he was acquitted of rape. When

* Of the Southern District of Illinois, sitting by designation.
another website, Jezebel (which was owned by Gawker at the time), reported on the lawsuit in an article entitled, “Acquitted Rapist Sues Blog for Calling Him Serial Rapist,” Huon added Gawker to the lawsuit. He accused Gawker of defamation, false light invasion of privacy, and intentional infliction of emotional distress with regard to (i) the article’s headline, (ii) its description of Huon’s criminal trial and subsequent complaint against Above the Law, and (iii) certain comments posted by a number of anonymous third-party users (at least some of whom Huon claimed were Gawker employees). The district judge granted Gawker’s motion to dismiss as to all of Huon’s claims, and later denied him leave to file a fifth amended complaint. Huon appeals both decisions.

We conclude that the district judge correctly rejected Huon’s defamation claim as to the article. The title can be construed innocently when viewed with the rest of the article as a whole, and the article’s text fairly reported on both Huon’s criminal trial and his initial complaint against Above the Law. In addition, the district judge did not err in denying Huon leave to file a fifth amended complaint, since Huon had ample opportunity to cure any deficiencies.

However, we reverse and remand the district judge’s rejection of Huon’s defamation claim as to the third-party user comments. Huon adequately alleged that Gawker helped create and develop at least some of the comments, and one of the comments constitutes defamation under Illinois law. We also reverse and remand the district judge’s rejection of Huon’s false-light and intentional-infliction claims, which were dismissed against Gawker based solely on the rejection of his defamation claims. Since part of his defamation claim
can proceed, so too can his false-light and intentional-infliction claims.

I. BACKGROUND

In July 2008, Plaintiff Meanith Huon was charged with criminal sexual assault in connection with a sexual encounter he had with Jane Doe. Huon pleaded not guilty, claimed that the encounter was consensual, and was acquitted by a jury. On the day Huon was acquitted, the legal website Above the Law (ATL) published an article entitled, “Rape Potpourri” (ATL article). The article discussed two “rape stories,” one of which concerned Jane Doe’s allegations and Huon’s opening statement at his criminal trial. At some point after its initial publication, the ATL article was updated to note that Huon was acquitted.

One year after publication of the ATL article, Huon filed suit against ATL, alleging defamation, intentional infliction of emotional distress, and false light invasion of privacy. Several days later, the website Jezebel published an article entitled, “Acquitted Rapist Sues Blog for Calling Him Serial Rapist” (Jezebel article). The article superimposed Huon’s 2008 mugshot onto the ATL article and briefly explained the circumstances of Huon’s criminal trial and subsequent lawsuit against ATL. The article’s title was later changed to read, “Man Acquitted of Sexual Assault Sues Blog for Calling Him Serial Rapist” (emphasis added), but otherwise remained the same. The Jezebel article generated over 80 comments from anonymous third-party users.

Huon amended his complaint in response to the publication of the Jezebel article, adding several new allegations and nearly a dozen new defendants, including Irin Carmon,
the Jezebel article’s author; Gawker Media, Jezebel’s then-owner; and Nick Denton, Gawker’s founder (Gawker Defendants1). After Huon amended his complaint several additional times to cure certain jurisdictional defects, the Gawker Defendants moved to dismiss Huon’s fourth amended complaint.

The district judge granted the motion in full. He rejected Huon’s defamation claims as to the third-party user comments, finding insufficient allegations that Gawker employees had actually authored the comments, and concluding that the Communications Decency Act protects online publishers like Gawker from third-party comments. The judge also dismissed Huon’s defamation per se claim, finding that the Article’s headline was protected by the innocent construction rule and its text by the fair report privilege, and concluded that Huon had failed to plead the requisite special damages to maintain his defamation per quod claim. In addition, the judge dismissed Huon’s false-light and intentional-infliction claims, noting that the failure of his defamation claims was dispositive. The district judge later denied Huon’s motion to reconsider and for leave to file a fifth amended complaint. This appeal followed.2

1 Following oral argument, we were notified that Defendants Gawker Media LLC and Nick Denton had separately filed petitions for bankruptcy protection under Chapter 11. Counsel for both Defendants tells us that the automatic stays in both bankruptcy proceedings have been modified so as to permit us to render a decision. We proceed accordingly.

2 The ATL Defendants separately moved to dismiss Huon’s fourth amended complaint. After the district judge granted their motion in part and denied it in part, the ATL Defendants and Huon settled. The ATL Defendants are not parties on appeal.
II. ANALYSIS

We review de novo the district judge’s grant of the Gawker Defendants’ motion to dismiss for failure to state a claim. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). A complaint need only contain enough factual content to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2009). While “detailed factual allegations” are not required, the complaint must contain more than mere “labels and conclusions” and “a formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). We review the complaint in the light most favorable to Huon and accept all well-pleaded facts as true. *Tamayo*, 526 F.3d at 1081.

A. Jezebel Article’s Title and Content Defamation Claim Properly Dismissed

A statement is defamatory under Illinois law if “it tends to harm a person’s reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person.” *Tuite v. Corbitt*, 866 N.E.2d 114, 121 (Ill. 2006). The *per se* designation applies if the statement’s “defamatory character is obvious and apparent on its face and injury to the plaintiff’s reputation may be presumed.” *Id.* A statement will usually constitute defamation *per se* if it falls into one of five categories; the only one at issue here concerns “statements imputing the commission of a crime.” *Id.*

On appeal, Huon contends that two aspects of the Jezebel article constituted defamation *per se*: (1) the headline and adjacent graphic containing his mug shot, to which the district
judge applied the innocent construction rule; and (2) the article’s description of the criminal trial and subsequent civil suit, to which the judge applied the fair report privilege. We consider each issue in turn.\(^3\)

1. **Innocent Construction Rule Applies to Headline and Graphic**

A statement that is defamatory *per se* will not be actionable “if it is reasonably capable of an innocent construction.” *Green v. Rogers*, 917 N.E.2d 450, 463 (Ill. 2009). Under this rule, a court must give the defendant’s words their natural and obvious meaning, after having considered “both the substance of defendant’s alleged statements and the context in which they allegedly were made.” *Id.* at 464. “[I]f a statement is capable of two reasonable constructions, one defamatory and one innocent, the innocent one will prevail.” *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 925 (7th Cir. 2003) (citing *Anderson v. Vanden Dorpel*, 667 N.E.2d 1296, 1302 (Ill. 1996)). Nevertheless, “when the defendant clearly intended and unmistakably conveyed a defamatory meaning, a court should not strain to see an inoffensive gloss on the statement.” *Green*, 917 N.E.2d at 463.

Here, Huon maintains that the Jezebel article’s headline, “Acquitted Rapist Sues Blog For Calling Him Serial Rapist,” is defamatory because it imputes to him the commission of a crime (rape), and is not subject to an innocent construction.

\(^3\) Huon’s fourth amended complaint also alleges defamation *per quod*. But since Huon does not press this claim on appeal, we consider it forfeited. *See, e.g.*, *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 386 (7th Cir. 2012); *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).
According to Huon, the most reasonable meaning of the headline is that Huon has committed rape at least once, and that the word “acquitted,” by itself, does not controvert this false insinuation.

We need not decide whether the headline itself defamed Huon because, even if it did, it is subject to an innocent construction. As the Gawker Defendants correctly note, headlines must be considered alongside the accompanying article and not in isolation. See, e.g., Harrison v. Chi. Sun-Times, Inc., 793 N.E.2d 760, 772 (Ill. App. Ct. 2003) (“As a general rule in applying the innocent construction rule, a newspaper headline and the text of the article to which it refers are to be considered as one document and read together as a whole.”); accord Solaia Tech., LLC v. Specialty Pub. Co., 852 N.E.2d 825, 846 (Ill. 2006); Seith v. Chi. Sun-Times, Inc., 861 N.E.2d 1117, 1127 (Ill. App. Ct. 2007); cf. Tuite, 866 N.E.2d at 127–28 (examining allegedly defamatory statements in the context of the entire book in which they were published); Bryson v. News Am. Publ’ns, Inc., 672 N.E.2d 1207, 1217 (Ill. 1996) (examining allegedly defamatory word in magazine article alongside the adjacent sentences).

Huon argues that “[h]eadlines alone may be enough to make libelous per se an otherwise innocuous article,” but the small handful of cases he relies on are unhelpful. All of them involve the laws of states other than Illinois, and many are distinguishable on their facts insofar as the allegedly defamatory front-page headline was not next to the underlying article. See Solano v. Playgirl, Inc., 292 F.3d 1078, 1083–84 (9th Cir. 2002) (emphasizing that “the magazine is displayed for sale in plastic wrapping, making the cover the key to what a reader can expect to find inside the magazine”); Kaelin v.
Globe Commc’ns Corp., 162 F.3d 1036, 1041 (9th Cir. 1998) (concluding that a reasonable jury could find that the magazine article “was too far removed [17 pages] from the cover headline to have the salutary effect that [defendant] claims”). Here, in contrast, the complaint indicates that the headline and article were directly adjacent to one another.

The content of the underlying Jezebel article makes clear that the only instance of alleged rape was the one Huon was acquitted of. Indeed, one need only read the first sentence to see that this is so: “A Chicago man who was acquitted on a sexual assault charge is suing the legal blog Above The Law for implying that he’s a serial rapist.” And two paragraphs later, after having discussed Huon’s acquittal, the article explains that ATL “mistakenly believes that news accounts of the same incident are different incidents that should have tipped the woman off that Huon was a serial offender.” (emphasis added).

Huon also contends the graphic containing his mugshot and the phrases “Above the Law” and “Rape Potpourri” constitutes defamation per se. We disagree. Above the Law was the name of the website that Huon had sued, “Rape Potpourri” was the headline of the ATL article, and the mugshot illustrated the subject matter at issue. So the innocent construction rule applies to the Jezebel article’s headline and graphic.

2. Fair Report Privilege Applies to Discussion of Criminal Trial and Civil Lawsuit

Under Illinois law, a defamatory statement is not actionable if it falls within the fair report privilege, which applies to statements that are “complete and accurate or a fair
abridgment of [an] official proceeding." *Solaia Tech., LLC v. Specialty Pub. Co.*, 852 N.E.2d 825, 843–44 (Ill. 2006). Illinois courts have repeatedly stressed the importance of a robust privilege, as it “promotes our system of self-governance by serving the public’s interest in official proceedings, including judicial proceedings.” *Id.* at 842; see also, e.g., *Lulay v. Peoria Journal-Star, Inc.*, 214 N.E.2d 746, 747–48 (Ill. 1966) (“The right to speak and print about such actions of government is well established; denial of this right would be a serious infringement of both State and Federal constitutional guarantees of free speech and press.”).

A report constitutes a fair abridgment if it conveys “a substantially correct account” to readers. *Solaia Tech.*, 852 N.E.2d at 844–45 (citation omitted). Because the summary of a legal proceeding “is bound to convey a somewhat different impression than the ... proceeding itself,” an abridgment is typically unfair only if it “significantly change[s] the defamation appearing in the governmental or public proceeding.” *O’Donnell v. Field Enters., Inc.*, 491 N.E.2d 1212, 1217 (Ill. App. Ct. 1986). A determination “is made by comparing the gist or sting of the alleged defamation in the official report or proceedings with the gist or sting in the news account.” *Harrison v. Chi. Sun-Times, Inc.*, 793 N.E.2d 760, 773 (Ill. App. Ct. 2003). Contrary to Huon’s contention, the fair report privilege typically raises a question of law, not a question of fact, and is not concerned with the defendant’s alleged subjective intent. E.g., *Solaia Tech.*, 852 N.E.2d at 842–43; *Missner v. Clifford*, 914 N.E.2d 540, 551 (Ill. App. Ct. 2009).

Huon argues that the privilege should not apply to the following sentence from the Jezebel article concerning his criminal trial: “Huon’s version was that it was a consensual
encounter, and partly on the strength of the bartender’s testimony that the woman had been drinking and asked where to go to have fun, the jury believed him.” It bears noting, however, that the district judge did not apply the fair report privilege to this sentence, concluding instead that it did not amount to defamation. See Huon v. Breaking Media, LLC, 75 F. Supp. 3d 747, 768 (N.D. Ill. 2014) (statement “bolster[ed] rather than defame[d] his reputation” because it suggested that “the jury found reason to discredit Jane Doe’s claims and therefore acquitted Huon of the charges”).

We agree with the Gawker Defendants that the fair report privilege applies to the Article’s references to consent and the bartender’s testimony, since they appear to accurately capture the gist of what occurred at the trial. Huon’s counsel emphatically and repeatedly referenced consent during opening statements, and the multiple facts that Huon points to as grounds for his acquittal, taken together, dovetail with a consent-focused defense strategy. In addition, Huon makes no attempt to explain how the statement about the bartender’s testimony mischaracterizes what she actually said at trial.

We cannot, however, easily dismiss Huon’s argument about the Article’s statement about the jury’s beliefs—especially since there is no indication as to what swayed any particular juror’s vote. The Gawker Defendants insist that the statement is nothing more than a non-actionable opinion, but we are dubious. The statement does not appear to be the kind of subjective claim that courts applying Illinois law have typically viewed as non-actionable, see, e.g., Wynne v. Loyola Univ., 741 N.E.2d 669, 676 (Ill. App. Ct. 2000) (explaining that non-actionable statements typically contain no “ob-
jectively verifiable factual assertion”), and the article’s context more closely resembles a news article than an editorial. However, we need not decide the issue, since we agree with the district judge that the statement could not have injured Huon’s reputation in the eyes of the public. (If anything, the statement improved it.)

Huon also maintains that the Jezebel article failed to capture the gist of his lawsuit against the ATL Defendants in two ways. First, he faults the article for omitting the fact that the ATL Defendants called him a rapist on the same day he was acquitted. However, we fail to see how omitting this fact, by itself, caused the gist to be inaccurate. The Jezebel article accurately conveyed the crux of Huon’s complaint against the ATL Defendants—that ATL erroneously indicated Huon had committed multiple sexual assaults, and that he was acquitted in the only case brought against him—and Huon makes no attempt to explain why omitting the temporal relationship between Huon’s acquittal and publication of the ATL article misrepresents the nature of his lawsuit. In essence, Huon complains that the Jezebel article omitted a factual allegation of only modest significance; yet without such omissions, abridgments of legal proceedings could never occur.

Second, Huon faults the Jezebel article for republishing the ATL article’s defamatory comments. See Brennan v. Kaddner, 814 N.E.2d 951, 970 (Ill. App. Ct. 2004) (“The republisher of a defamatory statement made by another is himself liable for defamation even if he gives the originator’s name.”). But the Jezebel Article did not simply parrot the rape-based allegations in the ATL article; rather, it summarized Huon’s criticism of these allegations, and, if anything, indicated that the
criticism was founded, insofar as it noted that Huon was “acquitted” and that the ATL article was based on a “mis-
taken[] belie[f].” So the fair report privilege applies to the Jezebel article’s statements regarding Huon’s criminal trial and subsequent lawsuit against ATL.

B. District Judge Erred in Dismissing Defamation Claim Involving Third-Party User Comments

1. Communications Decency Act Not Applicable

The Communications Decency Act states, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1); see also id. § 230(f)(3) (defining “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”). This means that for purposes of defamation and other related theories of liability, a company like Gawker cannot be considered the publisher of information simply because the company hosts an online forum for third-party users to submit comments. See, e.g., Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (concluding that Craigslist “is not the author of the ads and could not be treated as the ‘speaker’ of the posters’ words, given § 230(c)(1)”); Doe v. GTE Corp., 347 F.3d 655, 658–59 (7th Cir. 2003) (explaining that “entities that know the information’s content do not become liable for the sponsor’s deeds,” and noting that § 230(c) preempts contrary state law).
A company can, however, be liable for creating and posting, inducing another to post, or otherwise actively participating in the posting of a defamatory statement in a forum that that company maintains. See Chi. Lawyers’ Comm., 519 F.3d at 671; see also Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1166–67 (9th Cir. 2008) (en banc) (concluding that a website was not a “passive transmitter of information provided by others” but instead helped develop the information by “requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers”); FTC v. Accusearch Inc., 570 F.3d 1187, 1199–1200 (10th Cir. 2009) (concluding that a website developed the information by “solicit[ing] requests” for the information and then “pa[yin]g researchers to obtain it”).

Huon argues that the Act is inapplicable here because Gawker’s comments forum was not a mere passive conduit for disseminating defamatory statements. Rather, Gawker itself was an information content provider, insofar as the Gawker Defendants: (1) “encouraged and invited” users to defame Huon, through selecting and urging the most defamation-prone commenters to “post more comments and continue to escalate the dialogue”; (2) “edited,” “shaped,” and “choreographed” the content of the comments that it received; (3) “selected” for publication every comment that appeared beneath the Jezebel article; and (4) employed individuals who authored at least some of the comments themselves.

The district judge concluded that these arguments failed to plausibly state a claim for relief. But we see nothing farfetched about Huon’s factual allegations—in particular,
his contention that one or more of the comments were authored by Gawker employees. Rather than asserting one or two standalone factual allegations concerning Gawker’s control over comments, Huon’s fourth amended complaint devotes over four pages to detailing Gawker’s alleged activities. Critically, the complaint hints at why Gawker employees might have anonymously authored comments, alleging that increasing the defamatory nature of comments can increase traffic to Gawker’s websites, which can in turn enhance the attractiveness of Gawker’s commenting system for prospective advertisers. In doing so, the complaint quotes several passages from a Reuters article that explains precisely how Gawker was planning to “monetize” comments, and why advertisers might find this commenting system appealing.

The Gawker Defendants may well be correct in contending that none of Huon’s various allegations actually occurred, but this doesn’t mean that the allegations are so implausible as to warrant dismissal under Rule 12(b)(6). See Twombly, 550 U.S. at 555 (explaining that a complaint need only plead enough facts to “raise a right to relief above a speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” (footnote and citations omitted)); id. at 556 (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” (citation and internal quotation marks omitted)). Discovery is the proper tool for Huon to use to test the validity of his allegations, and if he is unable to marshal enough facts to support his claim the Gawker Defendants can move for summary judgment. Moreover, to the extent Gawker and other publishers are concerned that our
ruling will result in a flood of frivolous lawsuits, we remind them that sanctions are available under Federal Rule of Civil Procedure 11 if it is determined that a plaintiff’s factual allegations were plead with improper purpose, are frivolous, or were known by plaintiff’s counsel to be lacking any factual basis.

The Gawker Defendants proffer several arguments in support of the Act’s application here, but none are availing. For example, they argue that Huon’s allegations amount to the kind of “traditional publishing activities” that other courts of appeals have found warrant protection under the Act. See, e.g., Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (Under § 230, “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”); accord Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18–20 (1st Cir. 2016); Jones v. Dirty World Entm’t Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014). But we need not wade into that debate, since Huon has adequately pleaded that at least some of the allegedly defamatory comments were authored by Gawker employees—thus making Gawker an “information content provider” under § 230(f).

In addition, the Gawker Defendants argue that Huon’s allegation that the Defendants induced the comments is belied by Gawker’s terms of use for commenters, which, among other things, prohibited the posting of “harassing, defamatory or libelous material.” But the mere fact that a terms-of-use statement exists does not establish that all comments complied with it.
The Gawker Defendants also argue that Huon failed to plead facts plausibly establishing that Gawker authored the allegedly defamatory comments. As discussed above, however, there is nothing implausible about this allegation, and we reject the Gawker Defendants’ invitation to interpret Rule 8, Twombly, and Iqbal as requiring more. Indeed, potentially meritorious claims could be prematurely and improperly dismissed if we were to accept the Gawker Defendants’ position, since the information necessary to prove or refute allegations like Huon’s is typically available only to defendants. Cf. Brown v. Budz, 398 F.3d 904, 914 (7th Cir. 2005) (“Where pleadings concern matters peculiarly within the knowledge of the defendants, conclusory pleading on ‘information and belief’ should be liberally viewed.” (citation and internal quotation marks omitted)).

2. One Comment Is Defamatory

The fact that Huon has plausibly alleged that Gawker employees created the defamatory comments, by itself, does not allow him to press forward with his defamation per se claim; the comments must actually constitute defamation. We have already discussed the general principles of defamation per se under Illinois law. But given the fact that the statements at issue were shared in a comments forum, a brief discussion of the distinction between actionable factual assertions and non-actionable opinions is in order.

between factual assertions and opinions: “(1) whether the statement has a precise and readily understood meaning; (2) whether the statement is verifiable; and (3) whether the statement’s literary or social context signals that it has factual content.” *J. Maki Const. Co. v. Chi. Reg’l Council of Carpenters*, 882 N.E.2d 1173, 1183 (Ill. App. Ct. 2008). Notably, “[w]ords that are mere name calling or found to be rhetorical hyperbole or employed only in a loose, figurative sense have been deemed actionable.” *Pease v. Int’l Union of Operating Eng’rs Local 150*, 567 N.E.2d 614, 619 (Ill. App. Ct. 1991); see also *Milkovich*, 497 U.S. at 20 (statements that are not reasonably understood as stating actual facts should not be actionable, in order to ensure that “public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation”).

Here, most—but not all—of the comments do not constitute defamation per se. Some comments are not defamatory because they do not directly concern Huon himself, but instead relate to acquittal and guilt more generally. For example:

SarahMc:

Just because a man is acquitted of rape does not mean he did not commit rape. That a jury would decide “not guilty” does not magically erase what he did—if he did, in fact, rape someone. The vast majority of rapists are never convicted of rape. Does that make them not rapists?

Dinosaurs and Nachos, girlfriend!: 
Innocent until proven guilty is a widely misunderstood concept. It basically means that the mere fact that someone is charged with a crime is not itself evidence that the person committed a crime.

Then you go to court. In court, there will be evidence presented. This evidence is where an actual, legal determination is made. Nobody is declared “innocent” in a court of law, they are found guilty or not guilty.

“Not guilty” is absolutely not the same thing as “innocent” from a legal standpoint. Those words do not mean the same thing in the world of law. “Innocent until proven guilty” is merely a concept for laymen to try to keep their non-lawyer brains from jumping to (nonlegal) conclusions.

Other comments amount to hyperbole that cannot be reasonably understood as asserting objectively verifiable facts. For example:

SorciaMacnasty:

Nevermind [sic] “serial rapist,” he sounds like a foreal [sic] crazy person.

Still other comments, while referencing certain alleged facts surrounding Huon’s criminal trial, do not directly accuse him of committing a crime and are better classified as non-actionable opinions—specifically, a rhetorical decrying of general notions of “rape culture” and “victim blaming.” For example:
cool_as_KimDeal:

Well shit! I didn’t know kicking back at a bar and asking where I should go to have fun meant that I hereby consent to any and all sexual activity, with anybody, with this bartender here as my witness. Can I sign away my right to consent here on my bar tab? Okay, great.

JadeSays:

Weird. I didn’t know “where do I go to have fun” meant the same thing as “where do I go to get raped.” It’s great that that jury made that clear to me, otherwise I could get myself in some sticky situations like apparently accidentally begging to be raped.

AWE. SOME.

rachel723 (in reply to JadeSays’s comment):

you know it’s women like you who don’t understand the rules that make the rest of us ladies look bad.

I’m glad you learned before you actually got raped not to complain now if you do, you were asking for it!!

/sarcasm

HeartRateRapid:

Yea, all those crazy bitches going to the cops and lying about being raped. Except
that false reports for stolen cars are more common. False rape reports make up less than 3% of all reported rapes, and as I’m sure you know, it horrendously underreported.

Only the following comment qualifies as defamation _per se_ under Illinois law:

vikkitikkitavi:

She jumped out of a moving car, leaving her shoes and purse behind and ran barefoot through a cornfield and pounded on a stranger’s door to help her?

Fuck this “he’s been acquitted” noise. He’s a rapist alright, so we may as well call him one.

This comment unequivocally accuses Huon of committing a crime (rape), and nothing in its context suggests it is more appropriately viewed as mere name-calling or stylistic exaggeration. So Huon’s defamation _per se_ claim as to this comment may proceed.

C. False Light Invasion of Privacy and Intentional Infliction of Emotional Distress Claims Improperly Rejected

The district judge rejected Huon’s false-light and intentional-infliction claims based solely on the dismissal of Huon’s defamation claims. It appears that this tethering is consistent with Illinois law. See _Madison v. Frazier_, 539 F.3d 646, 659 (7th Cir. 2008) (When an “unsuccessful defamation _per se_ claim is the basis of [a plaintiff’s] false-light claim, his false-
light invasion of privacy claim fails as well.”). But that reasoning no longer holds, since Huon’s defamation per se claim as to one third-party user comment was improperly dismissed. And because the false-light and intentional-infliction claims have not been adequately briefed on appeal, we reverse the dismissal of those claims and remand for further proceedings.

D. No Error in Denying Motion for Leave to File Fifth Amended Complaint

Finally, Huon argues that the district judge erred in denying him leave to file a fifth amended complaint to cure certain alleged deficiencies relating to his defamation per quod claim. Federal Rule of Civil Procedure 15(a)(1) instructs that courts should freely give plaintiffs leave to amend their complaints “when justice so requires.” However, district judges have “broad discretion” to deny leave to amend, “where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile.” 

Huon has not satisfied this high bar. The district judge explained that in each of his previously amended complaints, Huon had added new factual and legal allegations, added or removed defendants, or revised certain statements in an attempt to cure jurisdictional deficiencies. In addition, the judge emphasized that the modifications in the proposed complaint could have been made earlier, since they purport
to cure deficiencies highlighted in the Defendants’ motions to dismiss Huon’s second amended complaint. Why Huon did not modify his third or fourth amended complaints accordingly remains a mystery. So the district judge did not err in finding that Huon had ample opportunity to plead his claims, and justice does not require an additional bite of the apple. See Agnew v. Nat’l Collegiate Athletic Ass’n, 683 F.3d 328, 347–48 (7th Cir. 2012) (finding no abuse of discretion in denying leave to amend where plaintiffs had already had three opportunities to state a claim); Emery v. Am. Gen. Fin., Inc., 134 F.3d 1321, 1322–23 (7th Cir. 1998) (same).

III. CONCLUSION

The judgment of the district court is AFFIRMED in part and REVERSED in part, and the case is REMANDED for proceedings consistent with this opinion.
Case No. 13-5946

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

SARAH JONES,
Appellee.

v.

DIRTY WORLD ENTERTAINMENT RECORDINGS, LLC, et al.,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY (BERTELSMAN, W.)

APPELLEE SARAH JONES' RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Appellee Sarah Jones makes the following disclosures: (1) that she is not a subsidiary or affiliate of a publicly owned corporation and (2) that there is no publicly owned corporation, that is a party to this appeal that has a financial interest in the outcome.

Dated: December 23, 2013

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REQUEST FOR ORAL ARGUMENT
Pursuant to Sixth Circuit Rule 28(b)(1)(B) and 34(a), the Appellee also requests that this matter be set for oral argument. This appeal involves a question of law with the potential to be a matter of first impression in this circuit.
SUPPLEMENTAL STATEMENT OF THE CASE

The most important, undisputed reality, which allows this circuit to make a narrow ruling, is that Richie created this site to collect dirt or gossip about real people, he reviewed all submissions prior to posting and made decisions about which posts would be displayed, and edited the posts and added comments to them. This is not Facebook or other platform that passively acquiesces to the content provided by users. Richie encouraged users of his site to post defamatory material and ratified that content and encouraged additional content through his comments.

The sole issue on appeal is whether the trial court appropriately denied immunity under the Communications Decency Act to the Appellants.

As a general matter, Sarah Jones, the Appellee agrees with most of the Appellants, Mr. Karamian’s and Dirty World, LLC’s (“Richie”), statement of the case. However, Richie tries to gloss over the undisputed fact that after a trial, the jury found Richie liable for defamation by clear and convincing evidence. Further, the trial court instructed the jury based upon the Appellee’s status as a public figure, requiring that the jury find that the statements were made with knowledge of the falsity or with reckless disregard to the truth. The trial court specifically included the jury instruction with the heightened standard to avoid appealable issues, despite the fact that the trial court found that Ms. Jones was actually a private figure.
STATEMENT OF FACTS

When Richie started the “thedirty.com,” he was looking at reality television and the popularity of celebrity gossip and decided that he wanted to do the same with regular people. (RE 176, Trial Transcript Day 3, pp. 2578-79). He is “in the business of putting insulting or humiliating things about normal people on his site. Id. at 2579. He knows that the humiliating and insulting posts are put up to embarrass people, so that others can watch their neighbors fall off their “high horse.” Id. at 2586.

Prior to October 27, 2009, Sarah Jones (“Ms. Jones”) had never even heard of thedirty.com until a comment was posted about both her and a Bengals football player, Shayne Graham. (RE 174, p. 2309). Specifically, that post stated, “She’s been spotted around town lately with the infamous Shayne Graham. She also slept with every other Bengal Football player.” Id. at 2310; RE 64-2, p. 507. Ms. Jones never slept with Mr. Graham or any other Bengal football player. Id. On that same day, Richie commented on the post about Shayne Graham being a sex addict. (RE 64-2, p. 507).

On December 7, 2009, the second post claiming that Ms. Jones’ husband had contracted sexually transmitted diseases and which implied that she had those diseases as well, was posted to the site. Id. at 509. The comment also stated that
she had sex at the school where she taught and Richie made his comment about teachers being freaks in the sack. *Id.* The December 7, 2009 post is as follows:

“The Dirty Army: Nik, here we have Sarah J, the captain cheerleader of the playoff-bound Cincy Bengals. Most people see Sarah as a gorgeous cheerleader and high school teacher. Yes, she’s also a teacher. What most of you don’t know is her ex, Nate cheated on her with over 50 girls in four years. **In that time, he’s tested positive for chlamydia infection and gonorrhea, so I’m sure Sarah also has those.** What’s worse is he brags about doing Sarah in the gym, football field, or classroom at the school. She teaches at Dixie Heights.”

RE 64-2, p. 509(emphasis added). This is defamation. Richie admitted at trial that he reviewed the submission before posting, decided to post the submission, and let it remain published. This is no different than a newspaper who is liable for defamation it publishes regardless of the source. Immediately below this text, Richie commented, “[w]hy are high school teachers freaks in the sack? -Nik." *Id.* Just two days after this post, someone posted a photo of Ms. Jones on vacation. *Id.* at 511. The post acknowledged the previous posts, commented in passing about “the infected couple,” insults Ms. Jones’ beauty, and is also commented upon by Richie. *Id.*

On December 28, 2009 a post stated that a lawsuit had been filed against Richie. *Id.* at 515. The next day, two posts were submitted relating to Ms. Jones. *Id.* at 517, 519. The first post references the lawsuit and Richie comments, “Note
to self: Never try to battle the DIRTY ARMY.” *Id.* at 517. The next post from the
same day referenced other BenGal cheerleaders and Richie commented, ”I love
how the DIRTY ARMY has war mentality… why go after one ugly cheerleader
when you can go after all the brown baggers.” *Id.* at 519.

Immediately upon learning of the October 27, 2013 post, Ms. Jones
attempted to contact Richie to have the post removed. (RE 174 at 2311-12). Just
two days later, she was able to send an email after trying to contact Richie via
MySpace. *Id.* at 2312. Ms. Jones never received a response to the email, and
concerned about her students’ questions regarding the post, she persisted in her
request to have the post removed. *Id.* She sent requests on November 1, 6, 8, 11,
12, 13, 14, 15, 19, of 2009, all without a response. *Id.* at 2312-13.

As a result of the October 27, 2013 post, Ms. Jones had to meet with the
superintendent and was told that she would have to sit down with the five class
periods she taught to tell them she did not have any sexually transmitted diseases.
*Id.* at 2317. She was also tested to verify that she did not have an STD and the
school went through its security footage to make sure that she did not have sex
with her ex-boyfriend on school property. *Id.* at 2317.

Similar to Richie’s original motion for judgment in the trial court, he once
again cites numerous times to his affidavit attached to that motion. However, those
comments still have to be viewed in conjunction with the other statements he made
under oath at deposition and at trial. Even standing alone, the statements in his affidavit do little to change the factual situation as it was examined by the district court.

At the very beginning of his deposition, Richie claims to be the editor of thedirty.com:

Q. What do you do? What is your role in thedirty.com?

A. I'm the editor.

(RE 67, Richie Depo. p. 696). Later, he says “Umm, I am the editor as far as I do—I do control, like, comments.” Id. at 698. Then when he wants all blame to fall on third parties he claims to not be an editor:

Q. And you edit it, correct?

A. No. I put my line at the end of it. I don't edit posts.

Id. at 734. Much more recently, Richie again claims to be not just an editor, but “Editor-In-Chief” of www.thedirty.com. (RE 64-2, p. 478, ¶ 1).

Likewise, Richie is extremely generous to himself with any numbers. When bragging about the popularity of his site, he claims, “[W]e get, you know, thousands of submissions a day and we weed it down to the top 150, 200.” that at most 10% of the “thousands of submissions a day” ever get posted. (RE 67 Depo.
p. 696). However later on, Richie claims that as much as “30 or 25 percent actually make the website.” *Id.* at 710.

When he wants to look responsible, Richie claims to personally weed through the “thousands” of SUBMISSIONS he receives, and then weeds it down to the “top 150, 200” posts which he actually puts up on his site. *Id.* at 696. Elsewhere in the deposition, when he remembers he is being held accountable for his complete control of the website and the harm it causes, he claims that the process isn’t run entirely by him, but that it is automatic. *Id.* at 700. Then later, he remembers (one can only assume) that he controls the entire process again:

> [Y]ou just upload your submission. So, you would say the picture and our process automatically, you know, resizes the image, puts the watermark, puts your saying and adds the Dirty Army, so it's coming from a third party, and it -- then it goes to our list of submissions and then we go through them and look at each image and see, you know, read the—read the stuff and see what's good enough . . . .

*Id.* at 709-10, emphasis added. Richie claims that thedirty.com has a “removal department,” and when asked about said “removal committee,” he admits grudgingly that that is, “Um, pretty much me.” *Id.* at 708.

When he wants to make himself look responsible and conscientious, Richie claims that “I’m there [on the site] to monitor stuff and make sure we’re putting up as much truthful information as possible.” *Id.* at 714. But when questioning gets more intense, Richie retreats to “It’s not my job to fact-check every single post,”
Id. at 755, and ultimately states his true opinion about www.thedirty.com: “It’s the Internet, you can say whatever you want on the Internet.” Id. at 757.

However the evidence presented during discovery at trial demonstrates that Richie’s actions place him and the other Appellants outside the protection of the Communications Decency Act (“CDA”). Despite the relatively lengthy review of the history of the CDA, the question of law in this case is very narrow. Whether, under these specific circumstances, that Richie developed the actionable content, thereby falling outside of the umbrella of immunity provided by the CDA. Mr. Richie crossed the line and became an information content provider. As betrayed by his own comment: you can say whatever you want on the Internet.

Of course, that is not true. Defamation is defamation and is not protected speech. The problem is anonymous defamation on the internet, while actionable, could hardly be collected by judgment in most cases. That is not the issue in this case where the source of the defamation is still unknown despite efforts to find out. However, it equally will not ever be known if Richie was the original source.

SUMMARY OF THE ARGUMENT

Richie holds onto the “fact” that the posts were not defamatory, but were hyperbole or rhetoric. As described in the statement of facts, the posts most certainly were defamatory. However, this factual issue has already been
determined by a jury to be defamatory by clear and convincing evidence. The sole issue is whether the Defendants were correctly denied immunity for these defamatory statements under the CDA. The district court was correct in denying immunity to Richie based upon the specific circumstances of this case.

The CDA was created to give protection to those who offer interactive computer services to third parties, and to encourage self-policing. Richie seeks to use the CDA as a shield, but he does not qualify under the statute. Richie acted as an information content provider by encouraging the development of the offensive content about Ms. Jones. Specifically, Richie fully controlled the dirty.com website: 1) he acted as the editor and selected small percentage of submissions to be posted, 2) he reviewed submissions without verifying accuracy, and 3) decided if postings should be removed, if he received an objection to a post.

In simple terms, he controlled what went up, how it read, and how long it stayed up. He even added his own two cents which encouraged others to post additional defamatory content. Richie posted the submission about Ms. Jones without verifying the accuracy of the content and decided that he would not remove the post despite Ms. Jones requests to have the post removed.

Richie also adopted the actionable content of the post by including his own taglines or comments about the posts. After the second post, Richie asks, “[w]hy
are all high school teachers freaks in the sack,” which encouraged others to post additional defamatory material. Finally, the name of the website, thedirty.com, when viewed in the totality of the circumstances, encouraged users to submit defamatory material. He even calls on his “Dirty Army.”

The district court held that the Richie was not eligible for immunity under the CDA because he was an information content provider. The district court reasoned that due to the name of the site, the manner in which it was managed, and Richie’s personal comments, that Richie encouraged the development of what is offensive about the content of the site.

ARGUMENT

The Communications Decency Act provides immunity to providers and users of interactive computer services for liability arising out of the content provided by a third-party:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider

47 U.S.C. § 230(c)(1). To determine whether the operator of a website is immune under the CDA, the Court must ask three questions:

1) Is the Defendant a provider or user of an “interactive computer service?”
2) Do the Plaintiff’s claims require treating the Defendant as a “publisher or speaker” of information? And
3) Was the allegedly actionable material provided by another information content provider?


However, CDA immunity applies only if the interactive computer service provider is not also an information content provider. *Fraley v. Facebook Inc.*, 830 F.Supp.2d 785, 802 (N.D. Cal. December 16, 2011) (citing *Roomates.com*, 521 F.3d at 1162).

The term ‘information content provider’ means any person or entity that is responsible, **in whole or in part**, for the **creation or development** of information provided through the Internet or any other interactive computer service.

47 U.S.C. § 230(f)(3)(emphasis added). Richie posted all content on thedirty.com and developed what was offensive about the site. “[T]he party responsible for putting information online may be subject to liability, even if the information originated with a user.” *Fraley v. Facebook Inc.*, 830 F.Supp.2d 785, 802 (N.D.Ca. 2011)(citing *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003). Richie admits to creating other content: “I do create content.”(RE 175, p. 2453).

The Sixth Circuit has previously rejected an interpretation of the CDA, which would grant broad immunity to almost all internet services. *Doe v. SexSearch.com*, 551 F.3d 412, 415 (6th Cir. 2008):
We do not adopt the district court’s discussion of the Act, which would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services.

Richie’s interpretation of the CDA would extend blanket immunity to interactive computer services. The district court also rejected this broad interpretation of the CDA in its holding below.

This case is the perfect example of why such a ruling has been made. Although Richie has cited other state courts’ rulings to try to claim protection under the CDA, the Sixth Circuit has refused to follow these courts’ rulings and “explicitly reserve[d] the question of its scope for another day” Id. at 416. Such a broad interpretation of the CDA would be overreaching and would give unlimited protection to any actor that makes defamatory comments as long as done on the internet.

After examining precedent from the Seventh, Eighth, Ninth, and Tenth Circuits, the district concluded that while the Courts have stated that immunity under the CDA is broad, “the weight of authority teaches that such immunity may be lost.” Jones v. Dirty World Entertainment, LLC, 2013 WL 4068780 *2-3 (E.D.Ky., Aug 12, 2013). A website operator who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or
adopting the posts becomes a creator or developer of that content and is not entitled to immunity. *Id.* at 3.

In its order denying Richie’s motion for judgment as a matter of law, the district court determined that under Kentucky law the posts could be found libelous and that the Defendants were the developers of the objectionable content of the website. *Id.* at 2-5. The district court reasoned that the name of the site, the manner in which it was managed, and the personal comments of Richie encouraged the development of what was offensive\(^1\) about the content of the site. *Id.* at 4-5. In July of 2013, a jury determined, by clear and convincing evidence, that the posts were defamatory, were posted with actual malice, were not hyperbole or rhetoric, and were not opinion. (RE 207, pp. 3130-33).

Richie is correct that the purpose of the CDA is to protect those who undertake to remove offensive material posted on a website. However the protection afforded was not intended to subvert the law of defamation. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

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\(^1\) In his brief, Richie comments on the fact that the speech that needs constitutional protection the most, is the speech that people find offensive. While the district court used the term “offensive,” it should be noted that the court examined a number of different cases in which the various defendants attempted to argue for immunity over different causes of action. In this matter, “offensive” is logically being used to describe content that created liability for different reasons. It is well established that not all speech is constitutionally protected, including common law defamatory speech.
1164 (9th Cir.2008) (“The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet.”). Here Richie was instrumental in developing the offensive content in question and is therefore not entitled to immunity under the CDA.

RICHIE DEVELOPED THE ACTIONABLE CONTENT BY ENCOURAGING THE POSTING OF DIRT, SELECTING A SMALL PERCENTAGE OF POSTS FOR PUBLICATION, AND MOST SIGNIFICANTLY BY ADDING A TAGLINE AT THE END OF EACH POST

Since a jury already found by clear and convincing evidence that the posts were defamatory, there is only one issue in this appeal: Whether the defamatory content was developed by Richie. The term “develop” is not as limited as Richie attempts to paint it. The examples that Richie uses to define the boundaries of develop are closer to the definition for creation of content.

The district court found that the name of the website, thedirty.com, specifically encourages users to post “dirt” about others. Jones v. Dirty World Entertainment, LLC, 2013 WL 4068780 *5; RE 76, p. 854. This goes beyond a site that encourages reviews of services, as encouraging the submission of dirt is designed to lead to the submission of defamatory content, as well as content that violates individuals’ right to privacy. Further, Richie sorts through at least one thousand submissions each day and decides to post between fifteen and twenty percent of the posts submitted.(RE 67, p. 696). Finally, after a submission is
posted, he adds a tagline and if a takedown request is received, he decides if they
should be taken down. *Id.*

It is not just the name of the site, or just the use of a tagline that makes the
CDA inapplicable to Richie. It is all of these items, taken together, which
demonstrates that Richie is responsible for developing the tortious content on the
website and specifically the content relating to Ms. Jones. Here the district court
correctly determined that Richie effectively acted as an information content
provider of the actionable content because he encouraged the development of what
was defamatory about the content. Because the defamatory material was developed
by Richie, those comments cannot be said to have been provided by another
information content provider and thus Richie is not immune for those comments
under the CDA.

**A. The Definition of Develop is not so Exceptionally Narrow as to
Require the Operator to Explicitly Create the Libelous Content**

Under Richie’s narrow definition of “develop,” the only way that a website
owner can lose immunity is by changing a post to make it defamatory or by
independently creating its own defamatory speech. (See Appellant Brief at 43).
This definition is contrived from *Roommates*, which requires that a website
operator materially contribute to the creation of unlawful content. *Fair Housing
Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th
Cir.2008). Richie spends close to thirteen pages of his brief trying to show how the definition of “develop” is narrowed to these two examples. These examples are, in reality, much closer to examples of creating content than developing content. This is important to Richie’s claim, as he indicates that there is no evidence presented by Ms. Jones that Richie himself created the libelous content, but rather she claims that Richie specifically encouraged the development of the libelous content.

On the other hand, the Roommates court noted that an operator that passively acquiesces to users’ misconduct would not lose protection under the CDA. Roommates at 1169. Richie’s interpretation of Ninth Circuit’s examples do little more than to give black and white examples that do little to cover the vast ocean in between passive acquiescence to users’ posts and modifying a post to make it defamatory. This is important, because this reading of the CDA is not new, it is well accepted.

B. Richie Developed the Defamatory Content Because the Name of the Site Encouraged the Posting of Dirt, Reviewed All Submissions, Posted a Small Percentage of Submissions, Decided if Posts should be

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2 The example given in Roommates is the editing of a word to make a true statement false and which then imputes a criminal conduct on another. This means that the statement was not defamatory until the operator made it defamatory. Another example given for an operator that did nothing to develop the actionable content was the providing neutral tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception.
Removed, and Added Taglines or Opinions that Effectively Ratified the Defamatory Content.

Richie attempts to distinguish the *Accusearch* and *Roomates*’ holdings in an attempt to show that he did not, under the current law from the Ninth and Tenth Circuit, develop the content so as to lose immunity. (Appellate Brief, 31-43). However, these holdings only help to strengthen the argument that Richie did develop the culpable content.

*Accusearch* involved a website that would sell “inherently unlawful” records to the public. *Fed. Trade Comm'n v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009). While here Richie claims that the defamatory material was posted by a third party, *Accusearch* claimed immunity from liability because the illegal records were obtained by third parties. *Id.* The *Accusearch* court held that one is not responsible for “developing” allegedly actionable content only “if one's conduct was neutral with respect to the offensiveness of the content.” *Id.* at 1199. The Tenth Circuit reasoned that *Accusearch* solicited requests for confidential information, paid researchers to find it, knew researchers would likely use improper methods, and charged the customers for the service. *Id.* at 1200.

In *Roomates*, a roommate-matching website required users to answer questions about their age, race, sex, and marital status as a condition of using the website. *See Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008). The Ninth
Circuit held that the website operator did not enjoy CDA immunity because the condition, requiring answers to the illegal questions, constituted the “creation or development of information” and thus made the site an “information content provider” within the scope of 47 U.S.C. § 2309(c) and (f)(3). Id. at 1164–69. The court reasoned that the operator was not being sued for removing some harmful messages while failing to remove others; instead, it is being sued for the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal. Id. at 1170.

First, Richie attempts to distinguish his site as a simple online message board that did not involve transactions for sale of illegal records. In doing so, Richie notes that, “[t]hese unlawful transactions could not have been completed without the direct participation of Accusearch itself.” (Appellate Brief, p. 33). He further compares Ms. Jones’ argument, and the district court’s holding, that he developed the offensive content to an argument rejected by the Ninth Circuit in Roomates.

What Richie fails to recognize is that, like Accusearch, the defamatory posts could not have been completed without the direct participation of Richie. Richie is the owner and editor of thedirty.com. (RE 175, p. 2449-50). The site receives at least 1000 submissions per day and he posts the top 150-200 submissions. Id. at 2450-51. The submissions that are posted are those that Mr. Richie selects, because
he thinks they are worthy of the site. *Id.* at 2450. Mr. Richie was the sole person that decided what submissions were posted, and what posts would be removed by request. *Id.* at 2452.

Like *Roommates*, the website is designed to encourage users to post defamatory material, which Richie then ratifies by the use of his own tagline on the submissions. “The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune.” *Roommates* at 1175. Richie encourages the submission of illegal content and is not entitled to immunity.

Richie further attempts to compare Ms. Jones argument with an argument that *Roommates* specifically rejected. In *Roommates*, the plaintiff separately argued that the defendant impliedly encouraged users to post unlawful content by providing a section for additional comments. *Id.* at 1174. The plaintiff specifically argued that the site developed additional culpable content by including a separate comments area, solely because of the original, mandatory, and discriminatory questions. *Id.* Neither Ms. Jones’ argument, nor the district court’s opinion, are analogous to this argument rejected by the Ninth Circuit in *Roommates*. The district court’s interpretation of the word develop does not include an action as innocuous as the inclusion of a text box for additional comments.
Mr. Richie acted as editor and selected a small percentage of submissions to be posted to the site, and it was common for Mr. Richie to add a tagline that stated his opinion of the post. Richie misunderstands, or otherwise misstates the district court’s ruling on these facts. He attempts to view each fact separate from all of the others, as though each single fact lead to the denial of immunity and could have done so separately. However, these facts must be taken together, the totality of the circumstances. Ascentive, LLC v. Opinion Corp., 842 F.Supp.2d 450, 474 (E.D.N.Y., Dec. 13, 2011)(citing Roommates)

1. Thedirty.com was Designed to Encourage the Posting of Defamatory or otherwise Tortious Material

Richie turns first to the argument that he made in the district court, that in a Western District of Missouri case, under “almost identical facts,” the court explained that the name of a “website is irrelevant.” S.C. v. Dirty World, LLC, 2012 WL 3335284 *5 (W.D.Mo., March 12, 2012). However, this claim is just not accurate. The court rejected the argument that the name of the website, standing alone, was enough to remove the defendant from the protection of the CDA. Id. The court noted that although a website name may encourage defamatory content, it does not make the operator liable for every post. Id. (citing Global Royalties, Ltd., 544 F.Supp.2d at 933).

Far from holding that the name of a website is irrelevant, the court merely held that the name standing alone is not sufficient to deny the operator immunity.
The S.C. court specifically distinguished the district court’s holding, from Ms. Jones’ case, noting that in this case that Richie ratified the defamatory comments by adding his own comment and refusing to remove the posts despite Ms. Jones’ request. *Id.* at 4-5. The S.C. court reasoned that the defendant did not ratify the post by adding his own comment and removed the post at the request of the plaintiff. *Id.* at 5. The court continued, “[g]iven these significant factual differences, *Jones* is not persuasive.” *Id.*

Richie also cites to *Ascentive* for the holding that a website was entitled to CDA immunity even though its name was offensive. Once again, Richie misquotes the court. It is Richie that labels the website “pissedconsumer.com” as offensive, not the court. In fact, the *Ascentive* court did not even take the name of the website into account in reaching its holding. Ascentive, LLC v. Opinion Corp., 842 F.Supp.2d 450, 474-75 (E.D.N.Y., Dec. 13, 2011). Instead the court looked at what the defendant did to encourage the development of culpable content. *Id.* at 476. In *Ascentive*, the defendants’ argument that the plaintiff developed the content was based upon the defendants’ manipulation of the order in which reviews were displayed. *Id.* While the Ascentive court held that the website was entitled to immunity, Ms. Jones put forward a distinct argument: that Richie developed the content at issue by the use of the website’s name, which not-coincidentally called
its fans the Dirty Army, and by the comments by Richie which encouraged the
posts.

The name of website encourages posting of “dirt,” or otherwise potentially
defamatory materials. At one point in his brief, Richie sites to a number of cases
involving potentially questionable website names.\(^3\) At another point he names
websites that seem to be reputable, but were the repository for some rather
shocking content. Anyone with experience surfing the internet is aware that a
website name might not adequately describe the content of the site.\(^4\) What Richie
misses is that while the name of the website alone will not necessarily encourage
development of illegal content, or necessarily even be relevant in the
determination, is that it may do either or both depending on the specific factual
circumstances of the case.

The name of the website can be relevant, in certain circumstances, to the
factual determination of whether an operator developed the offensive content.\(^5\)

Following Richie’s request to hold, as a matter of law, that his website’s name is

\(^3\) The questionable website names include pissedconsumer.com, shittyhabitats.com.

\(^4\) Richie quips that Apple.com is not about pomaceous fruit, and therefore it cannot
be believable that thedirty.com is about posting defamatory material.

\(^5\) Richie notes the “subtle point” that websites without offensive content do not
need the CDA to survive, because without offensive content there is no reason to
sue. However the CDA was only designed to protect those website operators who
do not create or develop the actionable content. No reading of the CDA offered by
Richie allows the creator or developer of the content to escape liability if the
content is defamatory.
irrelevant to the determination of whether he developed the actionable content is contrary to the well-established totality of the circumstances review. It also overlooks the fact that while the name might encourage users to post photographs of dirt or different objects that coated in grime, it is also relevant to a determination that it requests dirt about people. Ms. Jones even entered into evidence that Richie admitted that the website, “thedirty.com” is made for posting people’s dirt. (RE 176, p. 2580). Therefore the Court should be able to consider the impact of the name of the website in determining that Richie encouraged development of the content.

2. **Richie’s Purpose in Creating the Site and His Taglines and Comments Developed and Adopted the Actionable Content.**

As stated previously, a jury found by clear and convincing evidence that the postings on the website would be actionable even under the heightened standard for a public figure. It is important to remember that Richie was looking for these types of posts to be submitted. When Richie started the site, he was looking at reality television and the popularity of celebrity gossip and decided that he wanted to do the same with regular people. (RE 176, Trial Transcript Day 3, pp. 2578-79). He is “in the business’ of putting insulting or humiliating things about normal people on his site. *Id.* at 2579. He knows that the humiliating and insulting posts are put up to embarrass people, so that others can watch their neighbors fall off their “high horse.” *Id.* at 2586.
With the purpose of his website clearly in mind, it seems logical that Richie could have adopted or encouraged actionable content just by posting the submission, thereby validating that submission. However, Richie goes at least one step further. He taunts victims in front of his audience, including the Plaintiff, (See RE 67, p. 716), thereby encouraging his readers to post more about that victim, as well as to generate similar submissions about others, in the hopes that Richie will select theirs to expound upon.

Richie claims that it is “impossible to make generalized conclusions about what type of ‘principal content’ appears on the site” (RE 64-2, p. 479, ¶ 5). Even though he previously stated that “thedirty.com” is made for posting people’s dirt. (RE 176, p. 2580). While the standard is not what is on the site in general, but that “of the particular postings relating to [Plaintiff] that are the subject of this lawsuit,” Richie would have been denied immunity under any definition. Whitney Info. Network, Inc. v Xcentric Ventures LLC, 2008 WL 450095 at *12 (M.D.Fla. Feb. 15, 2008).

The CDA holds that an interactive computer service provider is responsible for the development of offensive comment “if it in some way specifically encourages development of what is offensive about the content.” Federal Trade Commission v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009). This is the entire purpose of thedirty.com. “Stuff comes in and it’s going to get a reaction.”
(RE 176, p 2584). Richie even admits he wants things that will “get a reaction” something shocking. “It’s to get a rise out of someone.” *Id.*

Richie acts as editor of the site and selects a small percentage of submissions to be posted. He adds a “tagline.” (RE 67, p. 698). He reviews the postings but does not verify their accuracy. *Id.* at 715. If someone objects to a posting, he decides if it should be removed. *Id.* at 708. It is undisputed that Richie refused to remove the postings about plaintiff that are alleged to be defamatory or an invasion of privacy.

In his comments, Richie refers to “the fans of the site” as “the Dirty Army.” *Id.* at 730-31. He also adds his own opinions as to what he thinks of postings. *Id.* at 734. Richie’s goal in establishing the site was to bring reality TV to the Internet. *Id.* at 737-38. He wants everybody to log on to “the dirty.com” and check it out. *Id.* at 743. In his opinion, “you can say whatever you want on the internet.” *Id.* at 757.

One of Richie’s comments posted concerning the plaintiff was “Why are all high school teachers freaks in the sack,” which a jury could certainly interpret as adopting the preceding allegedly defamatory comments concerning her alleged sexual activities. (RE 64-2, p. 509). This tagline, a photo of Ms. Jones, and the original story implying that Ms. Jones must also have a sexually transmitted disease appear on one page as a single story. *Id.* When asked about this comment, he stated: “[i]t was my opinion, you know, watching the news and seeing all these
Richie also posted his own comment addressed directly to the plaintiff, stating in part: “If you know the truth, then why do you care? With all the media attention this is only going to get worse for you . . . You dug your own grave here, Sarah.” Id. at 761. On another post, Richie stated: “I think they all need to be kicked off [the Bengals’ cheerleading squad] and the Cincinnati Bengals should start over. Note to self. Never try to battle the Dirty Army. Nik.” Id. at 761 (emphasis added).\(^6\)

Given this evidence, it cannot be said that Richie was neutral with respect to the offensiveness of the content. He made the site to collect potentially defamatory material, named it thedirty.com, named its users the dirty army and encouraged the army to have war mentality against those that objected to the site, and added his own comments to the posts to obtain that objective. Richie encouraged users to post defamatory content and to fight those that opposed them. Even taking into consideration that the original “freaks in the sack” comment may have been added later, does not change the district court’s interpretation. Every post included with Richie’s affidavit is in some fashion about Ms. Jones, whether it was through getting dirt on just her or on all of the BenGal cheerleaders. Under the precedent of

\(^6\) See RE 64-2, pp. 507-19 for all posts. Richie’s comments are followed by “-nik”
Roommates and Accusearch, Richie is not entitled to immunity under the CDA as he is a developer of the actionable content in question.

CONCLUSION

Richie designed this website to collect gossip or dirt about real people. He developed the site to encourage defamatory material by the use of the website name, thedirty.com, by encouraging his Dirty Army (users) to have war mentality, and by adding his own comments which validated the original post by adopting it as his own. A jury has already determined that the comments were defamatory, and Richie is not entitled to immunity under any rational reading of the CDA or the precedent interpreting it. Therefore, Ms. Jones respectfully requests that the Court affirm the district court’s denial of immunity.

Respectfully submitted,

/s/ Eric C. Deters

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(c) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Sixth Circuit Rule 32(a)(7)(b). The brief has been prepared in proportional typeface using Times New Roman 14 point.

Exclusive of the portions of the brief exempted by Sixth Circuit Rule 32(a)(7)(B)(iii), the brief contains 5,968 words. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

The undersigned understands a material misrepresentation in completing this certificate or circumvention of the type volume limits in Sixth Circuit Rule 32(a)(7), may result in the Court’s striking the brief and imposing sanctions against the person signing the brief.

/s/ Eric C. Deters

Eric C. Deters
ADDENDUM – DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Rules of Appellate Procedure, Rule 28(d) and 30(b), hereby designate the following portions of the record below for inclusion in the Joint Appendix:

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, a true copy of the foregoing corrected appellate brief has been sent via the Court’s CM/ECF system which will serve all counsel of record:
/s/ Eric C. Deters
Eric C. Deters
Attorney for Defendant
Meredith L. Lawrence
Eric C. Deters & Partners, P.S.C.
5247 Madison Pike
Independence, Kentucky 41051
Tel.: (859) 363-1900
Fax: (859) 363-1444
Email: eric@ericdeters.com
To amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 1, 2019

Mr. KENNEDY (for himself, Mr. DURBIN, Mr. TILLIS, Ms. HIRONO, Mrs. BLACKBURN, Mrs. SHAHEEN, Mr. UDALL, Mr. CRAMER, Mr. COONS, Mr. LEAHY, Mrs. FEINSTEIN, Mr. CORNYN, Mr. CRUZ, Mr. BLUMENTHAL, and Mr. HEINRICH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 12, 2019

reported by Mr. GRAHAM, without amendment

A BILL

To amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Copyright Alternative in Small-Claims Enforcement Act of 2019” or the “CASE Act of 2019”.

SEC. 2. COPYRIGHT SMALL CLAIMS.

(a) In General.—Title 17, United States Code, is amended by adding at the end the following:

“CHAPTER 15—COPYRIGHT SMALL CLAIMS

§ 1501. Definitions

§ 1502. Copyright Claims Board

§ 1503. Authority and duties of the Copyright Claims Board

§ 1504. Nature of proceedings

§ 1505. Registration requirement

§ 1506. Conduct of proceedings

§ 1507. Effect of proceeding

§ 1508. Review and confirmation by district court

§ 1509. Relationship to other district court actions

§ 1510. Implementation by Copyright Office

§ 1511. Funding

§§ 1501. Definitions

In this chapter—

(1) the term ‘party’—

(A) means a party; and

(B) includes the attorney of a party, as applicable;

(2) the term ‘claimant’ means the real party in interest that commences a proceeding before the Copyright Claims Board under section 1506(c), pursuant to a permissible claim of infringement brought under section 1504(c)(1), noninfringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3);

(3) the term ‘counterclaimant’ means a respondent in a proceeding before the Copyright Claims Board that—

(A) asserts a permissible counterclaim under section 1504(c)(4) against the claimant in the proceeding; and

(B) is the real party in interest with respect to the counterclaim described in subparagraph (A); and

(4) the term ‘respondent’ means any person against whom a proceeding is brought before the Copyright Claims Board under section 1506(e), pursuant to a permissible claim of infringement brought under section 1504(c)(1), noninfringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3).

§§ 1502. Copyright Claims Board
“(a) In General.—There is established in the Copyright Office the Copyright Claims Board, which shall serve as an alternative forum in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work, as provided in this chapter.

“(b) Officers and Staff.—

“(1) COPYRIGHT CLAIMS OFFICERS.—The Register of Copyrights shall recommend 3 full-time Copyright Claims Officers to serve on the Copyright Claims Board in accordance with paragraph (3)(A). The Officers shall be appointed by the Librarian of Congress to such positions after consultation with the Register of Copyrights.

“(2) COPYRIGHT CLAIMS ATTORNEYS.—The Register of Copyrights shall hire not fewer than 2 full-time Copyright Claims Attorneys to assist in the administration of the Copyright Claims Board.

“(3) QUALIFICATIONS.—

“(A) COPYRIGHT CLAIMS OFFICERS.—

“(i) IN GENERAL.—Each Copyright Claims Officer shall be an attorney who has not fewer than 7 years of legal experience.

“(ii) EXPERIENCE.—Two of the Copyright Claims Officers shall have—

“(I) substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims; and

“(II) between those 2 Officers, have represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works.

“(iii) ALTERNATIVE DISPUTE RESOLUTION.—The Copyright Claims Officer not described in clause (ii) shall have substantial familiarity with copyright law and experience in the field of alternative dispute resolution, including the resolution of litigation matters through that method of resolution.

“(B) COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be an attorney who has not fewer than 3 years of substantial experience in copyright law.

“(4) COMPENSATION.—

“(A) COPYRIGHT CLAIMS OFFICERS.—

“(i) DEFINITION.—In this subparagraph, the term ‘senior level employee of the Federal Government’ means an employee, other than an employee in the Senior Executive Service, the position of whom is classified above GS–15 of the General Schedule.

“(ii) PAY RANGE.—Each Copyright Claims Officer shall be compensated at a rate of pay that is not less than the minimum, and not more than the maximum, rate of pay payable for senior level employees of the Federal Government, including locality pay, as applicable.

“(B) COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be compensated at a rate of pay that is not more than the maximum rate of pay payable for level 10 of GS–15 of the General Schedule, including locality pay, as applicable.

“(5) TERMS.—
“(A) IN GENERAL.—Subject to subparagraph (B), a Copyright Claims Officer shall serve for a renewable term of 6 years.

“(B) INITIAL TERMS.—The terms for the first Copyright Claims Officers appointed under this chapter shall be as follows:

“(i) The first such Copyright Claims Officer appointed shall be appointed for a term of 4 years.

“(ii) The second Copyright Claims Officer appointed shall be appointed for a term of 5 years.

“(iii) The third Copyright Claims Officer appointed shall be appointed for a term of 6 years.

“(6) VACANCIES AND INCAPACITY.—

“(A) VACANCY.—

“(i) IN GENERAL.—If a vacancy occurs in the position of a Copyright Claims Officer, the Librarian of Congress shall, upon the recommendation of, and in consultation with, the Register of Copyrights, act expeditiously to appoint a Copyright Claims Officer for that position.

“(ii) VACANCY BEFORE EXPIRATION.—An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of the individual was appointed shall be appointed to serve a 6-year term.

“(B) INCAPACITY.—If a Copyright Claims Officer is temporarily unable to perform the duties of the Officer, the Librarian of Congress shall, upon recommendation of, and in consultation with, the Register of Copyrights, act expeditiously to appoint an interim Copyright Claims Officer to perform such duties during the period of such incapacity.

“(7) SANCTION OR REMOVAL.—Subject to section 1503(b), the Librarian of Congress may sanction or remove a Copyright Claims Officer.

“(8) ADMINISTRATIVE SUPPORT.—The Register of Copyrights shall provide the Copyright Claims Officers and Copyright Claims Attorneys with necessary administrative support, including technological facilities, to carry out the duties of the Officers and Attorneys under this chapter.

“(9) LOCATION OF COPYRIGHT CLAIMS BOARD.—The offices and facilities of the Copyright Claims Officers and Copyright Claims Attorneys shall be located at the Copyright Office.

“§1503. Authority and duties of the Copyright Claims Board

“(a) FUNCTIONS.—

“(1) COPYRIGHT CLAIMS OFFICERS.—Subject to the provisions of this chapter and applicable regulations, the functions of the Copyright Claims Officers shall be as follows:

“(A) To render determinations on the civil copyright claims, counterclaims, and defenses that may be brought before the Officers under this chapter.

“(B) To ensure that claims, counterclaims, and defenses are properly asserted and otherwise appropriate for resolution by the Copyright Claims Board.
“(C) To manage the proceedings before the Officers and render rulings pertaining to the consideration of claims, counterclaims, and defenses, including with respect to scheduling, discovery, evidentiary, and other matters.

“(D) To request, from participants and nonparticipants in a proceeding, the production of information and documents relevant to the resolution of a claim, counterclaim, or defense.

“(E) To conduct hearings and conferences.

“(F) To facilitate the settlement by the parties of claims and counterclaims.

“(G)(i) To award monetary relief; and

“(ii) to include in the determinations of the Officers a requirement that certain activities under section 1504(e)(2) cease or be mitigated, if the party to undertake the applicable measure has so agreed.

“(H) To provide information to the public concerning the procedures and requirements of the Copyright Claims Board.

“(I) To maintain records of the proceedings before the Officers, certify official records of such proceedings as needed, and, as provided in section 1506(t), make the records in such proceedings available to the public.

“(J) To carry out such other duties as are set forth in this chapter.

“(K) When not engaged in performing the duties of the Officers set forth in this chapter, to perform such other duties as may be assigned by the Register of Copyrights.

“(2) COPYRIGHT CLAIMS ATTORNEYS.—Subject to the provisions of this chapter and applicable regulations, the functions of the Copyright Claims Attorneys shall be as follows:

“(A) To provide assistance to the Copyright Claims Officers in the administration of the duties of those Officers under this chapter.

“(B) To provide assistance to members of the public with respect to the procedures and requirements of the Copyright Claims Board.

“(C) To provide information to potential claimants contemplating bringing a permissible action before the Copyright Claims Board about obtaining a subpoena under section 512(h) for the sole purpose of identifying a potential respondent in such an action.

“(D) When not engaged in performing the duties of the Attorneys set forth in this chapter, to perform such other duties as may be assigned by the Register of Copyrights.

“(b) INDEPENDENCE IN DETERMINATIONS.—

“(1) IN GENERAL.—The Copyright Claims Board shall render the determinations of the Board in individual proceedings independently on the basis of the records in the proceedings before it and in accordance with the provisions of this title, judicial precedent, and applicable regulations of the Register of Copyrights.

“(2) CONSULTATION.—The Copyright Claims Officers and Copyright Claims Attorneys may consult with the Register of Copyrights on general issues of law; and

“(B) subject to section 1506(x), may not consult with the Register of Copyrights with respect to—
“(i) the facts of any particular matter pending before the Officers and the Attorneys; or

“(ii) the application of law to the facts described in clause (i).

“(3) PERFORMANCE APPRAISALS.—Notwithstanding any other provision of law or any regulation or policy of the Library of Congress or Register of Copyrights, any performance appraisal of a Copyright Claims Officer or Copyright Claims Attorney may not consider the substantive result of any individual determination reached by the Copyright Claims Board as a basis for appraisal except to the extent that result may relate to any actual or alleged violation of an ethical standard of conduct.

“(c) DIRECTION BY REGISTER.—Subject to subsection (b), the Copyright Claims Officers and Copyright Claims Attorneys shall, in the administration of their duties, be under the general direction of the Register of Copyrights.

“(d) INCONSISTENT DUTIES BARRED.—A Copyright Claims Officer or Copyright Claims Attorney may not undertake any duty that conflicts with the duties of the Officer or Attorney in connection with the Copyright Claims Board.

“(e) RECUSAL.—A Copyright Claims Officer or Copyright Claims Attorney shall recuse himself or herself from participation in any proceeding with respect to which the Copyright Claims Officer or Copyright Claims Attorney, as the case may be, has reason to believe that he or she has a conflict of interest.

“(f) EX PARTE COMMUNICATIONS.—Except as may otherwise be permitted by applicable law, any party to a proceeding before the Copyright Claims Board shall refrain from ex parte communications with the Copyright Claims Officers and the Register of Copyrights concerning the substance of any active or pending proceeding before the Copyright Claims Board.

“(g) JUDICIAL REVIEW.—Actions of the Copyright Claims Officers and Register of Copyrights under this chapter in connection with the rendering of any determination are subject to judicial review as provided under section 1508(c) and not under chapter 7 of title 5.

“§1504. Nature of proceedings

“(a) VOLUNTARY PARTICIPATION.—Participation in a Copyright Claims Board proceeding shall be on a voluntary basis in accordance with this chapter and the right of any party to instead pursue a claim, counterclaim, or defense in a district court of the United States or any other court, and to seek a jury trial, shall be preserved.

“(b) STATUTE OF LIMITATIONS.—

“(1) IN GENERAL.—A proceeding may not be maintained before the Copyright Claims Board unless the proceeding is commenced, in accordance with section 1506(e), before the Copyright Claims Board within 3 years after the claim accrued.

“(2) TOLLING.—Subject to section 1507(a), a proceeding commenced before the Copyright Claims Board shall toll the time permitted under section 507(b) for the commencement of an action on the same claim in a district court of the United States during the period in which the proceeding is pending.

“(c) PERMISSIBLE CLAIMS, COUNTERCLAIMS, AND DEFENSES.—The Copyright Claims Board may render determinations with respect to the following claims, counterclaims, and defenses, subject to such further limitations and requirements, including with respect to particular classes of works, as may be set forth in regulations established by the Register of Copyrights:
“(1) A claim for infringement of an exclusive right in a copyrighted work provided under section 106 by the legal or beneficial owner of the exclusive right at the time of the infringement for which the claimant seeks damages, if any, within the limitations set forth in subsection (e)(1).

“(2) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under section 106, consistent with section 2201 of title 28.

“(3) A claim under section 512(f) for misrepresentation in connection with a notification of claimed infringement or a counter notification seeking to replace removed or disabled material, except that any remedies relating to such a claim in a proceeding before the Copyright Claims Board shall be limited to those available under this chapter.

“(4) A counterclaim that is asserted solely against the claimant in a proceeding—

“(A) pursuant to which the counterclaimant seeks damages, if any, within the limitations set forth in subsection (e)(1); and

“(B) that—

“(i) arises under section 106 or section 512(f) and out of the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), a claim of noninfringement brought under paragraph (2), or a claim of misrepresentation brought under paragraph (3); or

“(ii) arises under an agreement pertaining to the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), if the agreement could affect the relief awarded to the claimant.

“(5) A legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under this subsection.

“(6) A single claim or multiple claims permitted under paragraph (1), (2), or (3) by one or more claimants against one or more respondents, but only if all claims asserted in any one proceeding arise out of the same allegedly infringing activity or continuous course of infringing activities and do not, in the aggregate, result in the recovery of such claim or claims for damages that exceed the limitations under subsection (e)(1).

“(d) Excluded Claims.—The following claims and counterclaims are not subject to determination by the Copyright Claims Board:

“(1) A claim or counterclaim that is not a permissible claim or counterclaim under subsection (c).

“(2) A claim or counterclaim that has been finally adjudicated by a court of competent jurisdiction or that is pending before a court of competent jurisdiction, unless that court has granted a stay to permit that claim or counterclaim to proceed before the Copyright Claims Board.

“(3) A claim or counterclaim by or against a Federal or State governmental entity.

“(4) A claim or counterclaim asserted against a person or entity residing outside of the United States, except in a case in which the person or entity initiated the proceeding before the Copyright Claims Board and is subject to counterclaims under this chapter.

“(e) Permissible Remedies.—

“(1) MONETARY RECOVERY.—

“(A) ACTUAL DAMAGES, PROFITS, AND STATUTORY DAMAGES FOR INFRINGEMENT.—With respect to a claim or counterclaim for infringement of copyright,
and subject to the limitation on total monetary recovery under subparagraph (D), the Copyright Claims Board may award either of the following:

“(i) Actual damages and profits determined in accordance with section 504(b), with that award taking into consideration, in appropriate cases, whether the infringing party has agreed to cease or mitigate the infringing activity under paragraph (2).

“(ii) Statutory damages, which shall be determined in accordance with section 504(c), subject to the following conditions:

“(I) With respect to works timely registered under section 412, so that the works are eligible for an award of statutory damages in accordance with that section, the statutory damages may not exceed $15,000 for each work infringed.

“(II) With respect to works not timely registered under section 412, but eligible for an award of statutory damages under this section, statutory damages may not exceed $7,500 per work infringed, or a total of $15,000 in any 1 proceeding.

“(III) The Copyright Claims Board may not make any finding that, or consider whether, the infringement was committed willfully in making an award of statutory damages.

“(IV) The Copyright Claims Board may consider, as an additional factor in awarding statutory damages, whether the infringer has agreed to cease or mitigate the infringing activity under paragraph (2).

“(B) ELECTION OF DAMAGES.—With respect to a claim or counterclaim of infringement, at any time before final determination is rendered, the claimant or counterclaimant shall, in accordance with the schedule established by the Copyright Claims Board under section 1506(k), elect—

“(i) to pursue actual damages and profits or statutory damages under subparagraph (A); or

“(ii) not to pursue damages.

“(C) DAMAGES FOR OTHER CLAIMS.—Damages for claims and counterclaims other than infringement claims, such as those brought under section 512(f), shall be subject to the limitation under subparagraph (D).

“(D) LIMITATION ON TOTAL MONETARY RECOVERY.—Notwithstanding any other provision of law, a party that pursues any one or more claims or counterclaims in any single proceeding before the Copyright Claims Board may not seek or recover in that proceeding a total monetary recovery that exceeds the sum of $30,000, exclusive of any attorneys’ fees and costs that may be awarded under section 1506(y)(2).

“(2) AGREEMENT TO CEASE CERTAIN ACTIVITY.—In a determination of the Copyright Claims Board, the Board shall include a requirement to cease conduct if, in the proceeding relating to the determination—

“(A) a party agrees—

“(i) to cease activity that is found to be infringing, including removing or disabling access to, or destroying, infringing materials; or
§ 1505. Registration requirement

(ii) to cease sending a takedown notice or counter notice under section 512 to the other party regarding the conduct at issue before the Board if that notice or counter notice was found to be a knowing material misrepresentation under section 512(f); and

(B) the agreement described in subparagraph (A) is reflected in the record for the proceeding.

(3) ATTORNEYS’ FEES AND COSTS.—Notwithstanding any other provision of law, except in the case of bad faith conduct as provided in section 1506(y)(2), the parties to proceedings before the Copyright Claims Board shall bear their own attorneys’ fees and costs.

(f) Joint And Several Liability.—Parties to a proceeding before the Copyright Claims Board may be found jointly and severally liable if all such parties and relevant claims or counterclaims arise from the same activity or activities.

(g) Permissible Number Of Cases.—The Register of Copyrights may establish regulations relating to the permitted number of proceedings each year by the same claimant under this chapter, in the interests of justice and the administration of the Copyright Claims Board.

§ 1505. Registration requirement

(a) Application Or Certificate.—A claim or counterclaim alleging infringement of an exclusive right in a copyrighted work may not be asserted before the Copyright Claims Board unless —

(1) the legal or beneficial owner of the copyright has first delivered a completed application, a deposit, and the required fee for registration of the copyright to the Copyright Office; and

(2) a registration certificate has either been issued or has not been refused.

(b) Certificate Of Registration.—Notwithstanding any other provision of law, a claimant or counterclaimant in a proceeding before the Copyright Claims Board shall be eligible to recover actual damages and profits or statutory damages under this chapter for infringement of a work if the requirements of subsection (a) have been met, except that—

(1) the Copyright Claims Board may not render a determination in the proceeding until —

(A) a registration certificate with respect to the work has been issued by the Copyright Office, submitted to the Copyright Claims Board, and made available to the other parties to the proceeding; and

(B) the other parties to the proceeding have been provided an opportunity to address the registration certificate;

(2) if the proceeding may not proceed further because a registration certificate for the work is pending, the proceeding shall be held in abeyance pending submission of the certificate to the Copyright Claims Board, except that, if the proceeding is held in abeyance for more than 1 year, the Copyright Claims Board may, upon providing written notice to the parties to the proceeding, and 30 days to the parties to respond to the notice, dismiss the proceeding without prejudice; and

(3) if the Copyright Claims Board receives notice that registration with respect to the work has been refused, the proceeding shall be dismissed without prejudice.

(c) Presumption.—In a case in which a registration certificate shows that registration with respect to a work was issued not later than 5 years after the date of the first publication of the work, the presumption under section 410(c) shall apply in a proceeding before the Copyright Claims Board, in addition to relevant principles of law under this title.
“(d) Regulations.—In order to ensure that actions before the Copyright Claims Board proceed in a timely manner, the Register of Copyrights shall establish regulations allowing the Copyright Office to make a decision, on an expedited basis, to issue or deny copyright registration for an unregistered work that is at issue before the Board.

“§1506. Conduct of proceedings

“(a) In General.—

“(1) APPLICABLE LAW.—Proceedings of the Copyright Claims Board shall be conducted in accordance with this chapter and regulations established by the Register of Copyrights under this chapter, in addition to relevant principles of law under this title.

“(2) CONFLICTING PRECEDENT.—If it appears that there may be conflicting judicial precedent on an issue of substantive copyright law that cannot be reconciled, the Copyright Claims Board shall follow the law of the Federal jurisdiction in which the action could have been brought if filed in a district court of the United States, or, if the action could have been brought in more than 1 such jurisdiction, the jurisdiction that the Copyright Claims Board determines has the most significant ties to the parties and conduct at issue.

“(b) Record.—The Copyright Claims Board shall maintain records documenting the proceedings before the Board.

“(c) Centralized Process.—Proceedings before the Copyright Claims Board shall—

“(1) be conducted at the offices of the Copyright Claims Board without the requirement of in-person appearances by parties or others; and

“(2) take place by means of written submissions, hearings, and conferences carried out through internet-based applications and other telecommunications facilities, except that, in cases in which physical or other nontestimonial evidence material to a proceeding cannot be furnished to the Copyright Claims Board through available telecommunications facilities, the Copyright Claims Board may make alternative arrangements for the submission of such evidence that do not prejudice any other party to the proceeding.

“(d) Representation.—A party to a proceeding before the Copyright Claims Board may be, but is not required to be, represented by—

“(1) an attorney; or

“(2) a law student who is qualified under applicable law governing representation by law students of parties in legal proceedings and who provides such representation on a pro bono basis.

“(e) Commencement Of Proceeding.—In order to commence a proceeding under this chapter, a claimant shall, subject to such additional requirements as may be prescribed in regulations established by the Register of Copyrights, file a claim with the Copyright Claims Board, that—

“(1) includes a statement of material facts in support of the claim;

“(2) is certified under subsection (y)(1); and

“(3) is accompanied by a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights.

“(f) Review Of Claims And Counterclaims.—

“(1) CLAIMS.—Upon the filing of a claim under subsection (e), the claim shall be reviewed by a Copyright Claims Attorney to ensure that the claim complies with this chapter and applicable regulations, subject to the following:
“(A) If the claim is found to comply, the claimant shall be notified regarding that compliance and instructed to proceed with service of the claim under subsection (g).

“(B) If the claim is found not to comply, the claimant shall be notified that the claim is deficient and be permitted to file an amended claim not later than 30 days after the date on which the claimant receives the notice, without the requirement of an additional filing fee. If the claimant files a compliant claim within that 30-day period, the claimant shall be so notified and be instructed to proceed with service of the claim. If the claim is refiled within that 30-day period and still fails to comply, the claimant shall again be notified that the claim is deficient and shall be provided a second opportunity to amend the claim within 30 days after the date of that second notice, without the requirement of an additional filing fee. If the claim is refiled again within that second 30-day period and is compliant, the claimant shall be so notified and shall be instructed to proceed with service of the claim, but if the claim still fails to comply, upon confirmation of such noncompliance by a Copyright Claims Officer, the proceeding shall be dismissed without prejudice. The Copyright Claims Board shall also dismiss without prejudice any proceeding in which a compliant claim is not filed within the applicable 30-day period.

“(C)(i) Subject to clause (ii), for purposes of this paragraph, a claim against an online service provider for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in subsection (b), (c), or (d) of section 512 shall be considered noncompliant unless the claimant affirms in the statement required under subsection (e)(1) of this section that the claimant has previously notified the service provider of the claimed infringement in accordance with subsection (b)(2)(E), (c)(3), or (d)(3) of section 512, as applicable, and the service provider failed to remove or disable access to the material expeditiously upon the provision of such notice.

“(ii) If a claim is found to be noncompliant under clause (i), the Copyright Claims Board shall provide the claimant with information concerning the service of such a notice under the applicable provision of section 512.

“(2) COUNTERCLAIMS.—Upon the filing and service of a counterclaim, the counterclaim shall be reviewed by a Copyright Claims Attorney to ensure that the counterclaim complies with the provisions of this chapter and applicable regulations. If the counterclaim is found not to comply, the counterclaimant and the other parties to the proceeding shall be notified that the counterclaim is deficient, and the counterclaimant shall be permitted to file and serve an amended counterclaim within 30 days after the date of such notice. If the counterclaimant files and serves a compliant counterclaim within that 30-day period, the counterclaimant and such other parties shall be so notified. If the counterclaim is refiled and served within that 30-day period but still fails to comply, the counterclaimant and such other parties shall again be notified that the counterclaim is deficient, and the counterclaimant shall be provided a second opportunity to amend the counterclaim within 30 days after the date of the second notice. If the counterclaim is refiled and served again within that second 30-day period and is compliant, the counterclaimant and such other parties shall be so notified, but if the counterclaim still fails to comply, upon confirmation of such noncompliance by a Copyright Claims Officer, the counterclaim, but not the proceeding, shall be dismissed without prejudice.

“(3) DISMISSAL OF UNSUITABILITY.—The Copyright Claims Board shall dismiss a claim or counterclaim without prejudice if, upon reviewing the claim or counterclaim, or at any other time in the proceeding, the Copyright Claims Board concludes that the claim or
counterclaim is unsuitable for determination by the Copyright Claims Board, including on account of any of the following:

“(A) The failure to join a necessary party.

“(B) The lack of an essential witness, evidence, or expert testimony.

“(C) The determination of a relevant issue of law or fact that could exceed either the number of proceedings the Copyright Claims Board could reasonably administer or the subject matter competence of the Copyright Claims Board.

“(g) Service Of Notice And Claims.—In order to proceed with a claim against a respondent, a claimant shall, within 90 days after receiving notification under subsection (f) to proceed with service, file with the Copyright Claims Board proof of service on the respondent. In order to effectuate service on a respondent, the claimant shall cause notice of the proceeding and a copy of the claim to be served on the respondent, either by personal service or pursuant to a waiver of personal service, as prescribed in regulations established by the Register of Copyrights. Such regulations shall include the following requirements:

“(1) The notice of the proceeding shall adhere to a prescribed form and shall set forth the nature of the Copyright Claims Board and proceeding, the right of the respondent to opt out, and the consequences of opting out and not opting out, including a prominent statement that, by not opting out within 60 days after receiving the notice, the respondent—

“(A) loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States; and

“(B) waives the right to a jury trial regarding the dispute.

“(2) The copy of the claim served on the respondent shall be the same as the claim that was filed with the Copyright Claims Board.

“(3) Personal service of a notice and claim may be effected by an individual who is not a party to the proceeding and is older than 18 years of age.

“(4) An individual, other than a minor or incompetent individual, may be served by—

“(A) complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made;

“(B) delivering a copy of the notice and claim to the individual personally;

“(C) leaving a copy of the notice and claim at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

“(D) delivering a copy of the notice and claim to an agent designated by the respondent to receive service of process or, if not so designated, an agent authorized by appointment or by law to receive service of process.

“(5) (A) A corporation, partnership, or unincorporated association that is subject to suit in courts of general jurisdiction under a common name shall be served by delivering a copy of the notice and claim to its service agent. If such service agent has not been designated, service shall be accomplished—

“(i) by complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made; or

“(ii) by delivering a copy of the notice and claim to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process in an action brought in courts of general jurisdiction in the State where service is made and,
if the agent is one authorized by statute and the statute so requires, by also mailing a copy of the notice and claim to the respondent.

“(B) A corporation, partnership or unincorporated association that is subject to suit in courts of general jurisdiction under a common name may elect to designate a service agent to receive notice of a claim against it before the Copyright Claims Board by complying with requirements that the Register of Copyrights shall establish by regulation. The Register of Copyrights shall maintain a current directory of service agents that is available to the public for inspection, including through the internet, and may require such corporations, partnerships, and unincorporated associations designating such service agents to pay a fee to cover the costs of maintaining the directory.

“(6) In order to request a waiver of personal service, the claimant may notify a respondent, by first class mail or by other reasonable means, that a proceeding has been commenced, such notice to be made in accordance with regulations established by the Register of Copyrights, subject to the following:

“(A) Any such request shall be in writing, shall be addressed to the respondent, and shall be accompanied by a prescribed notice of the proceeding, a copy of the claim as filed with the Copyright Claims Board, a prescribed form for waiver of personal service, and a prepaid or other means of returning the form without cost.

“(B) The request shall state the date on which the request is sent, and shall provide the respondent a period of 30 days, beginning on the date on which the request is sent, to return the waiver form signed by the respondent. The signed waiver form shall, for purposes of this subsection, constitute acceptance and proof of service as of the date on which the waiver is signed.

“(7) (A) A respondent’s waiver of personal service shall not constitute a waiver of the respondent’s right to opt out of the proceeding.

“(B) A respondent who timely waives personal service under paragraph (6) and does not opt out of the proceeding shall be permitted a period of 30 days, in addition to the period otherwise permitted under the applicable procedures of the Copyright Claims Board, to submit a substantive response to the claim, including any defenses and counterclaims.

“(8) A minor or an incompetent individual may only be served by complying with State law for serving a summons or like process on such an individual in an action brought in the courts of general jurisdiction of the State where service is made.

“(9) Service of a claim and waiver of personal service may only be effected within the United States.

“(h) Notification By Copyright Claims Board.—The Register of Copyrights shall establish regulations providing for a written notification to be sent by, or on behalf of, the Copyright Claims Board to notify the respondent of a pending proceeding against the respondent, as set forth in those regulations, which shall—

“(1) include information concerning the respondent’s right to opt out of the proceeding, the consequences of opting out and not opting out, and a prominent statement that, by not opting out within 60 days after the date of service under subsection (g), the respondent loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States and waives the right to a jury trial regarding the dispute; and
“(2) be in addition to, and separate and apart from, the notice requirements under subsection (g).

“(i) Opt-Out Procedure.—Upon being properly served with a notice and claim, a respondent who chooses to opt out of the proceeding shall have a period of 60 days, beginning on the date of service, in which to provide written notice of such choice to the Copyright Claims Board, in accordance with regulations established by the Register of Copyrights. If proof of service has been filed by the claimant and the respondent does not submit an opt-out notice to the Copyright Claims Board within that 60-day period, the proceeding shall be deemed an active proceeding and the respondent shall be bound by the determination in the proceeding to the extent provided under section 1507(a). If the respondent opts out of the proceeding during that 60-day period, the proceeding shall be dismissed without prejudice, except that, in exceptional circumstances and upon written notice to the claimant, the Copyright Claims Board may extend that 60-day period in the interests of justice.

“(j) Service Of Other Documents.—Documents submitted or relied upon in a proceeding, other than the notice and claim, shall be served in accordance with regulations established by the Register of Copyrights.

“(k) Scheduling.—Upon confirmation that a proceeding has become an active proceeding, the Copyright Claims Board shall issue a schedule for the future conduct of the proceeding. A schedule issued by the Copyright Claims Board may be amended by the Copyright Claims Board in the interests of justice.

“(l) Conferences.—One or more Copyright Claims Officers may hold a conference to address case management or discovery issues in a proceeding, which shall be noted upon the record of the proceeding and may be recorded or transcribed.

“(m) Party Submissions.—A proceeding of the Copyright Claims Board may not include any formal motion practice, except that, subject to applicable regulations and procedures of the Copyright Claims Board—

“(1) the parties to the proceeding may make requests to the Copyright Claims Board to address case management and discovery matters, and submit responses thereto; and

“(2) the Copyright Claims Board may request or permit parties to make submissions addressing relevant questions of fact or law, or other matters, including matters raised sua sponte by the Copyright Claims Officers, and offer responses thereto.

“(n) Discovery.—Discovery in a proceeding shall be limited to the production of relevant information and documents, written interrogatories, and written requests for admission, as provided in regulations established by the Register of Copyrights, except that—

“(1) upon the request of a party, and for good cause shown, the Copyright Claims Board may approve additional relevant discovery, on a limited basis, in particular matters, and may request specific information and documents from participants in the proceeding and voluntary submissions from nonparticipants, consistent with the interests of justice;

“(2) upon the request of a party, and for good cause shown, the Copyright Claims Board may issue a protective order to limit the disclosure of documents or testimony that contain confidential information; and

“(3) after providing notice and an opportunity to respond, and upon good cause shown, the Copyright Claims Board may apply an adverse inference with respect to disputed facts against a party who has failed to timely provide discovery materials in response to a proper request for materials that could be relevant to such facts.
“(o) Evidence.—The Copyright Claims Board may consider the following types of evidence in a proceeding, and such evidence may be admitted without application of formal rules of evidence:

“(1) Documentary and other nontestimonial evidence that is relevant to the claims, counterclaims, or defenses in the proceeding.

“(2) Testimonial evidence, submitted under penalty of perjury in written form or in accordance with subsection (p), limited to statements of the parties and nonexpert witnesses, that is relevant to the claims, counterclaims, and defenses in a proceeding, except that, in exceptional cases, expert witness testimony or other types of testimony may be permitted by the Copyright Claims Board for good cause shown.

“(p) Hearings.—The Copyright Claims Board may conduct a hearing to receive oral presentations on issues of fact or law from parties and witnesses to a proceeding, including oral testimony, subject to the following:

“(1) Any such hearing shall be attended by not fewer than two of the Copyright Claims Officers.

“(2) The hearing shall be noted upon the record of the proceeding and, subject to paragraph (3), may be recorded or transcribed as deemed necessary by the Copyright Claims Board.

“(3) A recording or transcript of the hearing shall be made available to any Copyright Claims Officer who is not in attendance.

“(q) Voluntary Dismissal.—

“(1) BY CLAIMANT.—Upon the written request of a claimant that is received before a respondent files a response to the claim in a proceeding, the Copyright Claims Board shall dismiss the proceeding, or a claim or respondent, as requested, without prejudice.

“(2) BY COUNTERCLAIMANT.—Upon written request of a counterclaimant that is received before a claimant files a response to the counterclaim, the Copyright Claims Board shall dismiss the counterclaim, such dismissal to be without prejudice.

“(3) Class Actions.—Any party in an active proceeding before the Copyright Claims Board who receives notice of a pending or putative class action, arising out of the same transaction or occurrence, in which that party is a class member may request in writing dismissal of the proceeding before the Board. Upon notice to all claimants and counterclaimants, the Copyright Claims Board shall dismiss the proceeding without prejudice.

“(r) Settlement.—

“(1) IN GENERAL.—At any time in an active proceeding, some or all of the parties may—

“(A) jointly request a conference with a Copyright Claims Officer for the purpose of facilitating settlement discussions; or

“(B) submit to the Copyright Claims Board an agreement providing for settlement and dismissal of some or all of the claims and counterclaims in the proceeding.

“(2) ADDITIONAL REQUEST.—A submission under paragraph (1)(B) may include a request that the Copyright Claims Board adopt some or all of the terms of the parties’ settlement in a final determination in the proceeding.

“(s) Factual Findings.—Subject to subsection (n)(3), the Copyright Claims Board shall make factual findings based upon a preponderance of the evidence.

“(t) Determinations.—
“(1) NATURE AND CONTENTS.—A determination rendered by the Copyright Claims Board in a proceeding shall—

“(A) be reached by a majority of the Copyright Claims Board;

“(B) be in writing, and include an explanation of the factual and legal basis of the determination;

“(C) set forth any terms by which a respondent or counterclaim respondent has agreed to cease infringing activity under section 1504(e)(2);

“(D) to the extent requested under subsection (r)(2), set forth the terms of any settlement agreed to under subsection (r)(1); and

“(E) include a clear statement of all damages and other relief awarded, including under subparagraphs (C) and (D).

“(2) DISSENT.—A Copyright Claims Officer who dissents from a decision contained in a determination under paragraph (1) may append a statement setting forth the grounds for that dissent.

“(3) PUBLICATION.—Each final determination of the Copyright Claims Board shall be made available on a publicly accessible website. The Register shall establish regulations with respect to the publication of other records and information relating to such determinations, including the redaction of records to protect confidential information that is the subject of a protective order under subsection (n)(2).

“(4) FREEDOM OF INFORMATION ACT.—All information relating to proceedings of the Copyright Claims Board under this title is exempt from disclosure to the public under section 552(b)(3) of title 5, except for determinations, records, and information published under paragraph (3).

“(u) Respondent’s Default.—If a proceeding has been deemed an active proceeding but the respondent has failed to appear or has ceased participating in the proceeding, as demonstrated by the respondent’s failure, without justifiable cause, to meet one or more deadlines or requirements set forth in the schedule adopted by the Copyright Claims Board under subsection (k), the Copyright Claims Board may enter a default determination, including the dismissal of any counterclaim asserted by the respondent, as follows and in accordance with such other requirements as the Register of Copyrights may establish by regulation:

“(1) The Copyright Claims Board shall require the claimant to submit relevant evidence and other information in support of the claimant’s claim and any asserted damages and, upon review of such evidence and any other requested submissions from the claimant, shall determine whether the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law and, if so, the appropriate relief and damages, if any, to be awarded.

“(2) If the Copyright Claims Board makes an affirmative determination under paragraph (1), the Copyright Claims Board shall prepare a proposed default determination, and shall provide written notice to the respondent at all addresses, including email addresses, reflected in the records of the proceeding before the Copyright Claims Board, of the pendency of a default determination by the Copyright Claims Board and of the legal significance of such determination. Such notice shall be accompanied by the proposed default determination and shall provide that the respondent has a period of 30 days, beginning on the date of the notice, to submit any evidence or other information in opposition to the proposed default determination.
“(3) If the respondent responds to the notice provided under paragraph (2) within the 30-day period provided in such paragraph, the Copyright Claims Board shall consider respondent’s submissions and, after allowing the other parties to address such submissions, maintain, or amend its proposed determination as appropriate, and the resulting determination shall not be a default determination.

“(4) If the respondent fails to respond to the notice provided under paragraph (2), the Copyright Claims Board shall proceed to issue the default determination as a final determination. Thereafter, the respondent may only challenge such determination to the extent permitted under section 1508(c), except that, before any additional proceedings are initiated under section 1508, the Copyright Claims Board may, in the interests of justice, vacate the default determination.

“(v) Claimant’s Failure To Proceed.—

“(1) Failure To Complete Service.—If a claimant fails to complete service on a respondent within the 90-day period required under subsection (g), the Copyright Claims Board shall dismiss that respondent from the proceeding without prejudice. If a claimant fails to complete service on all respondents within that 90-day period, the Copyright Claims Board shall dismiss the proceeding without prejudice.

“(2) Failure To Prosecute.—If a claimant fails to proceed in an active proceeding, as demonstrated by the claimant’s failure, without justifiable cause, to meet one or more deadlines or requirements set forth in the schedule adopted by the Copyright Claims Board under subsection (k), the Copyright Claims Board may, upon providing written notice to the claimant and a period of 30 days, beginning on the date of the notice, to respond to the notice, and after considering any such response, issue a determination dismissing the claimants’ claims, which shall include an award of attorneys’ fees and costs, if appropriate, under subsection (y)(2). Thereafter, the claimant may only challenge such determination to the extent permitted under section 1508(c), except that, before any additional proceedings are initiated under section 1508, the Copyright Claims Board may, in the interests of justice, vacate the determination of dismissal.

“(w) Request For Reconsideration.—A party may, within 30 days after the date on which the Copyright Claims Board issues a final determination in a proceeding under this chapter, submit a written request for reconsideration of, or an amendment to, such determination if the party identifies a clear error of law or fact material to the outcome, or a technical mistake. After providing the other parties an opportunity to address such request, the Copyright Claims Board shall either deny the request or issue an amended final determination.

“(x) Review By Register.—If the Copyright Claims Board denies a party a request for reconsideration of a final determination under subsection (w), that party may, within 30 days after the date of such denial, request review of the final determination by the Register of Copyrights in accordance with regulations established by the Register. Such request shall be accompanied by a reasonable filing fee, as provided in such regulations. The review by the Register shall be limited to consideration of whether the Copyright Claims Board abused its discretion in denying reconsideration of the determination. After providing the other parties an opportunity to address the request, the Register shall either deny the request for review, or remand the proceeding to the Copyright Claims Board for reconsideration of issues specified in the remand and for issuance of an amended final determination. Such amended final determination shall not be subject to further consideration or review, other than under section 1508(c).

“(y) Conduct Of Parties And Attorneys.—
“(1) CERTIFICATION.—The Register of Copyrights shall establish regulations requiring certification of the accuracy and truthfulness of statements made by participants in proceedings before the Copyright Claims Board.

“(2) BAD FAITH CONDUCT.—Notwithstanding any other provision of law, in any proceeding in which a determination is rendered and it is established that a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact, then, unless inconsistent with the interests of justice, the Copyright Claims Board shall in such determination award reasonable attorneys’ fees and costs to any adversely affected party of in an amount of not more than $5,000, except that—

“(A) if an adversely affected party appeared pro se in the proceeding, the award to that party shall be for costs only, in an amount of not more than $2,500; and

“(B) in extraordinary circumstances, such as where a party has demonstrated a pattern or practice of bad faith conduct as described in this paragraph, the Copyright Claims Board may, in the interests of justice, award costs in excess of the limitations under this paragraph.

“(3) ADDITIONAL PENALTY.—If the Board finds that on more than one occasion within a 12-month period a party pursued a claim, counterclaim, or defense before the Copyright Claims Board for a harassing or other improper purpose, or without a reasonable basis in law or fact, that party shall be barred from initiating a claim before the Copyright Claims Board under this chapter for a period of 12 months beginning on the date on which the Board makes such a finding. Any proceeding commenced by that party that is still pending before the Board when such a finding is made shall be dismissed without prejudice, except that if a proceeding has been deemed active under subsection (i), the proceeding shall be dismissed under this paragraph only if the respondent provides written consent thereto.

“(z) Regulations For Smaller Claims.—The Register of Copyrights shall establish regulations to provide for the consideration and determination, by at least one Copyright Claims Officer, of any claim under this chapter in which total damages sought do not exceed $5,000 (exclusive of attorneys’ fees and costs). A determination issued under this subsection shall have the same effect as a determination issued by the entire Copyright Claims Board.

“§1507. Effect of proceeding

“(a) Determination.—Subject to the reconsideration and review processes provided under subsections (w) and (x) of section 1506 and section 1508(c), the issuance of a final determination by the Copyright Claims Board in a proceeding, including a default determination or determination based on a failure to prosecute, shall, solely with respect to the parties to such determination, preclude relitigation before any court or tribunal, or before the Copyright Claims Board, of the claims and counterclaims asserted and finally determined by the Board, and may be relied upon for such purpose in a future action or proceeding arising from the same specific activity or activities, subject to the following:

“(1) A determination of the Copyright Claims Board shall not preclude litigation or relitigation as between the same or different parties before any court or tribunal, or the Copyright Claims Board, of the same or similar issues of fact or law in connection with claims or counterclaims not asserted or not finally determined by the Copyright Claims Board.

“(2) A determination of ownership of a copyrighted work for purposes of resolving a matter before the Copyright Claims Board may not be relied upon, and shall not have any preclusive effect, in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.
“(3) Except to the extent permitted under this subsection and section 1508, any determination of the Copyright Claims Board may not be cited or relied upon as legal precedent in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.

“(b) **Class Actions Not Affected.**—

“(1) **IN GENERAL.**—A proceeding before the Copyright Claims Board shall not have any effect on a class action proceeding in a district court of the United States, and section 1509(a) shall not apply to a class action proceeding in a district court of the United States.

“(2) **NOTICE OF CLASS ACTION.**—Any party to an active proceeding before the Copyright Claims Board who receives notice of a pending class action, arising out of the same transaction or occurrence as the proceeding before the Copyright Claims Board, in which the party is a class member shall either—

“(A) opt out of the class action, in accordance with regulations established by the Register of Copyrights; or

“(B) seek dismissal under section 1506(q)(3) of the proceeding before the Copyright Claims Board.

“(c) **Other Materials In Proceeding.**—Except as permitted under this section and section 1508, a submission or statement of a party or witness made in connection with a proceeding before the Copyright Claims Board, including a proceeding that is dismissed, may not be cited or relied upon in, or serve as the basis of, any action or proceeding concerning rights or limitations on rights under this title before any court or tribunal, including the Copyright Claims Board.

“(d) **Applicability Of Section 512(g).**—A claim or counterclaim before the Copyright Claims Board that is brought under subsection (c)(1) or (c)(4) of section 1504, or brought under subsection (c)(6) of section 1504 and that relates to a claim under subsection (c)(1) or (c)(4) of such section, qualifies as an action seeking an order to restrain a subscriber from engaging in infringing activity under section 512(g)(2)(C) if—

“(1) notice of the commencement of the Copyright Claims Board proceeding is provided by the claimant to the service provider’s designated agent before the service provider replaces the material following receipt of a counter notification under section 512(g); and

“(2) the claim brought alleges infringement of the material identified in the notification of claimed infringement under section 512(c)(1)(C).

“(e) **Failure To Assert Counterclaim.**—The failure or inability to assert a counterclaim in a proceeding before the Copyright Claims Board shall not preclude the assertion of that counterclaim in a subsequent court action or proceeding before the Copyright Claims Board.

“(f) **Opt-Out Or Dismissal Of Party.**—If a party has timely opted out of a proceeding under section 1506(i) or is dismissed from a proceeding before the Copyright Claims Board issues a final determination in the proceeding, the determination shall not be binding upon and shall have no preclusive effect with respect to that party.

**§1508. Review and confirmation by district court**

“(a) **IN GENERAL.**—In any proceeding in which a party has failed to pay damages, or has failed otherwise to comply with the relief, awarded in a final determination of the Copyright Claims Board, including a default determination or a determination based on a failure to prosecute, the aggrieved party may, not later than 1 year after the date on which the final determination is issued, any reconsideration by the Copyright Claims Board or review by the Register of Copyrights is resolved, or
an amended final determination is issued, whichever occurs last, apply to the United States District Court for the District of Columbia or any other appropriate district court of the United States for an order confirming the relief awarded in the final determination and reducing such award to judgment. The court shall grant such order and direct entry of judgment unless the determination is or has been vacated, modified, or corrected under subsection (c). If the United States District Court for the District of Columbia or other district court of the United States, as the case may be, issues an order confirming the relief awarded by the Copyright Claims Board, the court shall impose on the party who failed to pay damages or otherwise comply with the relief, the reasonable expenses required to secure such order, including attorneys’ fees, that were incurred by the aggrieved party.

“(b) Filing Procedures.—

“(1) APPLICATION TO CONFIRM DETERMINATION.—Notice of the application under subsection (a) for confirmation of a determination of the Copyright Claims Board and entry of judgment shall be provided to all parties to the proceeding before the Copyright Claims Board that resulted in the determination, in accordance with the procedures applicable to service of a motion in the district court of the United States where the application is made.

“(2) CONTENTS OF APPLICATION.—The application shall include the following:

“(A) A certified copy of the final or amended final determination of the Copyright Claims Board, as reflected in the records of the Copyright Claims Board, following any process of reconsideration or review by the Register of Copyrights, to be confirmed and rendered to judgment.

“(B) A declaration by the applicant, under penalty of perjury—

“(i) that the copy is a true and correct copy of such determination;

“(ii) stating the date it was issued;

“(iii) stating the basis for the challenge under subsection (c)(1); and

“(iv) stating whether the applicant is aware of any other proceedings before the court concerning the same determination of the Copyright Claims Board.

“(c) Challenges To The Determination.—

“(1) BASES FOR CHALLENGE.—Not later than 90 days after the date on which Copyright Claims Board issues a final or amended final determination in a proceeding, or not later than 90 days after the date on which the Register of Copyrights completes any process of reconsideration or review of the determination, whichever occurs later, a party may seek a court order vacating, modifying, or correcting the determination of the Copyright Claims Board in the following cases:

“(A) If the determination was issued as a result of fraud, corruption, misrepresentation, or other misconduct.

“(B) If the Copyright Claims Board exceeded its authority or failed to render a final determination concerning the subject matter at issue.

“(C) In the case of a default determination or determination based on a failure to prosecute, if it is established that the default or failure was due to excusable neglect.

“(2) PROCEDURE TO CHALLENGE.—

“(A) NOTICE OF APPLICATION.—Notice of the application to challenge a determination of the Copyright Claims Board shall be provided to all parties to the
§ 1509. Relationship to other district court actions

(a) Stay of District Court Proceedings.—Subject to section 1507(b), a district court of the United States shall issue a stay of proceedings or such other relief as the court determines appropriate with respect to any claim brought before the court that is already the subject of a pending or active proceeding before the Copyright Claims Board.

(b) Alternative Dispute Resolution Process.—A proceeding before the Copyright Claims Board under this chapter shall qualify as an alternative dispute resolution process under section 651 of title 28 for purposes of referral of eligible cases by district courts of the United States upon the consent of the parties.

§ 1510. Implementation by Copyright Office

(a) Regulations.—

(1) Implementation Generally.—The Register of Copyrights shall establish regulations to carry out this chapter. Such regulations shall include the fees prescribed under subsections (e) and (x) of section 1506. The authority to issue such fees shall not limit the authority of the Register of Copyrights to establish fees for services under section 708. All fees received by the Copyright Office in connection with the activities under this chapter shall be deposited by the Register of Copyrights and credited to the appropriations for necessary expenses of the Office in accordance with section 708(d). In establishing regulations under this subsection, the Register of Copyrights shall provide for the efficient administration of the Copyright Claims Board, and for the ability of the Copyright Claims Board to timely complete proceedings instituted under this chapter, including by implementing mechanisms to prevent harassing or improper use of the Copyright Claims Board by any party.

(2) Limits on Monetary Relief.—

(A) In General.—Subject to subparagraph (B), the Register of Copyrights may, in order to further the goals of the Copyright Claims Board, conduct a rulemaking to adjust the limits on monetary recovery or attorneys’ fees and costs that may be awarded under this chapter.

(B) Effective Date of Adjustment.—Any rule under subparagraph (A) that makes an adjustment shall take effect at the end of the 120-day period beginning on the date on which the Register of Copyrights submits the rule to Congress and only if Congress does not, during that 120-day period, enact a law that provides in substance that Congress does not approve the rule.

(b) Necessary Facilities.—Subject to applicable law, the Register of Copyrights may retain outside vendors to establish internet-based, teleconferencing, and other facilities required to operate the Copyright Claims Board.

(c) Fees.—Any filing fees, including the fee to commence a proceeding under section 1506(e), shall be prescribed in regulations established by the Register of Copyrights. The sum total of such filing fees shall be in an amount of at least $100, may not exceed the cost of filing an action in a
district court of the United States, and shall be fixed in amounts that further the goals of the Copyright Claims Board.

“§1511. Funding

“There are authorized to be appropriated such sums as may be necessary to pay the costs incurred by the Copyright Office under this chapter that are not covered by fees collected for services rendered under this chapter, including the costs of establishing and maintaining the Copyright Claims Board and its facilities.”.

(b) Clerical Amendment.—The table of chapters for title 17, United States Code, is amended by adding after the item relating to chapter 14 the following:

- “15. Copyright Small Claims 1501”.

SEC. 3. IMPLEMENTATION.

Not later 1 year after the date of enactment of this Act, the Copyright Claims Board established under section 1502 of title 17, United States Code, as added by section 2 of this Act, shall begin operations.

SEC. 4. STUDY.

Not later than 3 years after the date on which Copyright Claims Board issues the first determination of the Copyright Claims Board under chapter 15 of title 17, United States Code, as added by section 2 of this Act, the Register of Copyrights shall conduct, and report to Congress on, a study that addresses the following:

(1) The use and efficacy of the Copyright Claims Board in resolving copyright claims, including the number of proceedings the Copyright Claims Board could reasonably administer.

(2) Whether adjustments to the authority of the Copyright Claims Board are necessary or advisable, including with respect to—

(A) eligible claims, such as claims under section 1202 of title 17, United States Code; and

(B) works and applicable damages limitations.

(3) Whether greater allowance should be made to permit awards of attorneys’ fees and costs to prevailing parties, including potential limitations on such awards.

(4) Potential mechanisms to assist copyright owners with small claims in ascertaining the identity and location of unknown online infringers.

(5) Whether the Copyright Claims Board should be expanded to offer mediation or other nonbinding alternative dispute resolution services to interested parties.

(6) Such other matters as the Register of Copyrights believes may be pertinent concerning the Copyright Claims Board.

SEC. 5. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of the provision or the amendment to any other person or circumstance, shall not be affected.
A BILL

To amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes.

SEPTEMBER 12, 2019
Reported without amendment
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that Hawai'i is home to many celebrities, particularly on Maui, who are subjected to harassment from photographers and reporters seeking photographs and news stories. The privacy of these celebrities endure unwarranted invasion into their personal lives. Although their celebrity status may justify a lower expectation of privacy, the legislature finds that sometimes the paparazzi go too far to disturb the peace and tranquility afforded celebrities who escape to Hawai'i for a quiet life.

Existing Hawai'i statutes are silent on a civil cause of action for constructive invasion of privacy. Therefore, many celebrities are deterred from buying property or vacationing in Hawai'i because the same paparazzi that harass them on the mainland are more likely to follow them to Hawai'i. However, a few celebrities are not discouraged from visiting or residing in our beautiful State. For example, Steven Tyler, the lead singer of Aerosmith for over forty years, former "American Idol" judge, and world-renowned celebrity has recently purchased a home on Maui. He will now be sharing his time between Boston, Los Angeles, and his new home on Maui. In
honor of Steven Tyler's contribution to the arts in Hawai‘i and throughout the world, this Act shall be known as the Steven Tyler Act.

The purpose of this Act is to encourage celebrities to visit and reside in our State by creating a civil cause of action for the constructive invasion of privacy.

SECTION 2. Chapter 663, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§663- Constructive invasion of privacy; civil cause of action. (a) This section shall be known and may be cited as the "Steven Tyler Act".

(b) A person is liable for a civil action of constructive invasion of privacy if the person captures or intends to capture, in a manner that is offensive to a reasonable person, through any means a visual image, sound recording, or other physical impression of another person while that person is engaging in a personal or familial activity with a reasonable expectation of privacy.

(c) Constructive invasion of privacy shall include an assault or false imprisonment committed with the capture of or intent to capture any type of visual image, sound recording, or other physical impression of another person.

(d) A person who commits constructive invasion of privacy shall be liable for the following damages proximately caused by a violation of this section:

(1) General damages;

(2) Special damages; and

(3) Punitive damages up to three times the amount of general and special damages combined.
(e) If the constructive invasion of privacy is committed for a commercial purpose, the person shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section.

(f) A person who directs, solicits, induces, or causes another person, regardless of whether there is an employer-employee relationship, to violate this section is liable for damages to the same extent as provided in subsection (d).

(g) Any person who transmits, publishes, broadcasts, sells, offers for sale, uses any visual image, sound recording, or other physical impression, or who subsequently retransmits, republishes, rebroadcasts, resells, reoffers to sell, or reuses any visual image, sound recording, or other physical impression in any form, medium, format, or work of the same visual image, sound recording, or other physical impression that was taken or captured in violation of this section shall constitute a violation of this section if:

(1) The person had actual knowledge that the visual image, sound recording, or other physical impression was taken or captured in violation of this section; and

(2) The person received compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.

(h) This section shall also apply to a person who is situated within state marine waters, as defined in section 187A-1.5, while engaging in constructive invasion of privacy.

(i) In any action pursuant to this section, the court additionally may grant equitable relief, including but not limited to an injunction and restraining order against further violation of this section.
(j) It is not a defense to a violation of this section that no image, recording, or physical impression was captured or sold.

(k) For the purposes of this section, "for a commercial purpose" means any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted.

(l) This section shall not be construed to supersede any criminal offense that may be related to a violation of this section.

(m) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2013.

INTRODUCED BY: _____________________________

Report Title:
Invasion of Privacy; Civil Cause of Action; Steven Tyler

Description:
Creates a civil cause of action of constructive invasion of privacy if the person obtains any type of visual image, sound recording, or other physical impression of another person under circumstances in
which another person has a reasonable expectation of keeping private their personal life under certain conditions.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

__________________________________________:
XCLUSIVE-LEE, INC.,
Plaintiff,
v.
JELENA NOURA “GIGI” HADID,
Defendant.

__________________________________________:
Civil Action No.: 19-cv-520

COMPLAINT AND JURY DEMAND

COMPLAINT FOR COPYRIGHT INFRINGEMENT

Plaintiff, XCLUSIVE-LEE, INC. ("Xclusive" or "Plaintiff"), brings this complaint in the
United States District Court for the Eastern District of New York against JELENA NOURA
“GIGI” HADID ("Hadid" or "Defendant"), alleging as follows:

PARTIES

1. Xclusive is a New York Domestic Business Corporation with a principal place of business in
Rego Park, New York.

2. Hadid is an American fashion model. In 2016, Hadid was named International Model of the
Year by British Fashion Council. Hadid has modeled for Versace, Chanel, Elie Saab, Fendi,
Marc Jacobs, Anna Sui, Miu Miu, Balmain, Diane Von Furstenberg, Tommy Hilfiger, Fenty,
Puma, Isabel Marant, and Giambattista Valli. Hadid has also starred in advertising
campaigns for Guess, Versace, Penshoppe, Balmain F/W 2015, Topshop, Max Mara, and
Stuart Weitzman. Hadid has appeared on the covers of magazines such as Vogue (United
States, Paris, Italy, Britain, Japan, Spain, Australia, Brazil, the Netherlands, Germany, Italy,
China), *Schön!*, *Numéro*, *Allure*, *W Magazine* and *Teen Vogue* as well as *WSJ Magazine*, *Elle Canada*, *Dazed* and *Harper’s Bazaar*. Hadid maintains and is personally responsible for her official Instagram account, which has over 44 million followers worldwide. Hadid resides in New York, New York.

**JURISDICTION AND VENUE**

3. This is a civil action seeking damages for copyright infringement under the copyright laws of the United States (17 U.S.C. § 101 et seq.).


5. Defendant is subject to personal jurisdiction in New York.

6. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) and 1400(a) because the events giving rise to the claims occurred in this district, Defendant engaged in infringement in this district, Plaintiff resides in this district, and Defendant is subject to personal jurisdiction in this district.

7. This Court also has personal jurisdiction over Defendant, and venue in this District is proper under 28 U.S.C. § 1400(a). This Court also has personal jurisdiction over Defendant, and venue in this District is proper under 28 U.S.C. § 1400(a).

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1 https://en.wikipedia.org/wiki/Gigi_Hadid
FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

8. Xclusive is the copyright holder of “Gigi Hadid on Oct 11, 2018” (“Copyrighted Photograph”), which was captured on October 11, 2018 in New York City. [Exhibit 1].

9. On October 12, 2018, Hadid copied and uploaded Copyrighted Photograph to Hadid’s Instagram account.

10. As a result of Hadid’s actions described in Paragraph 11, Copyrighted Photograph was posted and publicly displayed to the following URLs:
    - www.instagram.com/gigihadid/?hl=en. (Last visited October 15, 2018) [Exhibit 3]

11. Hadid copied and posted Copyrighted Photograph to Hadid’s Instagram account without license or permission from Xclusive.

12. Hadid’s Instagram account is followed by more than forty-three million (43,000,000) individuals throughout the world. [Exhibit 4].

13. More than 1.6 million (1,600,000) followers commented on Instagram Posts within four days of October 12, 2018. [Exhibit 4].

14. Prior to October 12, 2018, Hadid had first-hand knowledge that copying and posting photographs, of herself or other subject matters, to her Instagram or other social media accounts that she did not properly license or otherwise receive permission from the copyright holder constituted copyright infringement.

16. Although the case was settled prior to the discovery stage of litigation, the facts alleged in

*Cepeda* are nearly identical to the facts alleged in the present case, including the allegation

Hadid copied and posted Plaintiff Cepeda’s copyrighted photograph (of Hadid on a public

street in New York City) to Hadid’s Instagram and Twitter accounts without license or

permission from Cepeda.

17. As of the date of this filing, Hadid’s Instagram account includes at least fifty (50) examples

of uncredited photographs of Hadid in public, at press events, or on the runway. [Exhibit 5].

Most if not all of these photographs were posted by Hadid without license or permission

from the copyright holder.
COUNT I: INFRINGEMENT OF COPYRIGHT PURSUANT TO 17 U.S.C. § 101 ET SEQ.

18. Xclusive incorporates herein by this reference each and every allegation contained in each paragraph above.

19. Xclusive is the copyright owner or licensee of exclusive rights under United States copyright with respect to Copyrighted Photograph, which is the subject of a valid and complete application before the United States Copyright Office for Certificate of Copyright Registration by the Register of Copyrights.

20. Among the exclusive rights granted to each Xclusive under the Copyright Act are the exclusive rights to reproduce and distribute the Copyrighted Photograph to the public.

21. Xclusive is informed and believes Hadid, without the permission or consent of Xclusive, copied and used Copyrighted Photograph on Hadid’s Instagram account. In doing so, Hadid violated Xclusive’s exclusive rights of reproduction and distribution. Hadid’s actions constitute infringement of Xclusive’s copyright and exclusive rights under copyright.

22. Xclusive is informed and believes that the foregoing act of infringement was willful and intentional, in disregard of and with indifference to the rights of Xclusive.

23. As a result of Hadid’s infringement of Xclusive’s copyright and exclusive rights under copyright, Xclusive is entitled to statutory damages, including any profits realized by Hadid attributable to the infringement, pursuant to 17 U.S.C. § 504 for Hadid’s infringement of Copyrighted Photograph.
COUNT II: CONTRIBUTORY INFRINGEMENT

24. Xclusive is informed and believes that Hadid, without the permission or consent of Xclusive, knowingly made available Copyrighted Photograph to innumerable individuals and media outlets by posting Copyrighted Photograph to Hadid’s 43 million (43,000,000) Instagram followers.

25. Xclusive is informed and believes that Hadid, without the permission or consent of Xclusive, had knowledge or reason to know of such contributory infringement.

26. As a result of Hadid’s actions, Xclusive is entitled to actual damages or such other and further relief as is just and proper.

PRAYER FOR RELIEF

WHEREFORE, Xclusive prays for judgment against Hadid as follows:

A. Declaring that Hadid’s unauthorized conduct violates Xclusive’s rights under the Federal Copyright Act;

B. Immediately and permanently enjoining Hadid, its officers, directors, agents, servants, employees, representatives, attorneys, related companies, successors, assignors, and all others in active concert or participation with them from copying and republishing Xclusive’s Copyrighted Photograph without consent or otherwise infringing Xclusive’s copyright or other rights in any manner;

C. Ordering Hadid to account to Xclusive for all gains, profits, and advantages derived by Hadid by their infringement of Xclusive’s copyright or such damages as are proper, and since Hadid intentionally infringed Xclusive’s copyright, for the maximum allowable statutory damages for each violation;
D. Awarding Xclusive actual and/or statutory damages for Hadid’s copyright infringement in an amount to be determined at trial;

E. Awarding Xclusive his costs, reasonable attorney’s fees, and disbursements in this action, pursuant to 17 U.S.C. § 505; and

F. Awarding Xclusive such other and further relief as is just and proper.

**JURY DEMAND**

Xclusive hereby demands a trial by jury on all claims for which there is a right to jury trial.

Respectfully submitted,

Dated: January 28, 2019

REESE LLP

/s/ Michael R. Reese
Michael R. Reese
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New York, New York
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- and -

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Counsel for Plaintiff
EXHIBIT 1
EXHIBIT 3
EXHIBIT 4
EXHIBIT 5
47 U.S. Code § 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—
(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability
No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to 
information content providers or others the technical 
means to restrict access to material described in 
paragraph (1).[1]

(d) Obligations of interactive computer service
A provider of interactive computer service shall, at the time of 
entering an agreement with a customer for the provision of 
interactive computer service and in a manner deemed 
appropriate by the provider, notify such customer that parental 
control protections (such as computer hardware, software, or 
filtering services) are commercially available that may assist the 
customer in limiting access to material that is harmful to 
minors. Such notice shall identify, or provide the customer with 
access to information identifying, current providers of such 
protections.

(e) Effect on other laws

(1) No effect on criminal law
Nothing in this section shall be construed to impair the 
enforcement of section 223 or 231 of this title, chapter 71 
(relating to obscenity) or 110 (relating to sexual exploitation 
of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law
Nothing in this section shall be construed to limit or expand 
any law pertaining to intellectual property.

(3) State law
Nothing in this section shall be construed to prevent any 
State from enforcing any State law that is consistent with 
this section. No cause of action may be brought and no 
liability may be imposed under any State or local law that is 
inconsistent with this section.

(4) No effect on communications privacy law
Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) **No effect on sex trafficking law** Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) 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; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant’s promotion or facilitation of prostitution was targeted.

(f) **Definitions** As used in this section:

(1) **Internet**

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) **Interactive computer service**

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.
(3) **Information content provider**
The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) **Access software provider**
The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;
(B) pick, choose, analyze, or digest content; or
(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform

Danielle Keats Citron* and Mary Anne Franks**

Abstract

A robust public debate is currently underway about the responsibility of online platforms. We have long called for this discussion, but only recently has it been seriously taken up by legislators and the public. The debate begins with a basic question: should platforms be responsible for user-generated content? If so, under what circumstances? What exactly would such responsibility look like? Under consideration is Section 230 of the Communications Decency Act—a provision originally designed to encourage tech companies to clean up “offensive” online content. The public discourse around Section 230, however, is riddled with misconceptions. As an initial matter, many people who opine about the law are unfamiliar with its history, text, and application. This lack of knowledge impairs thoughtful evaluation of the law’s goals and how well they have been achieved. Accordingly, Part I of this Article sets the stage with a description of Section 230—its legislative history and purpose, its interpretation in the courts, and the problems that current judicial interpretation raises. A second, and related, major source of misunderstanding is the conflation of Section 230 and the First Amendment. Part II details how this conflation distorts discussion in three ways: it assumes all Internet activity is protected speech; it treats private actors as though they were government actors; and it presumes that regulation will inevitably result in less speech. These distortions must be addressed in order to pave the way for clear-eyed policy reform. Part III offers potential solutions to help Section 230 achieve its legitimate goals.

Introduction

A robust public debate is currently underway about the responsibility of online platforms. We have long called for this discussion, but only recently has it been seriously taken up by legislators and the public. The debate begins with a basic question: should platforms be responsible for user-generated content? If so, under what circumstances? What exactly would such responsibility look like?

* Professor of Law, Boston University School of Law, Vice President, Cyber Civil Rights Initiative.
** Professor of Law & Dean’s Distinguished Scholar, University of Miami School of Law, President, Cyber Civil Rights Initiative. Deep thanks to the editors of the University of Chicago Legal Forum for including us in the symposium. Genevieve Lakier, Brian Leiter, and symposium participants provided helpful comments. It was a particular pleasure to engage with co-panelists Amy Adler, Leslie Kendrick, and Fred Schauer.

1 DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity, 86 FORDHAM L. REV. 401 (2017); Danielle Keats Citron, Cyber Civil Rights, 89 B.U. L. REV. 61 (2009); Mary Anne Franks, Sexual Harassment 2.0, Md. L. Rev. (2012).

2 That is, beyond the select avenues that currently are not shielded from liability, such as intellectual property, federal criminal law, the Electronic Communications Privacy Act, and the knowing facilitation of sex trafficking.
Under consideration is Section 230 of the Communications Decency Act—a provision originally designed to encourage tech companies to clean up “offensive” online content. At the dawn of the commercial internet, federal lawmakers wanted the internet to be open and free, but they realized that such openness risked noxious activity. In their estimation, tech companies were essential partners in any effort to “clean up the Internet.”

A troubling 1995 judicial decision, however, imperiled the promise of self-regulation in ruling that any attempt to moderate content increased an online service’s risk of liability. Lawmakers devised Section 230 as a direct repudiation of that ruling. The idea was to incentivize—not penalize—private efforts to filter, block, or otherwise address noxious activity. Section 230 provided that incentive, securing a shield from liability for “Good Samaritans” that under- or over-filtered “offensive” content.

Over the past two (plus) decades, Section 230 has helped secure a variety of opportunities for online engagement, but individuals and society have not been the clear winners. Regrettably, state and lower federal courts have extended Section 230’s legal shield far beyond what the law’s words, context, and purpose support. Platforms have been shielded from liability even when they encourage illegal action, deliberately keep up manifestly harmful content, or take a cut of users’ illegal activities.

No matter, because for many, Section 230 is an article of faith. Section 230 has been hailed as “the most important law protecting internet speech” and online innovation. For years, to question Section 230’s value proposition was viewed as sheer folly.

No longer. Politicians across the ideological spectrum are raising concerns about the leeway provided content platforms under Section 230. Conservatives claim that Section 230 gives tech companies a license to silence speech based on viewpoint. Liberals criticize Section 230 for giving platforms the freedom to profit from harmful speech and conduct.

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5 CITRON, HATE CRIMES IN CYBERSPACE, supra note, at 170-73.
6 Citron & Wittes, supra note, at 404-06.
7 Id.
8 Id.
10 Danielle Citron & Quinta Jurecic, Platform Justice, Hoover Institute.
11 https://www.cruz.senate.gov/?p=press_release&id=4630
Although their assessment of the problem differs, lawmakers agree that Section 230 needs fixing. In a testament to the shift in attitudes, the House Energy and Commerce Committee held a hearing on October 16, 2019 on how to make the internet “healthier” for consumers, bringing together academics (including one of us, Citron), advocates, and social media companies to discuss whether and how to amend Section 230.12 The Department of Justice is holding an event devoted to Section 230 reform in February 2020. Needless to say, these developments are unique.

In a few short years, Section 230 reform efforts have turned from academic fantasy to legislative reality.13 One might think that we would cheer this opportunity. But we approach it with caution. Congress cannot fix what it does not understand. Sensible policymaking depends on a clear-eyed view of the interests at stake. As advisers to federal lawmakers on both sides of the aisle, we can attest to the need to dispel misunderstandings to clear the ground for meaningful policy discussions.

The public discourse around Section 230 is riddled with misconceptions.14 As an initial matter, many people who opine about the law are unfamiliar with its history, text, and application. This lack of knowledge impairs thoughtful evaluation of the law’s goals and how well they have been achieved. Accordingly, Part I of this Article sets the stage with a description of Section 230—its legislative history and purpose, its interpretation in the courts, and the problems that current judicial interpretation raises. A second, and related, major source of misunderstanding is the conflation of Section 230 and the First Amendment. Part II of this Article details how this conflation distorts discussion in three ways: it assumes all Internet activity is protected speech; it treats private actors as though they were government actors; and it presumes that regulation will inevitably result in less speech. These distortions must be addressed in order to pave the way for clear-eyed policy reform. This is the subject of Part III, which offers potential solutions to help Section 230 achieve its legitimate goals.

I. Section 230: A Complex History

12 Witnesses also included computer scientist Hany Farid of University of California at Berkeley, Gretchen Petersen of the Alliance to Counter Crime Online, Corynne McSherry of the Electronic Frontier Foundation, Steve Huffman of Reddit, and Katie Oyama of Google. At that hearing, one of us (Citron) took the opportunity to combat myths around Section 230 and offer sensible reform possibilities, which we explore in Part III. https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fostering-a-healthier-internet-to-protect-consumers

13 There are several House and Senate proposals to amend or remove Section 230’s legal shield.

14 This is not to say that every lawmaker misunderstands Section 230. Nancy Pelosi, the House Speaker, has agreed that Section 230 should be rethought because companies are not “treating it with respect” and “being responsible enough.” https://www.techdirt.com/articles/20190411/18521741986/nancy-pelosi-joins-fed-cruz-louis-gohmert-attacking-cda-230.shtml. Pelosi’s comments suggest that she has a clear sense of the problem—that tech companies are not acting as responsible Good Samaritans as Section 230’s drafters hoped—unlike far too many of her colleagues.
Tech policy reform is often a difficult endeavor. Sound tech policy reform depends upon a clear understanding of the technologies and varied interests at stake. As recent hearings on Capitol Hill have shown, lawmakers often struggle to effectively address fast-moving technological developments.15 Part of the problem stems from age and habits.16 The slowness of the lawmaking process further complicates matters.17 Lawmakers may be tempted to throw up their hands in the face of technological change that seems destined to outpace their efforts.

This Part highlights the developments that bring us to this moment of reform. Section 230 was devised to incentivize responsible content moderation practices.18 And yet its drafting fell short of that goal by failing to explicitly condition the legal shield on responsible practices. This has led to an overbroad reading of Section 230, with significant costs to individuals and society.

A. Reviewing the History Behind Section 230

In 1996, Congress faced a challenge. Lawmakers wanted the internet to be open and free, but they also knew that openness risked the posting of illegal and “offensive” material. They knew that federal agencies could not deal with it all “noxious material” on their own and that they needed tech companies to help moderate content. Congress devised an incentive: a shield from liability for “Good Samaritans” that did an incomplete or overly aggressive job in their efforts to “clean up the Internet.”19

The Communications Decency Act (CDA), part of the Telecommunications Act of 1996, was introduced to make the internet safer for children and to address concerns about

15 The 2018 congressional hearings on the Cambridge Analytica data leak poignantly illustrate the point. For instance, Facebook CEO Mark Zuckerberg testified for several days before the House and the Senate. During the questioning, lawmakers made clear that they had never used social network and had little understanding of online advertising, which is how the dominant tech companies make money. Senator Orrin Hatch asked Zuckerberg how his company made money since it does not charge users for its services. [https://money.cnn.com/2018/04/10/technology/senate-mark-zuckerberg-testimony/index.html]. As is clear from committee hearings and our work, there are indeed lawmakers and staff devoted to tackling tech policy including Senator Kamala Harris, Senator Richard Blumenthal, Congresswoman Jackie Speier, and Congresswoman Kathleen Clark.
16 We know from experience that staff endeavor to remedy those deficits.
17 A widely known quip is that federal laws take on average seven years to get passed. Not so of course with urgent matters, especially when lawmakers’ selfish interests hang in the balance. The Video Privacy Protection Act’s rapid-fire passage is an obvious case in point. That law passed in mere months after the failed nomination of Judge Robert Bork to the Supreme Court revealed that journalists could easily obtain people’s video rental records. Lawmakers fearing that their video rental records would be released to the public passed VPPA in short order. See William McGeveran, Data Privacy and Policy (2017).
18 Or at least this is the most generous reading of its history. One of us (Franks) is somewhat more skeptical about the narrative that Section 230’s flaws were not evident at its inception. See Mary Anne Franks, The Cult of the Constitution, supra note, at.
19 Citron & Wittes, supra note, at.
Besides proposing criminal penalties for the distribution of sexually explicit material online, members of Congress underscored the need for private sector help in reducing the volume of “offensive” material online. Then-Representatives Christopher Cox and Ron Wyden offered an amendment to the CDA entitled “Protection for Private Blocking and Screening of Offensive Material.” The Cox-Wyden Amendment, codified as Section 230, provided immunity from liability for “Good Samaritan” online service providers that over- or under-filtered objectionable content.

Section 230(c), entitled “Good Samaritan blocking and filtering of offensive content,” has two key provisions. Section 230(c)(1) specifies that providers or users of interactive computer services will not be treated as publishers or speakers of user-generated content. Section 230(c)(2) says that online service providers will not be held liable for good-faith filtering or blocking of user-generated content. Section 230 also carves out limitations for its immunity provisions: its protections do not apply to violations of federal criminal law, intellectual property law, the Electronic Privacy Communications Act, and, as of 2018, the facilitation of sex trafficking.

In 1996, lawmakers could hardly have imagined the role that the internet would play in modern life. Yet Section 230’s authors were prescient. In their view, “if this amazing new thing – the Internet – [was] going to blossom,” companies should not be “punished for trying to keep things clean.” Cox recently explained that, “the original purpose of [Section 230] was to help clean up the Internet, not to facilitate people doing bad things on the Internet.” The key to Section 230, Wyden agreed, was “making sure that companies in return for that protection – that they wouldn’t be sued indiscriminately – were being responsible in terms of policing their platforms.”

B. Explaining the Judiciary’s Interpretation of Section 230

The judiciary’s interpretation of Section 230 has not squared with this vision. Rather than a legal shield for responsible moderation efforts, courts have stretched Section 230 far beyond what its words, context, and purpose support. Section 230 has been read to immunize platforms from liability that:

20 Citron & Wittes, supra note, at.
21 Id.
22 Id.
26 See Citron & Jurecic, supra note.
27 Id.
28 Id.
29 Citron & Wittes, supra note, at 406-10; Mary Anne Franks, How the Internet Unmakes the Law, Ohio S. Tech. L. J. (forthcoming 2020).

Electronic copy available at: https://ssrn.com/abstract=3531236
• knew about users’ illegal activity, deliberately refused to remove it, and ensured that those responsible could not be identified;30
• solicited users to engage in tortious and illegal activity;31 and
• designed their sites to enhance the visibility of illegal activity and to ensure that the perpetrators could not be identified and caught.32

Courts have attributed this broad-sweeping approach to the fact that “First Amendment values [drove] the CDA.”33 For support, court have pointed to Section 230’s “findings” and “policy” sections, which highlight the importance of the “vibrant and competitive free market that presently exists” for the internet and the internet’s role in facilitating “myriad avenues for intellectual activity” and the “diversity of political discourse.”34 As one of us (Franks) has underscored, Congress’ stated goals also included the:

devlopment of technologies that “maximize user control over what information is received” by Internet users, as well as the “vigorous enforcement of Federal criminal laws to deter and publish trafficking in obscenity, stalking and harassment by means of the computer.” In other words, the law [wa]s intended to promote the values of privacy, security and liberty alongside the values of open discourse.35

Section 230’s liability shield has been extended to activity that has little or nothing to do with free speech, such as the sale of dangerous products.36 Consider Armslist.com, the self-described “firearms marketplace.”37 Unlicensed gun sellers use the site to find buyers who cannot pass background checks.38 Armslist.com is where Radcliffe Haughton illegally purchased a gun.39 Haughton’s estranged wife obtained a restraining order against him that banned him from legally purchasing a firearm.40 Haughton used Armslist.com, to easily find a gun seller that did not require a background check.41 He

30 Id.
31 Id.
33 Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017).
34 See, e.g., Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009).
35 Mary Anne Franks, The Lawless Internet? Myths and Misconceptions About CDA Section 230, HUFFINGTON POST (Feb. 17, 2014).
36 See, e.g., Hinton v. Amazon.com, LLC, 72 F. Supp. 3d 685, 687, 690 (S.D. Miss. 2014); Franks, How the Internet, supra __ at __.
37 https://www.armslist.com/
39 Id.
40 Id.
41 Id.
used the gun he purchased to murder his estranged wife and her two co-workers.\textsuperscript{42} The Wisconsin Supreme Court found Armslist immune from liability based on Section 230, despite the fact that its activities — i.e., knowingly profiting from illegal firearms purchases - were conduct, not speech.\textsuperscript{43}

Extending Section 230’s shield from liability to platforms that refuse to prohibit, and in some cases deliberately encourage, unlawful activity directly contradicts the stated goals of the CDA. Armslist.com can hardly be said to “provide ‘educational and informational resources’ or contribute to ‘the diversity of political discourse.’”\textsuperscript{44} Immunizing from liability enterprises that have nothing to do with moderating online speech, such as marketplaces that connect sellers of deadly weapons with prohibited buyers for a cut of the profits, is unjustifiable.

C. Evaluating the Status Quo

Section 230’s overbroad interpretation means that platforms have scant legal incentive to combat online abuse. Rebecca Tushnet put it well a decade ago: Section 230 ensures that platforms enjoy “power without responsibility.”\textsuperscript{45}

Market forces alone are unlikely to encourage responsible content moderation. Platforms make their money through online advertising generated when users like, click, and share.\textsuperscript{46} Allowing attention-grabbing abuse to remain online often accords with platforms’ rational self-interest.\textsuperscript{47} Platforms “produce nothing and sell nothing except advertisements and information about users, and conflict among those users may be good for business.”\textsuperscript{48} If a company’s analytics suggest that people pay more attention to content that makes them sad or angry, then the company will highlight such content.\textsuperscript{49} Research shows that people are more attracted to negative and novel information.\textsuperscript{50} Thus, keeping up destructive content may make the most sense for a company’s bottom line.

\textsuperscript{42} Id.
\textsuperscript{43} Id. The non-profit organization the Cyber Civil Rights Initiative, of which one of us (Franks) is the President and one of us (Citron) is the Vice President, filed an amicus brief in support of the petitioner’s request for writ of certiorari in the Supreme Court. Brief of Amicus Curiae of Cyber Civil Rights Initiative and Legal Academics in Support of Petitioners in Yasmine Daniel v. Armslist.com, available at https://www.supremecourt.gov/DocketPDF/19/19-153/114340/20190830155050530_Brief.PDF.
\textsuperscript{44} Amicus Curiae of Cyber Civil Right Initiative, supra note, at 16.
\textsuperscript{46} Mary Anne Franks, Justice Beyond Dispute, 131 HARV. L. REV. 1374, 1386 (2018) (reviewing ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES (2017)).
\textsuperscript{47} Danielle Keats Citron, Cyber Mobs, Disinformation, and Death Videos: The Internet As It Is (and as It Should Be), 118 MICH. L. REV. (forthcoming 2020).
\textsuperscript{48} Id.
\textsuperscript{49} Dissenting Statement of Commissioner Rohit Chopra, In re Facebook, Inc., Commission File No. 1823109, at 2 (July 24, 2019).
\textsuperscript{50} Id.
As Federal Trade Commissioner Rohit Chopra warned in his powerful dissent from the agency’s 2019 settlement with Facebook, the behavioral advertising business model is the “root cause of [social media companies’] widespread and systemic problems.”

Online behavioral advertising generates profits by “turning users into products, their activity into assets,” and their platforms into “weapons of mass manipulation.” Tech companies “have few incentives to stop [online abuse], and in some cases are incentivized to ignore or aggravate [it].”

To be sure, the dominant tech companies have moderated certain content by shadow banning, filtering, or blocking it. What often motivates these efforts is pressure from the European Commission to remove hate speech and terrorist activity. The same companies have banned certain forms of online abuse, such as nonconsensual pornography and threats, in response to pressure from users, advocacy groups, and advertisers. They have expended resources to stem abuse when it has threatened their bottom line.

Yet the online advertising business model continues to incentivize revenue-generating content that causes significant harm to the most vulnerable among us. Online abuse generates traffic, clicks, and shares because it is salacious and negative. Deep fake pornography sites as well as revenge porn and gossip sites thrive thanks to advertising revenue.

51 Id.
52 Id.
53 Franks, Justice Beyond Dispute, supra note, at 1386.
57 Id. at 1037.
58 CITRON, HATE CRIMES IN CYBERSPACE, supra note, at 229 (discussing how Facebook changed its position on pro rape pages after fifteen companies threatened to pull their ads); Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251 (2017).
59 For instance, eight of the top ten pornography websites host deepfake pornography, and there are nine deepfake pornography websites hosting 13,254 fake porn videos (mostly featuring female celebrities without their consent). These sites generate income from advertising. Indeed, as the first comprehensive study of deepfake video and audio explains, “deepfake pornography represents a growing business opportunity, with all of these websites featuring some form of advertising.” Deeptrace Labs, The State of Deepfakes: Landscape, Threats, and Impact 6 (September 2019), available at https://storage.googleapis.com/deeptrace-public/Deeptrace-the-State-of-Deepfakes-2019.pdf.
60 Id.
Without question, Section 230 has been valuable to innovation and expression.\(^62\) It has enabled vast and sundry businesses. It has led to the rise of social media companies that many people find valuable, such as Facebook, Twitter, and Reddit.

At the same time, Section 230 has subsidized platforms whose business is online abuse. It enables platforms to make money off of abuse without having to bear the costs that its business externalizes.\(^63\) It takes away the leverage that victims might have had to get harmful content take down.

This laissez-faire approach has been costly to individuals, groups, and society. As more than ten years of research have shown, cyber mobs and individual harassers target individuals with sexually threatening and sexually humiliating online abuse.\(^64\) According to a 2017 Pew Research Center study, one in five U.S. adults have experienced online harassment that includes stalking, threats of violence, or cyber sexual harassment.\(^65\) More often, targeted individuals are women—particularly women of color and bisexual women—and other sexual minorities.\(^66\)

Victims of online abuse do not feel safe on- or offline.\(^67\) They experience anxiety and severe emotional distress. They suffer damage to their reputations, their intimate relationships, their employment and educational opportunities. Some victims are forced to relocate, change jobs, or even change their names.\(^68\) In the face of online assaults, victims have difficulty finding employment or keeping their jobs because the abuse appears in searches of their names.\(^69\)

Failing to address online abuse does not just inflict economic, physical, and psychological harms on victims—it also jeopardizes their right to free speech. Online abuse silences victims.\(^70\) Targeted individuals often shut down social media profiles and email accounts.

\(^62\) CITRON, HATE CRIMES IN CYBERSPACE, supra note, at.
\(^63\) See Mary Anne Franks, Moral Hazard on Stilts, Knight Institute of the First Amendment (2019).
\(^64\) See generally CITRON, HATE CRIMES IN CYBERSPACE, supra note. The 2017 Pew study found that one in four Black individuals say they have been subject to online harassment due to their race; one in ten Hispanic individuals have said the same. For white individuals, the share is far lower: just three percent. Women are twice as likely as men to say they have been targeted online due to their gender (11 percent versus 5 percent). Duggan, supra note. Other studies have made clear that LGBTQ individuals are particularly vulnerable to online harassment, CITRON, HATE CRIMES IN CYBERSPACE, supra note, and nonconsensual pornography. Data & Society, Online Harassment, Digital Abuse, and Cyberstalking in America (November 21, 2016), available at https://innovativepublichealth.org/wp-content/uploads/2_Online-Harassment-Report_Final.pdf.
\(^65\) Maeve Duggan, Online Harassment 2017 Study, Pew Research Center (July 11, 2017).
\(^66\) CITRON, HATE CRIMES IN CYBERSPACE, supra note.
\(^67\) Id.
\(^68\) Id.
\(^69\) Id.
\(^70\) Jonathon W. Penney, Chilling Effects: Online Surveillance and Wikipedia Use, 31 BERKELEY TECH. L.J. 117, 125–26 (2016); see also Jonathon W. Penney, Internet Surveillance, Regulation, and Chilling Effects Online: A
and withdraw from public discourse.\textsuperscript{71} Those with political ambitions are deterred from running for office.\textsuperscript{72} Journalists refrain from reporting on controversial topics. Sexual assault victims are discouraged from holding perpetrators accountable.

An overly capacious view of Section 230 has undermined equal opportunity in employment, politics, journalism, education, cultural influence, and free speech.\textsuperscript{73} The benefits Section 230's immunity has enabled likely could have been secured at a lesser price.\textsuperscript{74}

\section*{II. Debunking the Myths about Section 230}

After writing about overbroad interpretations of Section 230 for more than a decade, we have eagerly anticipated the moment when federal lawmakers would begin listening to concerns about Section 230. Today, finally, lawmakers are questioning the received wisdom that any tinkering with Section 230 would lead to a profoundly worse society.

Yet we approach this moment with a healthy dose of skepticism. Nothing is gained if Section 230 is changed to indulge bad faith claims, address fictitious concerns, or disincentivize content moderation. We have been down this road before and it is not pretty.\textsuperscript{75} Yes, Section 230 is in need of reform, but not if it would make matters worse.

Our reservations stem from misconceptions riddling the debate. Those now advocating repealing or amending Section 230 often dramatically claim that broad platform immunity betrays free speech guarantees by sanctioning the censorship of political views. By contrast, Section 230 absolutists oppose any effort to amend Section 230 on the grounds that broad platform immunity is indispensable to free speech guarantees. Both sides tend to conflate the First Amendment and Section 230, though to very different ends. This conflation reflects and reinforces three major misconceptions. One is the presumption that all Internet activity is speech. The second is the treatment of private actors as if they were government actors. The third is the assumption that any regulation of online conduct will inevitably result in less speech. This Part identifies and debunks these prevailing myths.

\begin{flushleft}
\textit{Comparative Case Study, 6 INTERNET POL’Y REV., May 26, 2017, at 1, 3. See generally CITRON, HATE CRIMES IN CYBERSPACE, supra note, at; Danielle Keats Citron, \textit{Civil Rights In Our Information Age}, in \textit{THE OFFENSIVE INTERNET} (Saul Levmore & Martha C. Nussbaum, eds. 2010); Citron \& Richards, \textit{supra} note, at 1365 (”[N]ot everyone can freely engage online. This is especially true for women, minorities, and political dissenters who are more often the targets of cyber mobs and individual harassers.”); Citron \& Franks, \textit{supra} note, at 385; Citron, \textit{Cyber Civil Rights, supra} note.}
\end{flushleft}

\textsuperscript{71} Id.
\textsuperscript{72} Katie Hill, for instance, resigned from Congress after her vengeful ex shared intimate photos of her and a woman who she and her husband were engaged in a consensual relationship.
\textsuperscript{73} MARY ANNE FRANKS, \textit{THE CULT OF THE CONSTITUTION} (2019).
\textsuperscript{74} Citron \& Wittes, \textit{supra} note.
\textsuperscript{75} FOSTA-SESTA as case in point.
A. The Internet as a Speech Machine

Both detractors and supporters agree that Section 230 provides online intermediaries broad immunity from liability for third-party content. The real point of contention between the two groups is whether this broad immunity is a good or a bad thing. While critics of Section 230 point to the extensive range of harmful activity that the law’s deregulatory stance effectively allows to flourish, Section 230 enthusiasts argue that the law’s laissez-faire nature is vital to ensuring a robust online marketplace of ideas.

Section 230 enthusiast Elizabeth Nolan Brown argues that “Section 230 is the Internet’s First Amendment.”76 David Williams, president of the Taxpayers Protection Alliance, similarly contends that, “The internet flourishes when social media platforms allow for discourse and debate without fear of a tidal wave of liability. Ending Section 230 would shutter this marketplace of ideas at tremendous cost.”77 Eric Goldman contends that Section 230 is “even better than the First Amendment.”78

The view of Section 230 presumes that the Internet is primarily, if not exclusively, a medium of speech. The text of Section 230 reinforces this characterization through the use of the terms “publishers” and “speakers” in 230(c)(2) as well as the finding that the “Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”79

But the assertion that the Internet is primarily a medium of speech should be interrogated.80 When Section 230 was passed, it may have made sense to think of the Internet that way. In 1996, the Internet had for most of its history been text-based and limited to non-commercial activity. Only 20 million American adults had Internet access, and these users spent less than half an hour a month online. By comparison, in 2019, 293 million Americans were using the Internet,81 and they were using it not only to communicate, but also to buy and sell merchandise, find dates, make restaurant reservations, watch television, read books, stream music, and look for jobs.82 As one Section 230 proponent has described it,

79 § 230(a)(3).
80 See Franks, How the Internet Unmakes the Law.
the entire suite of products we think of as the internet—search engines, social media, online publications with comments sections, Wikis, private message boards, matchmaking apps, job search sites, consumer review tools, digital marketplaces, Airbnb, cloud storage companies, podcast distributors, app stores, GIF clearinghouses, crowdsourced funding platforms, chat tools, email newsletters, online classifieds, video sharing venues, and the vast majority of what makes up our day-to-day digital experience—have benefited from the protections offered by Section 230.

Many of these activities have very little to do with speech, and indeed many of the offline cognates would not be considered protected speech for First Amendment purposes. “Like any other rule, the First Amendment does not regulate the full range of human behavior.” The First Amendment draws a line, contested though it might be, between speech and conduct. While some actions are sufficiently expressive to be considered speech for First Amendment purposes, “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” The Court has made clear that conduct is not automatically protected simply because it involves language in some way: “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”

That is, while many Supreme Court free speech cases are focused on whether a particular kind of speech is protected, and to what degree, by the First Amendment, whether an act is speech at all for the purposes of the First Amendment is an even more fundamental question. When presented with cases involving the wearing of black armbands, setting flags on fire, making financial contributions to political campaigns, or burning draft cards, the Court has first engaged with the question of whether the acts in question are being regulated as speech before turning to the degree of protection that speech is afforded. The answer to the question “is it speech” can often be, once one is no longer dealing with the spoken or printed word, very complicated. As one of us (Citron) has written, “[a]dvances in law and technology . . . complicate this distinction as they make more actions achievable through ‘mere’ words.” Because so much online activity involves elements that are not unambiguously speech-related, whether such activities are in fact speech should be a subject of express inquiry.

87 Danielle Keats Citron, Cyber Civil Rights, 89 B.U. L. Rev. 61, 99 (2009).
But the conflation of Section 230 and the First Amendment short-circuits this inquiry. Intermediaries invoking Section 230 implicitly characterize the acts or omissions at issue as speech, and courts allow them to do so without challenge. When “courts routinely interpret Section 230 to immunize all claims based on third-party content,” including “negligence; deceptive trade practices, unfair competition, and false advertising; the common law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines,” they grant online intermediaries a presumption not available to offline intermediaries, thereby establishing a two-track system of liability.

In addition to short-circuiting the analysis of whether particular content qualifies as speech at all, an overly indulgent view of Section 230 also short-circuits the analysis of whether the speech is or should be protected. This view treats all online activity as normatively significant free expression. It supposes that all user-generated content involves presumptively protected speech. Under this view, collateral censorship is inevitable as is the destruction of the “marketplace of ideas.”

This view reflects what Leslie Kendrick describes as “First Amendment expansionism” — the tendency to treat speech as normatively significant no matter the actual speech in question. As Kendrick wisely observes, First Amendment expansionism is likely “in an information economy where many activities and products involve communication.” The debate over Section 230 bears this out.

Viewing all online speech as normatively significant or presumptively protected elides the different reasons why certain speech is viewed as distinctly important in our system of free expression. Some speech matters for self-expression, but not all speech does. Some speech is important for the search for truth or for self-governance, but not all speech serves those values. Also, as Kenneth Abraham and Edward White argue, the “all speech is free speech” view devalues the special cultural and social salience of speech about matters of public concern. And it disregards the fact that speech about private individuals about purely private matters may not remotely implicate free speech values

88 (Goldman, supra, at 6)
89 Leslie Kendrick, First Amendment Expansionism, 56 William & Mary L. Rev. 1199, 1212 (2015). As Leslie Kendrick explains, freedom of speech is a “term of art that does not refer to all speech activities, but rather designates some area of activity that society takes, for some reason, to have special importance.”
90 Id.
91 Kendrick, supra note, at.
92 Id.
93 Kenneth S. Abraham & Edward G. White,
at all. As the Court has repeatedly observed, not all speech receives full protection under the First Amendment.94

The indulgent approach to Section 230 veers far away from the public discourse values at the core of the First Amendment, as well as from the original intentions of Section 230’s sponsors. Christopher Cox, a former Republican Congressman who co-sponsored Section 230, has been openly critical of “how many Section 230 rulings have cited other rulings instead of the actual statute, stretching the law,” asserting that “websites that are ‘involved in soliciting’ unlawful materials or ‘connected to unlawful activity should not be immune under Section 230.’”95 The Democratic co-sponsor of Section 230, Senator Ron Wyden, has similarly emphasized that he “wanted to guarantee that bad actors would still be subject to federal law. Whether the criminals were operating on a street corner or online wasn’t going to make a difference.”96

There is no justification for treating the Internet as a magical speech conversion machine: if the conduct would not be speech protected by the First Amendment if it occurs offline, it should not be transformed into speech merely because it occurs online. Content that unquestionably qualifies as speech should not be presumed to be doctrinally or normatively protected. Intermediaries seeking to take advantage of Section 230’s protections – given that those protections were intended to foster free speech values – should have to demonstrate, rather than merely tacitly assert, that the content at issue is in fact speech.

B. Neutrality and the State Action Doctrine

The conflation of the First Amendment and Section 230, and Internet activity with speech, contributes to another common misconception about the law, which is that it requires tech companies to act as “neutral public forums” in order to receive the benefit of immunity. Stated slightly differently, the claim here is that tech companies receive Section 230’s legal shield only if they refrain, as the First Amendment generally requires the government to refrain, from viewpoint discrimination. On this view, a platform’s removal, blocking, or muting of user-generated content based on viewpoint amounts to impermissible censorship under the First Amendment that should deprive the platform of its statutory protection against liability.97

94 See United States v. Stevens, 559 U.S. 460, 468-69 (2010) (noting existence of “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem” (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).


This misconception is twofold: first, there is nothing in the legislative history or text of Section 230 that supports such an interpretation. Not only does Section 230 not require platforms to act neutrally vis-à-vis political viewpoints as state actors should, it urges exactly the opposite. Under Section 230(b)(4), one of the statute’s policy goals includes “remov[ing] disincentives for the development and utilization of blocking and filtering technologies.”

Secondly, the “neutral platform” myth completely ignores the state action doctrine, according to which the obligations created by the First Amendment fall only upon government actors, not private actors. Attempting to extend First Amendment obligations to private actors is not only constitutionally incoherent, but endangers the First Amendment rights of private actors against compelled speech.

High-profile examples of the “neutral platform” argument include Representative Gianforte denouncing Facebook’s refusal to run a gun manufacturer’s ads as blatant “censorship of conservative views.” Senator Ted Cruz has argued that “big tech enjoys an immunity from liability on the assumption they would be neutral and fair. If they’re not going to be neutral and fair, if they’re going to be biased, we should repeal the immunity from liability so they should be liable like the rest of us.” Along these lines, Representative Louie Gohmert contended that “Instead of acting like the neutral platforms they claim to be in order obtain their immunity . . . . social media companies have use[d their] platforms and algorithms to silence and prevent income to conservatives.”

It is not just politicians who fall under the spell of the viewpoint neutrality myth. The Daily Wire’s Editor, Chief Josh Hammer, tweeted: “It is not government overreach to demand that Silicon Valley tech giants disclose their censorship algorithms in exchange for continuing to receive CDA Sec. 230 immunity.”

99 230(b)(4).
Several legislative proposals endeavor to reset Section 230 to incentivize platforms to act as quasi-governmental actors with a commitment to viewpoint neutrality. Consider Senator Josh Hawley’s bill “Ending Support for Internet Censorship Act.” Under the Hawley proposal, Section 230’s legal shield would be conditioned on companies of a certain size obtaining FTC certification of their “political neutrality.” Under Representative Gohmert’s proposal, Section 230 immunity would be conditioned on a content platform’s posting of user-generated content in chronological order. Making judgments—in other words, moderating—about content’s prominence and visibility would mean the loss of the legal shield.

It is important to note that there is no empirical basis for the claim that conservative viewpoints are being suppressed on social media. Facebook, responding to concerns about anti-conservative bias, hired former Senator John Kyl and lawyers at Covington & Burling to conduct an independent audit of potential anti-conservative bias. The Covington Interim Report did not conclude that Facebook had anti-conservative bias. As Siva Vaidhyanathan observes, there is no evidence for accusations that social media companies are disproportionately silencing conservative speech: the complaints are “simply false” and that studies suggest that conservative political campaigns have in fact leveraged social media to much greater advantage than their adversaries.

But even if the claims of anti-conservative bias on platforms did have basis in reality, the “neutral platform” interpretation of Section 230 takes two forms that actually serve to undermine, not promote, First Amendment values. The first involves the conflation of private companies with state actors, while the second is the characterization of social media platforms with public forums. Tech companies are not governmental or quasi-governmental entities, and social media companies and most online service providers are not publicly owned or operated. Both of these forms of misidentification ignore private actors’ own First Amendment rights to decide what content they wish to endorse or promote.

105 Hawley claimed in a tweet that Section 230’s legal shield was predicated on platforms serving as “for[a] for a true diversity of political discourse.” https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/
108 Id. The audit found Facebook’s advertising policies prohibiting shocking and sensational content resulted in the rejection of pro-life ads focused on survival stories of infants born before full-term. Facebook adjusted its enforcement of this policy to focus on prohibiting ads only when the ad shows someone in visible pain or distress or where blood and bruising is visible.
110 Citron & Richards, supra note, at 1361 (exploring how entities comprising our digital infrastructure, including search engines, browsers, hosts, transit providers, security providers, internet service providers, and content platforms, are privately-owned with certain exceptions like the Internet Corporation for Assigned Names and Numbers).
Neither Section 230 nor judicial doctrine equates “interactive computer services” with state guarantors of First Amendment protections. As private actors, social media companies are no more required to uphold the First Amendment rights of their users than would be bookstores or restaurants to their patrons. As Eugene Kontorovich testified before the Senate Judiciary Committee’s hearing on “Stifling Free Speech: Technological Censorship and the Public Discourse:"

If tech platforms “engage in politically biased content-sorting . . . . it is not a First Amendment issue. The First Amendment only applies to censorship by the government. . . . The conduct of private actors is entirely outside the scope of the First Amendment. If anything, ideological content restrictions are editorial decisions that would be protected by the First Amendment. Nor can one say that the alleged actions of large tech companies implicate ‘First Amendment values,’ or inhibits the marketplace of ideas in ways analogous to those the First Amendment seeks to protect against.”

The alternative argument attempts to treat social media platforms as traditional public forums like parks, streets, or sidewalks. The public forum has a distinct purpose and significance in our constitutional order. The public forum is owned by the public and operated for the benefit of all. The public’s access to public parks, streets, and sidewalks is a matter of constitutional right. The public forum doctrine is premised on the notion that parks, streets, and sidewalks have been open for speech “immemorially . . . time out of mind.” For that reason, denying access to public parks, streets, and sidewalks on the basis of the content or viewpoint of speech is presumptively unconstitutional. But wholly privately-owned social media platforms have never been designated as “neutral public forums.”

As one of us (Franks) has written, the attempt to turn social media controversies into debates over the First Amendment is an yet another example of what Frederick Schauer describes as “the First Amendment’s cultural magnetism.” It suggests that “because

112 Written Testimony of Professor Eugene Kontorovich Before Senate Judiciary Committee for “Stifling Free Speech: Technological Censorship and the Public Discourse” (April 10, 2019).
114 Id.
private companies like Facebook, Twitter, and Google have become “state like” in many ways, even exerting more influence in some ways than the government, they should be understood as having First Amendment obligations, even if the First Amendment’s actual text or existing doctrine would not support it.” Under this view, the First Amendment should be expanded beyond its current borders.

But the erosion of the state action doctrine would actually undermine First Amendment rights, by depriving private actors of “a robust sphere of individual liberty,” as Justice Gorsuch recently expressed it in Halleck. An essential part of the right to free speech is the right to choose what to say, when to say it, and to whom. Indeed, the right not to speak at all is a fundamental aspect of the First Amendment’s protections. As the Court famously held in West Virginia v. Barnette, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

If content platforms are treated as governmental actors or their services deemed public fora, then they could not act as “Good Samaritans” to block online abuse. This would directly contravene the will of Section 230’s drafters. They could not combat spam, doxing, nonconsensual pornography, or deep fakes. They could not prohibit activity that chases people offline. In our view, it is desirable for content platforms to address online abuse that imperils people’s ability to enjoy life’s crucial opportunities, including the ability to engage with others online.

At the same time, the power that social media companies and other content platforms have over digital expression should not proceed unchecked, as it does in some respects. Currently, Section 230(c)(1)—the provision related to under-filtering content—shields companies from liability without any limit or condition, unlike Section 230(c)(2) that conditions the immunity for under-filtering on a showing of “good faith.” In Part III, we offer legislative reforms that would check that power afforded content platforms. The legal shield should be cabined to interactive computer services that wield their content-moderation powers responsibly, as the drafters of Section 230 wanted.

119 Id.; Citron & Richards, supra note, at 1371.
122 Citron & Richards, supra note, at 1371.
123 In connection with our work with CCRI, we have helped tech companies do precisely that. See Danielle Keats Citron, Sexual Privacy, Yale LJ (2019); Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251 (2017).
124 Of course, not all companies involved in providing our online experiences are alike in their power and privilege. Citron & Richards, supra note, at 1374. “As a company’s power over digital expression grows closer to total (meaning there are few to no alternatives to express oneself online), the greater the responsibilities (via regulation) attendant to that power.” Id. Companies running the physical infrastructure of the internet, such as internet service and broadband providers, have power over digital
We would lose much and gain little if Section 230 were replaced with the Hawley or Gohmert proposals. Section 230 already has a mechanism to address the unwarranted silencing of viewpoints. Under Section 230(c)(2), users or providers of interactive computer services enjoy immunity from liability for over-filtering or over-blocking speech only if they acted in “good faith.” Under current law, platforms could face liability for removing or blocking content without “good faith” justification, if a theory of relief exists on which they can be sued.125

C. The Myth that Any Change to Section 230 Would Destroy Free Speech

Another myth is that any Section 230 reform would jeopardize free speech in a larger sense, even if not strictly in the sense of violating the First Amendment. It is certainly true that free speech is a cultural as well as a constitutional matter. It is shaped by non-legal as well as legal norms, and tech companies play an outsized role in establishing those norms. We agree that there is good reason to be concerned about the influence of tech companies and other powerful private actors over the ability of individuals to express themselves. This is an observation we have been making for years – that some of the most serious threats to free speech come not from the government, but from non-state actors.126 Marginalized groups in particular, including women and racial minorities, have long battled with private censorial forces as well as governmental ones. But the unregulated Internet – or rather, the selectively regulated Internet – is exacerbating, not ameliorating, this problem. The current state of Section 230 may ensure free speech for the privileged few, but protecting free speech for all will require reform.

The concept of “cyber civil rights”127 speaks precisely to the reality that the Internet has rolled back many gains made for racial and gender equality. The anonymity, amplification, and aggregation possibilities offered by the Internet have allowed private actors to discriminate, harass, and threaten vulnerable groups on a massive scale.128 There is abundant empirical evidence showing that the Internet has been used to further chill expression tantamount to governmental power. In locations where people only have one broadband provider in their area, being banned from that provider would mean no broadband internet access at all. The (now-abandoned) net neutrality rules were animated by precisely those concerns. And, as Genevieve Lakier and Frank Pasquale have argued, the power of search engines may warrant far more regulation than currently exists. See Genevieve Lakier, The Problem Isn’t Analogies but the Analogies that Courts Use, Knight Institute; Frank Pasquale, The Black Box Society (2014). Although social media companies are powerful, they do not have the kind of control over our online experiences as broadband providers or even search engines do. Users banned on Facebook could recreate a social network elsewhere, though it would be time consuming and likely incomplete. Dissatisfaction with Facebook has inspired people’s migration to upstart social network services like MeWe. See Citron & Richards, supra note, at 1374 (exploring different non-constitutional ways that law can protect digital expression).

125 At the symposium, Brian Leiter provided helpful comments on this point.
126 See Franks, Democratic Surveillance; Beyond Free Speech for the White Man
127 See Citron, Cyber Civil Rights, supra note, at.
128 Id; Franks, Unwilling Avatars
the intimate, artistic, and professional expression of individuals whose rights were already under assault offline.

Even as the Internet has multiplied the possibilities of expression, it multiplied the possibilities of repression.129 The new forms of communication offered by the Internet have been used to unleash a regressive and censorious backlash against women, racial minorities, sexual minorities, and any other groups seeking to assert their rights of expression. The Internet lowers the costs of engaging in abuse by providing abusers with anonymity and social validation, while providing new ways to increase the range and impact of that abuse. The online abuse of women in particular amplifies sexist stereotyping and discrimination, compromising gender equality online and off.

The reality of unequal free speech rights demonstrates why regulation not only may not chill speech, but can, when done carefully and well, enhance speech and encourage more people to freely engage in speech. According to a 2017 study, regulating online abuse “may actually facilitate and encourage more speech, expression, and sharing by those who are most often the targets of online harassment: women.” The study’s author suggests that when women “feel less likely to be attacked or harassed,” they become more “willing to share, speak, and engage online.” Knowing that there are laws criminalizing online harassment and stalking “may actually lead to more speech, expression, and sharing online among adult women online, not less.” As expressed in the title of a recent article by one of us (Citron) and Jonathon Penney, sometimes “law frees us to speak.”130

III. Moving Beyond the Myths: A Menu of Potential Solutions

Having addressed misconceptions about the relationship between Section 230 and the First Amendment, state and private actors, and regulation and free speech outcomes, we turn to reform proposals that address the problems that actually exist and are legitimately concerning. This Part explores different possibilities for fixing the overbroad interpretation of Section 230.

A. Against Carveouts

Some reformers urge Congress to maintain Section 230’s immunity, but to create an explicit exception from its legal shield for certain types of behavior. A recent example of that approach is the Stop Enabling Sex Traffickers Act (SESTA), which passed by an overwhelming vote in 2016. The bill amended Section 230 by rendering websites liable for knowingly hosting sex trafficking content.

That law, however, is flawed. By effectively pinning the legal shield on a platform’s lack of knowledge of sex trafficking, the law reprises the dilemma that led Congress to pass

129 Franks, Cult of the Constitution, supra note, at.
Section 230 in the first place. To avoid liability, platforms have resorted to either filtering everything related to sex or sitting on their hands so they cannot be said to have knowingly facilitated sex trafficking.\textsuperscript{131} That is the opposite of what the drafters of Section 230 wanted—responsible content moderation practices.

Olivier Sylvain offers another potential route for reform, who urges Congress to maintain Section 230’s immunity but to create an explicit exception from the legal shield for civil rights violations.\textsuperscript{132} He argues that other exceptions could be added, such as those related to combating nonconsensual pornography or child sexual exploitation.

While we sympathize with the impulse to address particularly egregious harms, we argue that the best way to reform Section 230 is not through a piecemeal approach. The carveout approach is inevitably underinclusive, establishing a normative hierarchy of harms that leaves other harmful conduct to be addressed another day. Such an approach requires that Section 230’s exceptions would need to be regularly updated, an impractical option given the slow pace of congressional efforts and partisan deadlock.\textsuperscript{133}

\textbf{B. A Modest Proposal – Speech, not Content}

In light of the observations made in Part II.A., one simple reform of Section 230 would be to make explicitly clear that the statute’s protections only apply to speech. The statutory fix is simple: replace the word “information” in (c)(1) with the word “speech.” Thus, that section of the statute would read:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any \textit{speech} provided by another information content provider.

This revision would put all parties in a Section 230 case on notice that the classification of content as speech is not a given, but a fact to be demonstrated. If a platform cannot make a showing that the content or information at issue is speech, then it should not be able to take advantage of Section 230 immunity.

\textbf{C. Excluding Bad Samaritans}

Another effective and modest adjustment would involve amending Section 230 to exclude bad actors from its legal shield. There are a few ways to do this. One possibility would be to deny the immunity to online service providers that “deliberately leave up

\textsuperscript{\textdagger} Citron & Jurecic, \textit{supra} note.
\textsuperscript{\textdagger} Sylvain, \textit{supra} note, at.
\textsuperscript{\textdagger} See Citron, \url{https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties}.

Electronic copy available at: https://ssrn.com/abstract=3531236
unambiguously unlawful content that clearly creates a serious harm to others.”\textsuperscript{134} Another would be to exclude from the immunity “the very worst actors:” sites encouraging illegality or that principally host illegality.\textsuperscript{135}

A variant on this theme would deny the legal shield to cases involving platforms that have solicited or induced unlawful content. This approach takes a page from intermediary liability rules in trademark and copyright law. As Stacey Dogan observed in that context, inducement doctrines allow courts to target bad actors whose business models center on infringement.\textsuperscript{136} Providers that solicit or induce unlawful content should not enjoy immunity from liability. This approach targets the harmful activity while providing breathing space for protected expression.\textsuperscript{137}

A version of this approach is embraced in the SHIELD Act, which one of us (Franks) assisted in drafting and the other (Citron) supported in advising lawmakers on behalf of CCRI. Because SHIELD is a federal criminal statute, Section 230 cannot be used as a defense against it. However, the statute creates a separate liability standard for providers of communications services that effectively grants them Section 230 immunity so long as the provider does not intentionally solicit, or knowingly and predominantly distribute, content that the provider actually knows is in violation of the statute.\textsuperscript{138}

\textbf{D. Conditioning the Legal Shield on Reasonable Content Moderation}

There is a broader legislative fix that Benjamin Wittes and one of us (Citron) have proposed. Under that proposal, platforms would enjoy immunity from liability if they could show that their content-moderation practices writ large are reasonable. The revision to Section 230(c)(1) would read as follows:

\begin{quote}
No provider or user of an interactive computer service that takes reasonable steps to address unlawful uses of its service that clearly create serious harm to others shall be treated as the publisher or speaker of any information provided by another information content provider in any action arising out of the publication of content provided by that information content provider.
\end{quote}

If adopted, the question before the courts in a motion to dismiss on Section 230 grounds would be whether a defendant employed reasonable content moderation practices in the face of unlawful activity that manifestly causes harm to individuals.

\textsuperscript{134} E-mail from Geoffrey Stone, Professor of Law, Univ. of Chi., to author (Apr. 8, 2018).
\textsuperscript{135} Citron, Hate Crimes in Cyberspace, supra note, at. One of us (Citron) supported this approach as an important interim step to broader reform. \textit{id.}
\textsuperscript{137} \textit{id.} at 508-09.
\textsuperscript{138} H.R. 2896: SHIELD Act of 2019; see also Franks, Revenge Porn Reform (explaining the exception).
The question would not be whether a platform acted reasonably with regard to a specific use of the service. Instead, the court would ask whether the provider or user of a service engaged in reasonable content moderation practices writ large with regard to unlawful uses that clearly create serious harm to others.139

Congressman Deven Nunes has argued that reasonableness is a vague and unworkable policy.140 Eric Goldman considers the proposal a “radical change that would destroy Section 230.” In Goldman’s estimation, “such amorphous eligibility standards” makes “Section 230 litigation far less predictable, and it would require expensive and lengthy factual inquiries into all evidence probative of the reasonableness of defendant’s behavior.”141

Yes, a reasonableness standard would require evidence of a site’s content moderation practices. But impossibly vague or amorphous—it is not. Courts have assessed the reasonableness of practices in varied fields, from tort law to the Fourth Amendment’s ban on unreasonable searches and seizures.142 In a wide variety of contexts, the judiciary has invested the concept of reasonableness with meaning.143

Courts are well suited to address the reasonableness of a platform’s speech policies and practices vis-à-vis particular forms of illegality that cause clear harm to others (at the heart of a litigant’s claims). The reasonableness inquiry would begin with the alleged wrongdoing and liability. To state the obvious, platforms are not strictly liable for all content posted on their sites. Plaintiffs need a theory of relief to assert against content platforms. Section 230’s legal shield would turn on whether the defendant employed reasonable content moderation practices to deal with the kind of harmful illegality alleged in the suit.

139 Tech companies have signaled their support as well. For instance, IBM issued a statement saying that Congress should adopt the proposal and wrote a tweet to that effect as well. Ryan Hagemann, A Precision Approach to Stopping Illegal Online Activities, IBM THINK POLICY (July 10, 2019), https://www.ibm.com/blogs/policy/cda-230/; see also @RyanLeeHagemann, TWITTER (July 10, 2019, 3:14 PM), https://twitter.com/RyanLeeHagemann/status/114903586945934575?ref_src=twsrc%5Etfw (“A special shoutout to @daniellecitron and @benjaminwittes, who helped to clarify what a moderate, compromise-oriented approach to the #Section230 debate looks like.”).

140 See Congressman Deven Nunes’ questioning of one of us at a House Intelligence Committee hearing about deep fakes in June 2018, https://www.c-span.org/video/?c4802966/user-clip-danielle-citron-explains-content-moderation. As Benjamin Zipursky explains, “For a term or a phrase to fall short of clarity because of vagueness is quite different from having no meaning at all, and both are different from having multiple meanings—being ambiguous.” Benjamin C. Zipursky, Reasonableness In and Out of Negligence Law, 163 Penn. L. Rev. 2131 (2015).

141 Goldman, supra note, at 45.

142 Reasonableness is the hallmark of negligence claims. Benjamin C. Zipursky, Reasonableness In and Out of Negligence Law, 163 Penn. L. Rev. 2131, 2135 (2015) (“The range of uses of “reasonableness” in law is so great that a list is not an efficient way to describe and demarcate it.”).

143 This is not to suggest that all uses of the concept of reasonableness are sound or advisable. There is a considerable literature criticizing various features of reasonableness inquiries. In this piece, we endeavor to tackle the most salient critiques of reasonableness in the context of content moderation practices.
Let’s take an example. Suppose a social network is sued for defamation and negligent enablement of a crime. In the complaint, the plaintiff alleges that her nude photos were posted on defendant’s site without consent. Plaintiff further alleges that the photos and deep fake videos appeared alongside her name and address. Hundreds of strangers rang the plaintiff’s doorbell at night, demanding sex. One man broke into her house and plaintiff had to call the police. Regrettably, defendant failed to respond to her reports of abuse. The defendant filed a motion to dismiss on Section 230 grounds, alleging that its terms of service (TOS) ban stalking and sexual-privacy invasions like nonconsensual pornography and the site has procedures in place that enables it to respond to complaints quickly.

The question before the court would be whether the defendant’s content moderation practices towards the kind of harm-causing conduct alleged in the suit—defamation and sexual-privacy invasions—were reasonable. Defendant submits evidence showing it has a clear policy against cyber stalking and sexual privacy invasions. On average, the site’s content moderators respond to complaints about sexual-privacy invasions and cyberstalking within a week’s time. The site has an easy-to-use process to report abuse. It uses a hashing process to prevent the reposting of nude images determined by the site to violate the site’s TOS.144 Defendant acknowledges that its moderators did not act quickly enough in plaintiff’s case but that generally speaking its speech rules and procedures satisfy the reasonableness inquiry.

The court would likely grant the defendant’s motion to dismiss on Section 230 grounds. The defendant has clearly stated standards and a systematic process to consider complaints. The court would likely find the site’s moderation practices reasonable given its systematic process to deal with the harmful conduct of the sort alleged in the complaint even though the site had fallen short of that standard in the plaintiffs’ case. The key is the reasonableness of the site’s practices writ large, not its response in any given case.

There isn’t a one-size-fits-all approach to reasonable content moderation. Reasonableness is tailored to the harmful conduct at hand and the size and nature of the platform. A reasonable approach to sexual-privacy invasions would be different from a reasonable approach to fraud or spam. Crucially, the assessment of reasonable content-moderation practices would take into account differences among content platforms. A blog with a few postings a day and a handful of commenters is in a different position than a social network with millions of postings a day. The social network could not plausibly respond to complaints of abuse immediately, let alone within a day or two, whereas the blog

144 For a discussion of Facebook’s hashing process as an illustration of an effective market response to nonconsensual pornography, see Danielle Keats Citron, Sexual Privacy, Yale LJ (2019).
could. On the other hand, the social network and the blog could deploy technologies to detect and filter content that they previously determined was unlawful.\textsuperscript{145}

A reasonableness standard would not “effectively ‘lock in’ certain approaches, even if they are not the best or don’t apply appropriately to other forms of content,” as critics suggest.\textsuperscript{146} The promise of a reasonableness approach is its elasticity. As technology and content moderation practices changes, so will the reasonableness of practices. As new kinds of harmful online activity emerge so will the strategies for addressing them.

A reasonable standard of care will reduce opportunities for abuse without interfering with the further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites. Approaching the problem as one of setting an appropriate standard of care more readily allows differentiating between different kinds of online actors. Websites that solicit illegality or that refuse to address unlawful activity that clearly creates serious harm should not enjoy immunity from liability. On the other hand, social networks that have safety and speech policies that are transparent and reasonably executed at scale should enjoy the immunity from liability as the drafters of Section 230 intended.

\textbf{Conclusion}

A crucial task in any reform project is clear-eyed thinking. And yet clear-eyed thinking about the Internet is often difficult. The Section 230 debate is, like many other tech policy reform projects, beset by misconceptions. We have taken this opportunity to dispel myths around Section 230 so that this reform moment, a long time coming and anticipated, is not wasted.

Reforming Section 230 is long overdue. Law should change to ensure that such power is wielded responsibly. With Section 230, Congress sought to provide incentives for “Good Samaritans” engaged in efforts to moderate content. Their goal was laudable. Section 230 should be amended to condition the immunity on reasonable moderation practices rather than the free pass that exists today. Market pressures and morals are not always enough, and they should not have to be.

\textsuperscript{145} Citron, \textit{Sexual Privacy}, supra note (discussing Facebook’s hashing initiative to address nonconsensual distribution of intimate images).

\textsuperscript{146} Mike Masnick, supra note, at.
Devin Nunes, Johnny Depp lawsuits seen as threats to free speech and press

By Justin Jouvenal

Dec. 22, 2019 at 8:00 p.m. EST

Rep. Devin Nunes of California was angered by a story in his hometown newspaper detailing a claim that investors in a winery he partly owns partied with cocaine and prostitutes. So the Republican decided to sue — in rural Virginia.

Nunes bypassed the courthouse less than two miles from one of his offices and 10 blocks from the Fresno Bee to file the $150 million defamation claim against its owner 2,600 miles away. He also chose the Old Dominion to file two other recent defamation suits, one naming San Francisco-based Twitter and an anonymous user who has mocked him in the voice of an imaginary cow.
Likewise, actor Johnny Depp sued his ex-wife Amber Heard for $50 million in a Northern Virginia courthouse, claiming he was defamed in an op-ed in The Washington Post in which she called for support for domestic violence victims like herself. Both Depp and Heard live in Hollywood. Heard, who came to at least one hearing in the case, said in court filings that she had never previously set foot in the state.

The suits are part of a string of splashy defamation claims by politicians and the A-list star seeking nearly $1 billion in damages in Virginia courts this year, even though many of the cases have only loose connections to the state.

The plaintiffs argue their names have been smeared and the venues are appropriate, but several of the defendants — including Twitter and Heard — say the filing location is aimed at exploiting the state’s weak protections for defamation defendants. Some legal experts say Virginia law allows those with deep pockets to bulldoze targets with frivolous, protracted and expensive litigation they couldn’t pursue in many other states.
The true goals of the suits, the defendants argue, are to stifle critics, blunt aggressive journalism and settle scores. Some deride the legal maneuvers as “libel tourism” and see a growing trend not just in Virginia but in other states that similarly lack safeguards. The suits have prompted Virginia lawmakers to look at changing the law.

Liz Mair, a Republican political consultant who was named in the suits targeting the McClatchy Co. and Twitter for critical comments she made about Nunes on the social media platform, said she feels Nunes has weaponized Virginia’s legal system.

“He’s using litigation as a cudgel to try to stifle my and apparently quite a few other people’s free speech,” Mair said. “That is a right protected by the Constitution, which he has sworn an oath to support and defend.”

Nunes and his attorney, Steven S. Biss, did not respond to numerous requests for comment.
California, where Nunes and Depp might have filed their cases, has one of the nation’s strongest protections against lawsuits aimed at silencing critics on topics of public concern, known as Strategic Lawsuits Against Public Participation (SLAPP).

California’s anti-SLAPP law allows defendants to file a special motion at the outset of litigation if they feel the lawsuit is without merit and aimed at chilling First Amendment rights on a topic of public interest. If a judge sides with the defendant, the plaintiff is required to pay the defendant’s legal fees.

Virginia has an anti-SLAPP law, but there is no special motion provision and defendants are not guaranteed legal fees if a case is dismissed. The practical effect, experts say, is that cases can drag on until the sides begin to exchange evidence and a case goes to trial. That can mean months — or even years — of legal wrangling and hefty legal bills.

Experts said a 2017 move to strengthen protections for defamation defendants in Virginia has not produced a much more robust law.
“I really have not seen the anti-SLAPP in Virginia successfully applied,” said Jennifer Nelson, co-director of the University of Virginia School of Law’s First Amendment Clinic. “It does not seem to be working the way it was intended to.”

Nunes’s opening salvo in Virginia began in March.

He filed a $250 million lawsuit in Henrico County Circuit Court accusing Twitter of censoring him and allowing other users, including Mair and the anonymous operator of a parody account called “Devin Nunes’ cow” and another called “Devin Nunes’ Mom” to defame him, arguing the social media platform is biased against conservatives.

“Twitter . . . intended to generate and proliferate the false and defamatory statements in order to influence the outcome of the 2018 Congressional election and to intimidate plaintiff,” the lawsuit reads.
The parody accounts poked at Nunes, often with corny, caustic or off-color comments.

“Devin’s boots are full of manure,” read one of the offending tweets by “Devin Nunes’ cow” cited in the lawsuit. “He’s udder-ly worthless and its pasture time to move him to prison.”

The suit went viral.

In the days after it was filed, “Devin Nunes’ cow” gained more than 500,000 Twitter followers — surpassing Nunes himself. The account appears inspired by the fact that Nunes’s family owns a dairy farm.

In April, Nunes filed the defamation lawsuit against McClatchy, which owns the Fresno Bee, and Mair, who tweeted the story detailing a lawsuit involving the winery. Nunes accused McClatchy of “character assassination” by publishing the piece headlined “A yacht, cocaine, prostitutes: Winery partly owned by Nunes sued after fundraiser event.”
Nunes claims in the lawsuit, filed in Albemarle County Circuit Court, that he was not at the event and not associated with it, so connecting him with it sullied his reputation. The article did not claim Nunes attended the event and said it was “unclear” if he was affiliated with it. McClatchy says the story was accurately reported.

“The lawsuit represents a baseless attack on local journalism and a free press,” McClatchy said in a statement. “At a time when local journalism is facing more pressing and urgent challenges, the lawsuit is an unproductive distraction and a misuse of the judicial system.”

Nunes sued CNN in early December, claiming a November news story was “demonstrably false.” The piece reported an attorney for Lev Parnas, an associate of Rudolph W. Giuliani who is facing criminal charges, said that his client was willing to testify that Nunes sought dirt on former vice president Joe Biden during a meeting in Vienna with a former Ukrainian prosecutor. Nunes claims in the lawsuit he never traveled to Vienna in 2018 and did not meet with the prosecutor.
CNN did not respond to a request for comment.

In March, Johnny Depp sued Heard, whose op-ed described the backlash she faced after going public about domestic abuse she said she suffered over a lifetime.

“I felt the full force of our culture’s wrath for women who speak out,” Heard wrote.

Depp was not named in the piece, but he argues it clearly implied he was one of Heard’s abusers. Depp denies hurting Heard in his lawsuit in Fairfax County Circuit Court and claims he was dropped from the lucrative Pirates of the Caribbean movie franchise as a result of the piece.

Attorneys for Depp did not respond to requests for comment, and Heard’s attorney declined to comment.
Nunes and Depp both argued Virginia was a valid location for their suits. Nunes said Twitter, CNN and McClatchy have users and readers in the state, while Mair lived in and worked in Virginia. Depp said The Post is printed in the state and it is home to the servers for its website.

The defendants filed motions to move the lawsuits to California, saying the relevant action had occurred there, not in Virginia. But in each case, a judge ruled Nunes and Depp met the state’s standard for jurisdiction in a defamation case: point of publication of the allegedly defamatory statements. CNN has not yet filed a response to Nunes’s lawsuit.

In the Internet age when defamatory statements are published in multiple jurisdictions at once, many states have moved to a “significant relationship” test to determine what state a case should be heard in. Legal experts said Virginia’s standard has helped make it a magnet for defamation cases.
Lee Berlik, an attorney who specializes in defamation in Virginia, said plaintiffs must prove a defendant made a factually false statement about them to win a defamation case under state law. Opinion and parody are exempt.

Berlik said public figures like politicians and celebrities have a particularly high bar. Those plaintiffs must show “actual malice,” meaning defendants made a defamatory statement with knowledge it was false or displayed reckless disregard for the truth. Berlik said such cases are rarely successful.

Berlik said he considered Nunes’s lawsuits particularly shaky.

“All appearances are that the plaintiff in these cases has brought the litigation to make a statement or prove a point rather than to obtain compensation for actual harm caused by false statements,” Berlik wrote in an email. “The pleadings are full of superlatives and right-wing hyperbole that cause the reader to question the plaintiff’s motives.”

Mair said she has pro bono representation in her defamation cases, but has started an online fundraiser to cover legal expenses should that situation end.

“This is not the kind of thing people should have to treat as a hazard of the job,” Mair said.
The lawsuits have caught the attention of Virginia legislators. Del. Schuyler T. VanValkenburg (D-Henrico) is preparing a bill for the state’s next legislative session in January that would seek to put its anti-SLAPP law on par with California’s. Defendants would have the opportunity to file a motion to dismiss a case early in litigation if they feel it is frivolous and, if successful, could recover fees from the plaintiff.

“If you have a democracy that works for people, the main thing we can do is make sure everyone has the ability to participate on an equal footing,” VanValkenburg said.

Nationally, 30 states and the District of Columbia have passed anti-SLAPP laws with varying degrees of protection. There is no similar federal provision. Evan Mascagni, policy director with the Public Participation Project, which is pushing for a federal anti-SLAPP law, said that an uneven legal landscape has prompted plaintiffs to “forum shop” their cases.

“As more states are adopting anti-SLAPP laws, we are starting to see clever plaintiffs looking to weaker jurisdictions where they can file these lawsuits and not be subject to anti-SLAPP motions,” Mascagni said.
The First Amendment was a dead letter for much of American history. Unfortunately, there is reason to fear it is entering a new period of political irrelevance. We live in a golden age of efforts by governments and other actors to control speech, discredit and harass the press, and manipulate public debate. Yet as these efforts mount, and the expressive environment deteriorates, the First Amendment has been confined to a narrow and frequently irrelevant role. Hence the question—when it comes to political speech in the twenty-first century, is the First Amendment obsolete?

The most important change in the expressive environment can be boiled down to one idea: it is no longer speech itself that is scarce, but the attention of listeners. Emerging threats to public discourse take advantage of this change. As Zeynep Tufekci puts it, “censorship during the Internet era does not operate under the same logic [as] it did under the heyday of print or even broadcast television.”¹ Instead of targeting speakers directly, it targets listeners or it undermines speakers indirectly. More precisely, emerging techniques of speech control depend on (1) a range of new punishments, like unleashing “troll armies” to abuse the press and other critics, and (2) “flooding” tactics (sometimes called “reverse censorship”) that distort or drown out disfavored speech through the creation and dissemination of fake news, the payment of fake commentators, and the deployment of propaganda robots.² As journalist Peter Pomerantsev writes, these techniques employ “information . . . in weaponized terms, as a tool to confuse, blackmail, demoralize, subvert and paralyze.”³

The First Amendment first came to life in the early twentieth century, when the main threat to the nation’s political speech environment was state suppression of dissidents. The jurisprudence of the First Amendment was shaped by that era. It presupposes an information-poor world, and it focuses exclusively on the protection of speakers from government, as if they were rare and delicate butterflies threatened by one terrible monster.

But today, speakers are more like moths—their supply is apparently endless. The massive decline in barriers to publishing makes information abundant, especially when speakers congregate on brightly lit matters of public controversy. The low costs of speaking have, paradoxically, made it easier to weaponize speech as a tool of speech control. The unfortunate
truth is that cheap speech may be used to attack, harass, and silence as much as it is used to illuminate or debate. And the use of speech as a tool to suppress speech is, by its nature, something very challenging for the First Amendment to deal with. In the face of such challenges, First Amendment doctrine seems at best unprepared. It is a body of law that waits for a pamphleteer to be arrested before it will recognize a problem. Even worse, the doctrine may actually block efforts to deal with some of the problems described here.

It may sound odd to say that the First Amendment is growing obsolete when the Supreme Court has an active First Amendment docket and there remain plenty of First Amendment cases in litigation. So that I am not misunderstood, I hasten to add that the First Amendment’s protection of the press and political speakers against government suppression is hardly useless or undesirable. With the important exception of cases related to campaign finance, however, the “big” free speech decisions of the last few decades have centered not on political speech but on economic matters like the right to resell patient data or the right to register offensive trademarks. The safeguarding of political speech is widely understood to be the core function of the First Amendment. Many of the recent cases are not merely at the periphery of this project; they are off exploring some other continent. The apparent flurry of First Amendment activity masks the fact that the Amendment has become increasingly irrelevant in its area of historic concern: the coercive control of political speech.

What might be done in response is a question without an easy answer. One possibility is simply to concede that the First Amendment, built in another era, is not suited to today’s challenges. Instead, any answer must lie in the development of better social norms, adoption of journalistic ethics by private speech platforms, or action by the political branches. Perhaps constitutional law has reached its natural limit.

On the other hand, in the 1920s Justices Oliver Wendell Holmes and Louis Brandeis and Judge Learned Hand also faced forms of speech control that did not seem to be matters of plausible constitutional concern by the standards of their time. If, following their lead, we take the bolder view that the First Amendment should be adapted to contemporary speech
conditions, I suggest it may force us to confront buried doctrinal and theoretical questions, mainly related to state action, government speech, and listener interests. We might, for instance, explore “accomplice liability” under the First Amendment. That is, we might ask when the state or political leaders may be held constitutionally responsible for encouraging private parties to punish critics. I suggest here that if the President or other officials direct, encourage, fund, or covertly command attacks on their critics by private mobs or foreign powers, the First Amendment should be implicated.

Second, given that many of the new speech control techniques target listener attention, it may be worth reassessing how the First Amendment handles efforts to promote healthy speech environments and protect listener interests. Many of the problems described here might be subject to legislative or regulatory remedies that would themselves raise First Amendment questions. For example, consider a law that would bar major speech platforms and networks from accepting money from foreign governments for materials designed to influence American elections. Or a law that broadened criminal liability for online intimidation of members of the press. Such laws would likely be challenged under the First Amendment, which suggests that the needed evolution may lie in the jurisprudence of what the Amendment permits.

These tentative suggestions and explorations should not distract from the main point of this paper, which is to demonstrate that a range of speech control techniques have arisen from which the First Amendment, at present, provides little or no protection. In the pages that follow, the paper first identifies the core assumptions that proceeded from the founding era of First Amendment jurisprudence. It then argues that many of those assumptions no longer hold, and it details a series of techniques that are used by governmental and nongovernmental actors to censor and degrade speech. The paper concludes with a few ideas about what might be done.

I. Core Assumptions of the Political First Amendment

As scholars and historians know well, but the public is sometimes surprised to learn, the First Amendment sat dormant for much of American
history, despite its absolute language ("Congress shall make no law . . . .") and its placement in the Bill of Rights. It is an American "tradition" in the sense that the Super Bowl is an American tradition—one that is relatively new, even if it has come to be defining. To understand the basic paradigm by which the law provides protection, we therefore look not to the Constitution’s founding era but to the First Amendment’s founding era, in the early 1900s.

As the story goes, the First Amendment remained inert well into the 1920s. The trigger that gave it life was the federal government’s extensive speech control program during the First World War. The program was composed of two parts. First, following the passage of new Espionage and Sedition Acts, men and women voicing opposition to the war, or holding other unpopular positions, were charged with crimes directly related to their speech. Eugene Debs, the presidential candidate for the Socialist Party, was arrested and imprisoned for a speech that questioned the war effort, in which he memorably told the crowd that they were “fit for something better than slavery and cannon fodder.”

Second, the federal government operated an extensive domestic propaganda campaign. The Committee on Public Information, created by Executive Order 2594, was a massive federal organization of over 150,000 employees. Its efforts were comprehensive and unrelenting. As George Creel put it: “The printed word, the spoken word, the motion picture, the telegraph, the cable, the wireless, the poster, the sign-board—all these were used in our campaign to make our own people and all other peoples understand the causes that compelled America to take arms.” The Committee on Public Information’s “division of news” supplied the press with content “guidelines,” “appropriate” materials, and pressure to run them. All told, the American propaganda effort reached a scope and level of organization that would be matched only by totalitarian states in the 1930s.

The story of the judiciary’s reaction to these new speech controls has by now attained the status of legend. The federal courts, including the Supreme Court, widely condoned the government’s heavy-handed arrests and other censorial practices as necessary to the war effort. But as time
passed, some of the most influential jurists—including Hand, followed by Brandeis and Holmes—found themselves unable to stomach what they saw, despite the fact that each was notably reluctant to use the Constitution for anti-majoritarian purposes. Judge Hand was the only one of the three to act during wartime, but eventually the thoughts of these great judges (mostly expressed in dissent or in concurrence) became the founding jurisprudence of the modern First Amendment. To be sure, their views remained in the minority into the 1950s and 60s, but eventually the dissenting and concurring opinions would become majority holdings, and by the 1970s the “core” political protections of the First Amendment had become fully active, achieving more or less the basic structure we see today.

Left out of this well-known story is a detail quite important for our purposes. The Court’s scrutiny extended only to part of the government’s speech control program: its censorship and punishment of dissidents. Left untouched and unquestioned was the Wilson Administration’s unprecedented domestic propaganda campaign. This was not a deliberate choice, so far as I can tell (although it does seem surprising, in retrospect, that there was no serious challenge brought contesting the President’s power to create a major propaganda agency on the basis of a single executive order). Yet as a practical matter, it was probably the propaganda campaign that had the greater influence over wartime speech, and almost certainly a stronger limiting effect on the freedom of the mainstream press.

I should also add, for completeness, that the story just told only covers the First Amendment’s protection of political speech, or what we might call the story of the “political First Amendment.” Later, beginning in the 1950s, the Court also developed constitutional protections for non-political speech, such as indecency, commercial advertising, and cultural expression, in landmark cases like *Roth v. United States* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* The Court also expanded upon both who counted as a speaker and what counted as speech—trends that have continued into this decade. I mention this only for making the boundaries of this paper clear: it is focused on the kind
of political and press activity that was the original concern of those who brought the First Amendment to life.\textsuperscript{26}

Let us return to the founding jurisprudence of the 1920s. In its time, for the conditions faced, it was as imaginative, convincing, and thoughtful as judicial writing can be. The jurisprudence of the 1920s has the unusual distinction of actually living up to the hype. Rereading the canonical opinions is an exciting and stirring experience not unlike re-watching \textit{The Godfather} or \textit{Gone with the Wind}. But that is also the problem. The paradigm established in the 1920s and fleshed out in the 1960s and 70s was so convincing that it is simply hard to admit that it has grown obsolete for some of the major political speech challenges of the twenty-first century.

Consider three main assumptions that the law grew up with. The first is an underlying premise of informational scarcity. For years, it was taken for granted that few people would be willing to invest in speaking publicly. Relatedly, it was assumed that with respect to any given issue—say, the war—one limited number of important speakers could compete in the “marketplace of ideas.”\textsuperscript{27} The second notable assumption arises from the first: listeners are assumed not to be overwhelmed with information, but rather to have abundant time and interest to be influenced by publicly presented views. Finally, the government is assumed to be the main threat to the “marketplace of ideas” through its use of criminal law or other coercive instruments to target speakers (as opposed to listeners) with punishment or bans on publication.\textsuperscript{28} Without government intervention, this assumption goes, the marketplace of ideas operates well by itself.

Each of these assumptions has, one way or another, become obsolete in the twenty-first century, due to the rise in importance of attention markets and changes in communications technologies. It is to those phenomena that we now turn.

\textbf{II. Attentional Scarcity and the Economics of Filter Bubbles}

As early as 1971, Herbert Simon predicted the trend that drives this paper. As he wrote:
in an information-rich world, the wealth of information means a
dearth of something else: a scarcity of whatever it is that
information consumes. What information consumes is rather
obvious: it consumes the attention of its recipients. Hence a wealth
of information creates a poverty of attention and a need to allocate
that attention efficiently among the overabundance of information
sources that might consume it.29

In other words, if it was once hard to speak, it is now hard to be heard.
Stated differently, it is no longer speech or information that is scarce, but
the attention of listeners. Unlike in the 1920s, information is abundant and
speaking is easy, while listener time and attention have become highly
valued commodities. It follows that one important means of controlling
speech is targeting the bottleneck of listener attention, instead of speech
itself.30

Several major technological and economic developments over the last two
decades have transformed the relative scarcity of speech and listener
attention. The first is associated with the popularization of the Internet: the
massive decrease since the 1990s in the costs of being an online speaker,
otherwise known (in Eugene Volokh’s phrase) as “cheap speech,” or what
James Gleick calls the “information flood.”31 Using blogs, micro-blogs, or
platforms like Twitter or Facebook, just about anyone, potentially, can
disseminate speech into the digital public sphere. This has had several
important implications. As Jack Balkin, Jeffrey Rosen, and I myself have
argued, it gives the main platforms—which do not consider themselves to
be part of the press—an extremely important role in the construction of
public discourse.32 Cheap speech also makes it easier for mobs to harass or
abuse other speakers with whom they disagree.

The second, more long-term, development has been the rise of an
“attention industry”—that is, a set of actors whose business model is the
resale of human attention.33 Traditionally, these were outfits like
broadcasters or newspapers; they have been joined by the major Internet
platforms and publishers, all of which seek to maximize the amount of
time and attention that people spend with them. The rise and centrality of
advertising to their business models has the broad effect of making listener attention ever more valuable.

The third development is the rise of the “filter bubble.” This phrase refers to the tendency of attention merchants or brokers to maximize revenue by offering audiences a highly tailored, filtered package of information designed to match their preexisting interests. Andrew Shapiro and Cass Sunstein were among the first legal writers to express concern about filter bubbles (which Sunstein nicknamed “the Daily Me”). Over the 2010s, filter bubbles became more important as they became linked to the attention-resale business model just described. A platform like Facebook primarily profits from the resale of its users’ time and attention: hence its efforts to maximize “time on site.” That, in turn, leads the company to provide content that maximizes “engagement,” which is information tailored to the interests of each user. While this sounds relatively innocuous (giving users what they want), it has the secondary effect of exercising strong control over what the listener is exposed to, and blocking content that is unlikely to engage.

The combined consequence of these three developments is to make listener attention scarce and highly fought for. As the commercial and political value of attention has grown, much of that time and attention has become subject to furious competition, so much so that even institutions like the family or traditional religious communities find it difficult to compete. Additionally, some form of celebrity, even “micro-celebrity,” has become increasingly necessary to gain any attention at all. Every hour, indeed every second, of our time has commercial actors seeking to occupy it one way or another.

Hopefully the reader (if she hasn’t already disappeared to check her Facebook page) now understands what it means to say that listener attention has become a major speech bottleneck. With so much alluring, individually tailored content being produced—and so much talent devoted to keeping people clicking away on various platforms—speakers face ever greater challenges in reaching an audience of any meaningful size or political relevance. I want to stress that these developments matter not just to the hypothetical dissident sitting in her basement, who fared no better
in previous times, but to the press as well. Gone are the days when the CBS evening news might reach the nation automatically, or whatever made the front cover of the *New York Times* was known to all. The challenge, paradoxically, has only increased in an age when the President himself consumes so much of the media’s attention. The population is distracted and scattered, making it difficult even for those with substantial resources to reach an audience.

The revolutionary changes just described have hardly gone unnoticed by First Amendment or Internet scholars. By the mid-1990s, Volokh, Kathleen Sullivan, and others had prophesied the coming era of cheaper speech and suggested it would transform much of what the First Amendment had taken for granted. (Sullivan memorably described the reaction to the Internet’s arrival as “First Amendment manna from heaven.”) Lawrence Lessig’s brilliant “code is law” formulation suggested that much of the future of censorship and speech control would reside in the design of the network and its major applications. Rosen, Jack Goldsmith, Jonathan Zittrain, Christopher Yoo, and others, including myself, wrote of the censorial potential that lay either in the network infrastructure itself (hence “net neutrality” as a counterweight) or in the main platforms (search engines, hosting sites, and later social media). The use of infrastructure and platforms as a tool of censorship has been extensively documented overseas and now also in the United States, especially by Balkin. Finally, the democratic implications of filter bubbles and similar technologies have become their own cottage industries.

Yet despite the scholarly attention, no one quite anticipated that speech itself might become a censorial weapon, or that scarcity of attention would become such a target of flooding and similar tactics. While the major changes described here have been decades in the making, we are nonetheless still in the midst of understanding their implications for classic questions of political speech control. We can now turn to the ways these changes have rendered basic assumptions about the First Amendment outmoded.

**III. Obsolete Assumptions**
Much can be understood by asking what “evil” any law is designed to combat. The founding First Amendment jurisprudence presumed that the evil of government speech control would be primarily effected by criminal punishment of publishers or speakers (or the threat thereof) and by the direct censorship of disfavored presses. These were, of course, the devices used by the Espionage and Sedition Acts in the 1790s and variations from the 1910s through the 1960s. On the censor’s part, the technique is intuitive: it has the effect of silencing the speaker herself, while also chilling those who might fear similar treatment. Nowadays, however, it is increasingly not the case that the relevant means of censorship is direct punishment by the state, or that the state itself is the primary censor.

**The Waning of Direct Censorship**

Despite its historic effectiveness, direct and overt government punishment of speakers has fallen out of favor in the twenty-first-century media environment, even in nations without strong free speech traditions. This fact is harder to see in the United States because the First Amendment itself has been read to impose a strong bar on viewpoint-based censorship. The point comes through most clearly when observing the techniques of governments that are unconstrained by similar constitutional protections. Such observation reveals that multiple governments have increasingly turned away from high-profile suppression of speech or arrest of dissidents, in favor of techniques that target listeners or enlist government accomplices.

The study of Chinese speech control provides some of the strongest evidence that a regime with full powers to directly censor nonetheless usually avoids doing so. In a fascinating ongoing study of Chinese censorship, Gary King, Jennifer Pan, and Margaret Roberts have conducted several massive investigations into the government’s evolving approach to social media and other Internet-based speech. What they have discovered is a regime less intent on stamping out forbidden content, but instead focused on distraction, cheerleading, and preventing meaningful collective action. For the most part, they conclude, the state’s agents “do not censor posts criticizing the regime, its leaders, or their policies” and “do not
engage on controversial issues.” The authors suggest that the reasons are as follows:

Letting an argument die, or changing the subject, usually works much better than picking an argument and getting someone’s back up . . . . [S]ince censorship alone seems to anger people, the [Chinese] program has the additional advantage of enabling the government to actively control opinion without having to censor as much as they might otherwise.

A related reason for avoiding direct speech suppression is that under conditions of attentional scarcity, high-profile government censorship or the imprisonment of speakers runs the risk of backfiring. The government is, effectively, a kind of celebrity whose actions draw disproportionate attention. And such attention may help overcome the greatest barrier facing a disfavored speaker: that of getting heard at all. In certain instances, the attention showered on an arrested speaker may even, counterintuitively, yield financial or reputational rewards—the opposite of chill.

In Internet lore, one term for this backlash potential is the Streisand effect. Named after celebrity Barbra Streisand, whose lawyer’s efforts to suppress aerial photos of her beachfront resort attracted hundreds of thousands of downloads of those photos, the term stands for the proposition that “the simple act of trying to repress something . . . online is likely to make it . . . seen by many more people.” To be sure, the concept’s general applicability might be questioned, especially with regard to viral dissemination, which is highly unpredictable and rarer than one might imagine. Even still, the possibility of creating attention for the original speaker makes direct censorship less attractive, given the proliferation of cheaper—and often more effective—alternatives.

As suggested in the introduction, those alternatives can be placed in several categories: (1) online harassment and attacks, (2) distorting and flooding, or so-called reverse censorship, and (3) control of the main speech platforms. (The third topic is included for completeness, but it has already received extensive scholarly attention.) These techniques are
practiced to different degrees by different governments abroad. Yet given
that they could be used by U.S. officials as well—and that they pose a
major threat to the speech environment whether or not one’s own
government is using them—all are worth exploring in our consideration of
whether the First Amendment, in its political aspects, is obsolete.

Troll Armies

Among the newer emerging threats is the rise of abusive online mobs who
seek to wear down targeted speakers and have them think twice about
writing critical content, thus making political journalism less attractive.
Whether directly employed by, loosely associated with, or merely aligned
with the goals of the government or particular politicians, the technique
relies on the low cost of speech to punish speakers.

While there have long been Internet trolls, in the early 2000s the Russian
government pioneered their use as a systematic speech control technique
with the establishment of a “web brigade” (Веб-бригады), often called a
“troll army.” Its methods, discovered through leaks and the undercover
work of investigative reporters, range from mere encouragement of
loyalists, to funding groups that pay commentators piecemeal, to
employing full-time staff to engage in around-the-clock propagation of pro-
government views and attacks on critics.

There are three hallmarks of the Russian approach. The first is obscuring
the government’s influence. The hand of the Kremlin is not explicit;
funding comes from “pro-Kremlin” groups or nonprofits, and those
involved usually disclaim any formal association with the Russian state.
In addition, individuals sympathetic to the cause often join as de facto
volunteers. The second is the use of vicious, swarm-like attacks over email,
telephone, or social media to harass and humiliate critics of Russian
policies or President Putin. While the online hate mob is certainly not a
Russian invention, its deployment for such political objectives seems to
be a novel development. The third hallmark is its international scope.
Although these techniques have mainly been used domestically in Russia,
they have also been employed against political opponents elsewhere in the
world, including in the Ukraine and in countries like Finland, where trolls
savagely attacked journalists who favored joining NATO (or questioned Russian efforts to influence that decision). Likewise, these tactics have been deployed in the United States, where paid Russian trolls targeted the 2016 presidential campaign.

Soviet-born British journalist Peter Pomerantsev, who was among the first to document the evolving Russian approach to speech control, has presented the operative questions this way:

[W]hat happens when a powerful actor systematically abuses freedom of information to spread disinformation? Uses freedom of speech in such a way as to subvert the very possibility of a debate? And does so not merely inside a country, as part of vicious election campaigns, but as part of a transnational military campaign? Since at least 2008, Kremlin military and intelligence thinkers have been talking about information not in the familiar terms of “persuasion,” “public diplomacy” or even “propaganda,” but in weaponized terms, as a tool to confuse, blackmail, demoralize, subvert and paralyze.

Over the last two years, the basic elements of the Russian approach have spread to the United States. As in Russia, journalists of all stripes have been targeted by virtual mobs when they criticize the American President or his policies. While some of the attacks appear to have originated from independent actors who borrowed Russian techniques, others have come from the (paid) Russian force itself; members of the Senate Select Committee on Intelligence have said that over 1,000 people on that force were assigned to influence the U.S. election in 2016. For certain journalists in particular, such harassment has become a regular occurrence, an ongoing assault. As David French of the National Review puts it: “The formula is simple: Criticize Trump—especially his connection to the alt-right—and the backlash will come.”

Ironically, while sometimes the President himself attacks, insults, or abuses journalists, this behavior has not necessarily had censorial consequences in itself, as it tends to draw attention to the speech in question. In fact, the improved fortunes of media outlets like CNN might
serve as a demonstration that there often is a measurable Streisandeffect.\footnote{65} We are speaking here of a form of censorial punishment practiced by the government's allies, which is much less newsworthy but potentially just as punitive, especially over the long term.

Consider, for example, French's description of the response to his criticisms of the President:

I saw images of my daughter's face in gas chambers, with a smiling Trump in a Nazi uniform preparing to press a button and kill her. I saw her face photo-shopped into images of slaves. She was called a "niglet" and a "dindu." The alt-right unleashed on my wife, Nancy, claiming that she had slept with black men while I was deployed to Iraq, and that I loved to watch while she had sex with "black bucks." People sent her pornographic images of black men having sex with white women, with someone photoshopped to look like me, watching.\footnote{66}

A similar story is told by Rosa Brooks, a law professor and popular commentator, who wrote a column in late January of 2017 that was critical of President Trump and speculated about whether the military might decline to follow plainly irrational orders, despite the tradition of deference to the Commander-in-Chief. After the piece was picked up by Breitbart News, where it was described as a call for a military coup, Brooks experienced the following. Her account is worth quoting at length:

By mid-afternoon, I was getting death threats. "I AM GOING TO CUT YOUR HEAD OFF........BITCH!" screamed one email. Other correspondents threatened to hang me, shoot me, deport me, imprison me, and/or get me fired (this last one seemed a bit anticlimactic). The dean of Georgetown Law, where I teach, got nasty emails about me. The Georgetown University president's office received a voicemail from someone threatening to shoot me. New America, the think tank where I am a fellow, got a similar influx of nasty calls and messages. "You're a fucking cunt! Piece of shit whore!" read a typical missive.
My correspondents were united on the matter of my crimes (treason, sedition, inciting insurrection, etc.). The only issue that appeared to confound and divide them was the vexing question of just what kind of undesirable I was. Several decided, based presumably on my first name, that I was Latina and proposed that I be forcibly sent to the other side of the soon-to-be-built Trump border wall. Others, presumably conflating me with African-American civil rights heroine Rosa Parks, asserted that I would never have gotten hired if it weren’t for race-based affirmative action. The anti-Semitic rants flowed in, too: A website called the Daily Stormer noted darkly that I am “the daughter of the infamous communist Barbara Ehrenreich and the Jew John Ehrenreich,” and I got an anonymous phone call from someone who informed me, in a chillingly pleasant tone, that he supported a military coup “to kill all the Jews.”

The angry, censorial online mob is not merely a tool of neo-fascists or the political right, although the association of such mobs with the current Administration merits special attention. Without assuming any moral equivalence, it is worth noting that there seems to be a growing, parallel tendency of leftist mobs to harass and shut down disfavored speakers as well.

Some suppression of speech is disturbing enough to make one wonder if the First Amendment and its state action doctrine (which holds that the Amendment only applies to actions by the state, not by private parties) are hopelessly limited in an era when harassment is so easy. Consider the story of Lindy West, a comedian and writer who has authored controversial columns, generally on feminist topics. By virtue of her writing talent and her association with The Guardian, she does not, like other speakers, face difficulties getting heard. However, she does face near-constant harassment and abuse. Every time she publishes a controversial piece, West recounts, “the harassment comes in a deluge. It floods my Twitter feed, my Facebook page, my email, so fast that I can’t even keep up (not that I want to).” In a standard example, after West wrote a column about rape, she received the following messages: “She won't ever have to worry about rape”; “No one would want to rape that fat, disgusting mess”; and many more. As West
observes: “It’s a silencing tactic. The message is: you are outnumbered. The message is: we’ll stop when you’re gone.” Eventually, West quit Twitter and other social media entirely.

It is not terribly new to suggest that private suppression of speech may matter as much as state suppression. For example, John Stuart Mill’s *On Liberty* seemed to take Victorian sensibilities as a greater threat to freedom than anything the government might do. But what has increased is the ability of nominally private forms of punishment—which may be directed or encouraged by government officials—to operate through the very channels meant to facilitate public speech.

**Reverse Censorship, Flooding, and Propaganda Robots**

Reverse censorship, which is also called “flooding,” is another contemporary technique of speech control. With roots in so-called “astroturfing,” it relies on counter-programming with a sufficient volume of information to drown out disfavored speech, or at least distort the information environment. Politically motivated reverse censorship often involves the dissemination of fake news (or atrocity propaganda) in order to distract and discredit. Whatever form it takes, this technique clearly qualifies as listener-targeted speech control.

The Chinese and Russian governments have led the way in developing methods of flooding and reverse censorship. China in particular stands out for its control of domestic speech. China has not, like North Korea, sought to avoid twenty-first-century communications technologies. Its embrace of the Internet has been enthusiastic and thorough. Yet the Communist Party has nonetheless managed to survive—and even enhance—itself over politics, defying the predictions of many in the West who forecast that the arrival of the Internet would soon lead to the government’s overthrow. Among the Chinese methods uncovered by researchers are the efforts of as many as two million people who are paid to post on behalf of the Party. As King, Pan, and Roberts have found:

[T]he [Chinese] government fabricates and posts about 448 million social media comments a year. In contrast to prior claims, we show
that the Chinese regime’s strategy is to avoid arguing with skeptics of the party and the government, and to not even discuss controversial issues. We show that the goal of this massive secretive operation is instead to distract the public and change the subject, as most of these posts involve cheerleading for China, the revolutionary history of the Communist Party, or other symbols of the regime.\textsuperscript{75}

In an attention-scarce world, these kinds of methods are more effective than they might have been in previous decades. When listeners have highly limited bandwidth to devote to any given issue, they will rarely dig deeply, and they are less likely to hear dissenting opinions. In such an environment, flooding can be just as effective as more traditional forms of censorship.

Related to techniques of flooding is the intentional dissemination of so-called “fake news” and the discrediting of mainstream media sources. In modern times, this technique seems, once again, to be a key tool of political influence used by the Russian government. In addition to its attacks on regime critics, the Russian web brigade also spreads massive numbers of false stories, often alleging atrocities committed by its targets.\textsuperscript{76} While this technique can be accomplished by humans, it is aided and amplified by the increasing use of human-impersonating robots, or “bots,” which relay the messages through millions of fake accounts on social media sites like Twitter.

Tufekci has documented similar strategies employed by the Turkish government in its efforts to control opposition. The Turkish government, in her account, relies most heavily on discrediting nongovernmental sources of information. As she writes, critics of the state found “an enormous increase in challenges to their credibility, ranging from reasonable questions to outrageous and clearly false accusations. These took place using the same channels, and even the same methods, that a social movement might have used to challenge false claims by authorities.”\textsuperscript{77} The goal, she writes, was to create “an ever-bigger glut of mashed-up truth and falsehood to foment confusion and distraction” and “to overwhelm people with so many pieces of bad and disturbing information that they become
confused and give up trying to figure out what the truth might be—or even the possibility of finding out what is true.”

While the technique was pioneered overseas, it is clear that flooding has come to the United States. Here, the most important variant has been the development and mass dissemination of so-called “fake news.” Consider in this regard the work of Philip Howard, who runs the Computational Propaganda Project at Oxford University. As Howard points out, voters are strongly influenced by what they think their neighbors are thinking; hence fake crowds, deployed at crucial moments, can create a false sense of solidarity and support. Howard and his collaborators studied the linking and sharing of news on Twitter in the week before the November 2016 U.S. presidential vote. Their research produced a startling revelation: “junk news was shared just as widely as professional news in the days leading up to the election.”

Howard’s group believes that bots were used to help achieve this effect. These bots pose as humans on Facebook, Twitter, and other social media, and they transmit messages as directed. Researchers have estimated that Twitter has as many as 48 million bot users, and Facebook has previously estimated that it has between 67.65 million and 137.76 million fake users. Some percentage of these, according to Howard and his team, are harnessed en masse to help spread fake news before and after important events.

Robots have even been employed to attack the “open” processes of the administrative state. In the spring of 2017, the Federal Communications Commission put its proposed revocation of net neutrality up for public comment. In previous years, such proceedings attracted vigorous argument by (human) commentators. This time, someone directed robots to impersonate—via stolen identities—over one hundred thousand people, flooding the system with fake comments, all of which were purportedly against federal net neutrality rules.
As it stands, the First Amendment has little to say about any of these tools and techniques. The mobilization of online vitriol or the dissemination of fake news by private parties or foreign states, even if in coordination with the U.S. government, has been considered a matter of journalistic ethics or foreign policy, not constitutional law. And it has long been assumed (though rarely tested) that the U.S. government’s own use of domestic propaganda is not a contestable First Amendment concern, on the premise that propaganda is “government speech.” The closest thing to a constitutional limit on propagandizing is the premise that the state cannot compel citizens to voice messages on its behalf (under the doctrine of compelled speech) or to engage in patriotic acts like saluting the flag or reciting the pledge of allegiance. But under the existing jurisprudence, it seems that little—other than political norms that are fast eroding—stands in the way of a full-blown campaign designed to manipulate the political speech environment to the advantage of current officeholders.

IV. What Might Be Done

What I have written suggests that the First Amendment and its jurisprudence is a bystander in an age of aggressive efforts to propagandize and control online speech. While it does wall off the most coercive technique of the government—directly punishing disfavored speakers or the press—that’s just one part of the problem.

If it seems that the First Amendment’s main presumptions are obsolete, what might be done? There are two basic answers to this question. The first is to admit defeat and suggest that the role of the political First Amendment will be confined to harms that fall within the original 1920s paradigm. There remains important work to be done here, as protecting the press and other speakers from explicit government censorship will continue to be essential. And perhaps this is all that might be expected from the Constitution (and the judiciary). The second—and more ambitious—answer is to imagine how First Amendment doctrine might adapt to the kinds of speech manipulation described above. In some cases, this could mean that the First Amendment must broaden its own reach to encompass new techniques of speech control. In other cases, it could mean that the First Amendment must step slightly to the side and allow different legal
tools—like the enforcement of existing or as-yet-to-be-created criminal statutes—to do the lion’s share of the work needed to promote a healthy speech environment.

**Accepting a Limited First Amendment**

If we accept the premise that the First Amendment cannot itself address the issues here discussed, reform initiatives must center on the behaviors of major private parties that are, in practice, the most important speech brokers of our times. What naturally emerges is a debate over the public duties of both “the media,” traditionally understood, and of major Internet speech platforms like Facebook, Twitter, and Google. At its essence, the debate boils down to asking whether these platforms should adopt (or be forced to adopt) norms and policies traditionally associated with twentieth-century journalism.  

We often take for granted the press’s role as a bulwark against the speech control techniques described in this paper. Ever since the rise of “objectivity” and “independence” norms in the 1920s, along with the adoption of formal journalism codes of ethics, the press has tried to avoid printing mere rumors or false claims, knowingly serving as an arm of government propaganda efforts, or succumbing to the influence of business interests. It has also guaranteed reporters some security from attacks and abuse. The press may not have performed these duties perfectly, and there have been the usual debates about what constitutes a “fact” or “objectivity.” But the aspiration exists, and it succeeds in filtering out many obvious distortions.

In contrast, the major speech platforms, born as tech firms, have become players in the media world almost by accident. By design, they have none of the filters or safeguards that the press historically has employed. There are advantages to this design: it yields the appealing idea that anyone, and not only professionals, might have her say. In practice, it has precipitated a great flourishing of speech in various new forms, from blogging to user-created encyclopedias to social media. As Volokh prophesized in 1995: “Cheap speech will mean that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available
to all.” But it has also meant, as we’ve seen, that the platforms have been vulnerable to tactics that weaponize speech and use the openness of the Internet as ammunition. The question now before us is whether the platforms need do more to combat these problems for the sake of political culture in the United States.

We might, for example, fairly focus on Twitter, which has served as a tool for computational propaganda (through millions of fake users), dissemination of fake news, and harassment of speakers. Twitter does little about any of these problems. It has adopted policies that are meant, supposedly, to curb abuse. But the policies are widely viewed as ineffective, in no small part because they put the burden of action on the person being harassed. West, for example, describes her attempt to report as “abusive” a user who threatened to rape her with an “anthropomorphic train.” Twitter staff responded that the comment was “currently not violating the Twitter Rules.” When Twitter’s CEO recently asked, “What’s the most important thing you want to see Twitter improve or create in 2017?” one user responded: a “comprehensive plan for getting rid of the Nazis.” To suggest that private platforms could—and should—be doing more to prevent speakers from harassment and abuse is perhaps the clearest remedy for the emerging threats identified above, even if it is not clear at this time exactly what such remedies ought to look like.

The so-called troll problem is among the online world’s oldest problems and a fixture of early “cyberspace” debates. Anonymous commentators and mobs have long shown their capacity to poison any environment and, through their vicious and demeaning attacks, chill expression. That old debate also revealed that design can mitigate some of these concerns. For example, consider that Wikipedia does not have a widespread fake news problem. But even if the debate remains similar, the stakes and consequences have changed. In the 1990s, trolls would abuse avatars, scare people off AOL chatrooms, or wreck virtual worlds. Today, we are witnessing efforts to destroy the reputations of real people for political purposes, to tip elections, and to influence foreign policy. It is hard to resist the conclusion that the law must be enlisted to fight such scourges.

First Amendment Possibilities
Could the First Amendment find a way to adapt to twenty-first-century speech challenges? How this might be accomplished is far from obvious, and I will freely admit that this paper is of the variety that is intended to ask the question rather than answer it. The most basic stumbling block is well known to lawyers. The First Amendment, like other guarantees in the Bill of Rights, has been understood primarily as a negative right against coercive government action—not as a right against the conduct of non-governmental actors, or as a right that obliges the government to ensure a pristine speech environment. Tactics such as flooding and purposeful generation of fake news are, by our current ways of thinking, either private action or, at most, the government’s own protected speech.

A few possible adaptations present themselves, and they can be placed in three groups. The first concerns the “state action” doctrine, which is the limit that most obviously constrains the First Amendment from serving as a check on many of the emerging threats to the political speech environment. If a private mob attacks and silences critics of the government, purely of its own volition, under a basic theory of state action there is no role for the First Amendment—even if the mob replicates punishments that the government itself might have wanted to inflict. But what about when the mob is not quite as independent as it first appears? The First Amendment’s under-discussed “accomplice liability” doctrine may become of increasing importance if, in practice, governmental units or politicians have a hand in encouraging, coordinating, or otherwise providing direction to what might seem like private parties.

A second possibility is expanding the category of “state action” itself to encompass the conduct of major speech platforms like Facebook or Twitter. However, as discussed below, I view this as an unpromising and potentially counterproductive solution.

Third, the project of realizing a healthier speech environment may depend more on what the First Amendment permits, rather than what it prevents or requires. Indeed, some of the most important remedies for the challenges described in this paper may consist of new laws or more aggressive enforcement of existing laws. The federal cyberstalking statute, for example, has already been used to protect the press from egregious trolling.
and harassment. New laws might target foreign efforts to manipulate American elections, or provide better and faster protections for members of the press. Assuming such laws are challenged as unconstitutional, the necessary doctrinal evolution may involve the First Amendment accommodating robust efforts to fight the new tools of speech control.

Let us look a little more closely at each of these possibilities.

**State Action—Accomplice Liability**

The state action doctrine, once again, limits constitutional scrutiny to (as the name suggests) actions taken by the state. However, in the “troll army” model, punishment of the press and political critics is conducted by ostensibly private parties or foreign governments. Hence, at a first look, such conduct seems unreachable by the Constitution.

Yet as many have observed, the current American President has seemingly directed online mobs to go after his critics and opponents, particularly members of the press. Even members of the President’s party have reportedly been nervous to speak their minds, not based on threats of ordinary political reactions but for fear of attack by online mobs. And while the directed-mob technique may have been pioneered by Russia and employed by Trump, it is not hard to imagine a future in which other Presidents and powerful leaders sic their loyal mobs on critics, confident that in so doing they may avoid the limits imposed by the First Amendment.

But the state action doctrine may not be as much of a hindrance as this end-run supposes. The First Amendment already has a nascent accomplice liability doctrine that makes state actors, under some circumstances, “liable for the actions of private parties.” In *Blum v. Yaretsky*, the Supreme Court explained that the state can be held responsible for private action “when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” The *Blum* formulation echoes common-law accomplice liability principles: a principal is ordinarily liable for the illegal actions of another party when it both shares the underlying
mens rea, or purpose, and when it acts to encourage, command, support, or otherwise provide aid to that party.\textsuperscript{102} \textit{Blum} itself was not a First Amendment case, and it left open the question of what might constitute “significant encouragement” in various settings.\textsuperscript{103} But in subsequent cases, the lower courts have provided a greater sense of what factual scenarios might suffice for state accomplice liability in the First Amendment context.

For example, the Sixth Circuit has a line of First Amendment employment retaliation cases that suggest when public actors may be held liable for nominally private conduct. In the 2010 case \textit{Paige v. Coyner}, the Sixth Circuit addressed the constitutional claims of a woman who was fired by her employer at the behest of a state official (Coyner) after she spoke out at a public meeting in opposition to a new highway development.\textsuperscript{104} Unlike a typical retaliation-termination case, the plaintiff presented evidence that she was fired because the state official complained to her employer and sought to have her terminated.\textsuperscript{105} The Sixth Circuit held that the lawsuit properly alleged state action because Coyner encouraged the firing, even though it was the employer who actually inflicted the punishment.\textsuperscript{106} Moreover, the court suggested an even broader liability standard than \textit{Blum}, holding that the private punishment of a speaker could be attributed to a state official “if that result was a reasonably foreseeable consequence.”\textsuperscript{107} More recently, the Sixth Circuit reaffirmed \textit{Coyner} where a police officer, after a dispute with a private individual, went to her workplace to complain about her with the “reasonably foreseeable” result of having her fired.\textsuperscript{108} Similar cases can be found in other circuits.\textsuperscript{109}

In the political “attack mob” context, it seems that some official encouragement of attacks on the press or other speakers should trigger First Amendment scrutiny. Naturally, those who attack critics of the state merely because they feel inspired to do so by an official’s example do not present a case of state action. (If burdensome enough, however, the original attack might be a matter of First Amendment concern.) But more direct encouragement may yield a First Amendment constraint. Consider, for example, the following scenarios:
• If the President or other government officials name individual members of the press and suggest they should be punished, yielding a foreseeable attack;

• If the President or other officials call upon media companies to fire or otherwise discipline their critics, and the companies do so;

• If the government is found to be directly funding third-party efforts to attack or flood critics of the government, or organizing or coordinating with those who provide such funding; or

• If the President or other officials order private individuals or organizations to attack or punish critics of the government.

Based on the standards enumerated in *Blum* and other cases, these scenarios might support a finding of state action and a First Amendment violation. In other words, an official who spurs private censorial mobs to attack a disfavored speaker might—in an appropriately brought lawsuit, contingent on the usual questions of standing and immunity—be subject to a court injunction or even damages, just as if she performed the attack herself.

*State Action—Platforms*

The central role played by major speech platforms like Twitter, Google, and Facebook might prompt another question: should the platforms themselves be treated as state actors for First Amendment purposes? Perhaps, like the company town in *Marsh v. Alabama*, these companies have assumed sufficiently public duties or importance that they stand “in the shoes of the State.” While some have argued that this is appropriate, there are a number of reasons why treating these platforms as state actors strikes me as an unpromising and undesirable avenue.

First, there are real differences between the *Marsh* company town and today’s speech platforms. *Marsh* was a case where the firm had effectively taken over the full spectrum of municipal government duties, including ownership of the sidewalk, roads, sewer systems, and policing. The company town was, in most respects, indistinguishable from a traditional
government-run locality—it just happened to be private. The residents of Chickasaw had no way of escaping the reach of the company’s power, as the Gulf Shipbuilding Corporation claimed, in Max Weber’s terms, a “monopoly of the legitimate use of physical force.” To exempt such a company town from constitutional scrutiny therefore produced the prospect of easy constitutional evasion by privatization.

However important Facebook or Google may be to our speech environment, it seems much harder to say that they are acting like the government all but in name and thereby avoiding the Constitution. It is true that one’s life may be heavily influenced by these and other large companies, but influence alone cannot be the criterion for what makes something a state actor; in that case, every employer would be a state actor, and perhaps so would nearly every family. If the major speech platforms (including the major television networks) ought to be classified as state actors based not on the assumption of specific state-like duties but merely on their influence, it is hard to know where the category ends.

This is not to deny that the leading speech platforms have an important public function. In fact, I have argued in other work that regulation of communications carriers plays a critical role in facilitating speech, comprising a de facto First Amendment tradition. Yet if these platforms are treated as state actors under the First Amendment in all that they do, their ability to handle some of the problems presented here may well be curtailed. This danger is made clear by Cyber Promotions, Inc. v. American Online, a 1996 case against AOL, the major online platform at the time. In Cyber Promotions, a mass-email marketing firm alleged that AOL’s new spam filters were violations of the First Amendment as, effectively, a form of state censorship. The court distinguished Marsh on factual grounds, but what if it hadn’t? Holding AOL—or today’s major platforms—to be a state actor could have severely limited its ability to fight not only spam but also trolling, flooding, abuse, and myriad other unpleasantries. From the perspective of listeners, it would likely be counterproductive.

Statutory or Law Enforcement Protection of Speech Environments and the Press
Many of the efforts to control speech described in this paper may be best countered not by the judiciary using the First Amendment, but rather by law enforcement using already existing or newly enacted laws. Consider several possibilities, some of which target trolling and others of which focus on flooding:

- Extensive enforcement of existing federal or state anti-cyberstalking laws to protect journalists or other speakers from individual abuse;

- The introduction of anti-trolling laws designed to better combat the specific problem of “troll army”-style attacks on journalists or other public figures;

- New statutory or regulatory restrictions on the ability of major media and Internet speech platforms to knowingly accept money from foreign governments attempting to influence American elections; and

- New laws or regulations requiring that major speech platforms behave as public trustees, with general duties to police fake users, remove propaganda robots, and promote a robust speech environment surrounding matters of public concern.

The enactment and vigorous enforcement of these laws would yield a range of challenging constitutional questions that this paper cannot address in their entirety. But the important doctrinal question held in common is whether the First Amendment would give sufficient room for such measures. To handle the political speech challenges of our time, I suggest that the First Amendment must be interpreted to give wide latitude for new measures to advance listener interests, including measures that protect some speakers from others.

As a doctrinal matter, such new laws would bring renewed attention to classic doctrines that accommodate the interests of listeners—such as the doctrines of “true threats” and “captive audiences”—as well as to the latitude that courts have traditionally given efforts to protect the electoral process from manipulation. Such laws might also redirect attention to a question originally raised by the Federal Communications Commission’s
fairness doctrine and the Red Lion Co. v. FCC decision: how far the government may go solely to promote a better speech environment.  

We might begin with the prosecution of trolls, which could be addressed criminally as a form of harassment or threat. Current case law is relatively receptive to such efforts, for it allows the government to protect listeners from speech designed to intimidate them by creating a fear of violence. The death threat and burning cross serve as archetypical examples. As we have seen, trolls frequently operate by describing horrific acts, and not in a manner suggesting good humor or artistic self-expression. In the Supreme Court’s most recent statement on the matter, it advised that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” The fact that threats are often not carried out is immaterial; the intent to create a fear of violence is sufficient. Given this doctrinal backdrop, there is reason to believe that the First Amendment can already accommodate increased prosecution of those who try to intimidate journalists or other critics.

This belief is supported by the outcome of United States v. Moreland, the first lower court decision to consider the use of the federal cyberstalking statute to protect a journalist from an aggressive troll. Jason Moreland, the defendant, directed hundreds of aggressive emails, social media comments, and physical mailings at a journalist living and reporting in Washington, D.C. Many of his messages referenced violence and “a fight to the death.” In the face of a multi-faceted First Amendment challenge, the court wrote:

His communications directly referenced violence, indicated frustration that CP would not respond to his hundreds of emails, reflected concern that CP or someone on her behalf wanted to kill Moreland, stated that it was time to “eliminate things” and “fight to the death,” informed plaintiff that he knew where her brother was, and repeatedly conveyed that he expected a confrontation with CP or others on her behalf. . . . [T]he Court concludes that the statute is
not unconstitutional as applied, as the words are in the nature of a true threat and speech integral to criminal conduct.  

Cases like *Moreland* suggest that while efforts to reduce trolling might present a serious enforcement challenge, the Constitution will not stand in the way so long as the trolling at issue looks more like threats and not just strongly expressed political views.

The constitutional questions raised by government efforts to fight flooding are more difficult. Much depends on the extent to which these efforts are seen as serving important societal interests beyond the quality or integrity of public discourse, such as the protection of privacy or the protection of the electoral process.

Of particular relevance, as more and more of our lives are lived online—for many Americans today, nearly every waking moment is spent in close proximity to a screen—we may be “captive audiences” far more often than in previous decades. The captive audience doctrine, first developed in the 1940s, describes situations in which one is left with no practical means of avoiding unwanted speech. It was developed in cases like *Kovacs v. Cooper*, which concerned a city ban on “sound trucks” that drove around broadcasting various messages at a loud volume so as to reach both pedestrians and people within their homes. The Court wrote that “[t]he unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.” It is worth pondering the extent to which we are now captive audiences in somewhat subtler scenarios, and whether we have developed virtual equivalents to the home—like our various devices or our email inboxes—where it is effectively impossible to avoid certain messages. The idea that one might simply “avert the eyes” as a means to deal with offensive messages seems increasingly implausible in many digital contexts. Relying on cases like *Kovacs*, the government might seek to develop and enforce “anti-captivity” measures that are designed to protect our privacy or autonomy online.
Other government interests may be implicated by efforts to fight flooding in the form of foreign propaganda. Consider, for instance, a ban on political advertising—including payments to social media firms—by foreign governments or even foreigners in general. Such a ban, if challenged as censorship, might be justified by the state’s compelling interest in defending the electoral process and the “national political community,” in the same manner that the government has justified laws banning foreign campaign contributions. As a three-judge panel of the D.C. district court explained in a recent ruling: “the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.” It should not be any great step to assert that the United States may also have a compelling interest in preventing foreign interests from manipulating American elections through propaganda campaigns conducted through social media platforms.

I have left for last the question presented by potential new laws premised solely on an interest in improving the political speech environment. These laws would be inspired by the indelible dictum of Alexander Meiklejohn: “What is essential is not that everyone shall speak, but that everything worth saying shall be said” —and, to some meaningful degree, heard. Imagine, for instance, a law that makes any social media platform with significant market power a kind of trustee operating in the public interest, and requires that it actively take steps to promote a healthy speech environment. This could, in effect, be akin to a “fairness doctrine” for social media.

For those not familiar with it, for decades the fairness doctrine obligated broadcasters to use their power over spectrum to improve the conditions of political speech in the United States. It required that broadcasters affirmatively cover matters of public concern and do so in a “fair” manner. Furthermore, it created a right for anyone to demand the opportunity to respond to opposing views using the broadcaster’s facilities. At the time of the doctrine’s first adoption in 1949, the First Amendment remained largely inert; by the 1960s, a constitutional challenge to the regulations
became inevitable. In the 1969 *Red Lion* decision, the Supreme Court upheld the doctrine and in doing so described the First Amendment’s goals as follows:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.\(^{131}\)

While *Red Lion* has never been explicitly overruled, it has been limited by subsequent cases, and it is now usually said to be dependent on the scarcity of spectrum suitable for broadcasting.\(^{132}\) The FCC withdrew the fairness doctrine in 1987, opining that it was unconstitutional,\(^{133}\) and *Red Lion* has been presumed dead or overruled by a variety of government officials and scholars.\(^{134}\) Nonetheless, in the law, no doctrine is ever truly dead. All things have their season, and the major changes in our media environment seem to have strengthened the constitutional case for laws explicitly intended to improve political discourse.

To make my own preferences clear, I personally would not favor the creation of a fairness doctrine for social media or other parts of the web. That kind of law, I think, would be too hard to administer, too prone to manipulation, and too apt to flatten what has made the Internet interesting and innovative. But I could be overestimating those risks, and my own preferences do not bear on the question of whether Congress has the power to pass such a law. Given the problems discussed in this paper, among others, Congress might conclude that our political discourse has been deeply damaged, threatening not just coherent governance but the survival of the republic. On that basis, I think the elected branches should be allowed, within reasonable limits, to try returning the country to the kind of media environment that prevailed in the 1950s. Stated differently, it seems implausible that the First Amendment cannot allow Congress to cultivate more bipartisanship or nonpartisanship online. The justification for such a law would turn on the trends described above: the increasing scarcity of human attention, the rise to dominance of a few major
platforms, and the pervasive evidence of negative effects on our democratic life.

V. Conclusion

It is obvious that changes in communications technologies will present new challenges for the First Amendment. For nearly twenty years now, scholars have been debating how the rise of the popular Internet might unsettle what the First Amendment takes for granted. Yet the future retains its capacity to surprise, for the emerging threats to our political speech environment are different from what many predicted. Few forecast that speech itself would become a weapon of censorship. In fact, some might say that celebrants of open and unfettered channels of Internet expression (myself included) are being hoisted on their own petard, as those very same channels are today used as ammunition against disfavored speakers. As such, the emerging methods of speech control present a particularly difficult set of challenges for those who share the commitment to free speech articulated so powerfully in the founding—and increasingly obsolete—generation of First Amendment jurisprudence.

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Tim Wu’s remarkable essay raises profound questions about the future of free expression in a world of ever-changing technology. Wu identifies a number of potentially serious threats to our capacity to maintain the robust public discourse that is essential to a well-functioning democracy. Before offering a few thoughts on those challenges, though, let me first take issue with the central question raised in the essay: “Is the First Amendment Obsolete?”

In raising this question, and arguing that in large part the First Amendment—as currently understood—is, in fact, “obsolete,” Wu misses a fundamental reality. The issues he rightly identifies in his essay are critical to our democratic future only because the First Amendment, as interpreted and applied by the Supreme Court, has been extraordinarily successful at constraining the primary evil at which the First Amendment was directed—government censorship of unwelcome ideas and criticism.

If the Supreme Court had not done such a good job of enforcing the central meaning of the First Amendment, then all of the issues that concern Wu would be largely unimportant. If, as was once the case, government could constitutionally imprison anyone whose ideas it sought to suppress, then none of the issues that concern Wu would matter all that much. These issues are critical only because the First Amendment has, on balance, been remarkably successful in constraining the fundamental evil at which it was directed. It is important to give credit where credit is due!

None of that is to suggest, however, that the concerns that Wu raises are not deeply troubling. They do, indeed, pose serious threats to the future functioning of our democracy. There are at least two ways in which the First Amendment might be relevant to these issues. First, the First Amendment might be interpreted in such a way as to forbid some of these activities. Second, the First Amendment might be interpreted in such a way as to allow government to forbid some of these activities.

The primary constraint on the first approach is, as Wu notes, the state action doctrine. Most of the concerns he raises involve speech by private actors—for example, those who flood the marketplace of ideas with “fake” news or who threaten those who express views they want to stifle. Under
well-settled principles of constitutional interpretation, the actions of those individuals, even if they act in concert with one another, do not constitute state action and thus do not trigger the First Amendment.

There have been occasional instances, however, in which the Court has played rather fast-and-loose with the state action doctrine in order to bring essentially private action within the sphere of constitutional law. This was so, for example, in cases like *Shelley v. Kraemer*¹ and *Marsh v. Alabama*,² and it is at least possible that the Court would once again move in that direction in the face of what it might perceive as profound private threats to our system of free expression. For example, one could imagine the Court holding that extraordinary powerful internet sites, like Facebook, Twitter, and Google, are so powerful that they are in effect government action and must therefore be deemed the equivalent of public forums. *Marsh*, which dealt with company towns, might be a good jumping off point for such an analysis.

The more likely expansion in the scope of First Amendment restrictions, as Wu notes, is in the realm of government speech. This is still a relatively novel concept in First Amendment jurisprudence, and recognition that the government is permitted to express points of view does not imply that government has unlimited authority to exercise its power to speak when doing so violates the Constitution. For example, if a state government, in which all three branches are controlled by the same political party, authorizes the expenditure of public funds to support the election of only Republican Party candidates, that would surely violate the First Amendment. Some government speech, in other words, is itself unconstitutional.

The more difficult question, as Wu observes, is whether the government’s use of public resources to advocate a particular political position can ever go so far as to violate the First Amendment. The World War I example poses a useful illustration of the problem. The challenge, of course, is figuring out when too much is too much. A similar issue arises when the government encourages private speakers to advance a particular partisan or political position. The Supreme Court has not yet begun to grapple with these questions, but as Wu notes they might well come before the Court in
the future, and one can imagine situations in which the Court would in fact hold that such conduct violates the First Amendment, although the line-drawing issues would be daunting.

The second way in which the First Amendment might be relevant to the concerns described by Wu is by permitting greater government regulation of the marketplace of ideas. That is, the government might attempt to address some of these concerns by legislation or regulation, and the Supreme Court might then interpret the First Amendment in a way that permits such intervention, even though the intervention itself raises potentially serious First Amendment questions.

It is worth recalling that there was a time in our history when technological advances in the communications market caused similar angst. This occurred with the advent of radio, when citizens feared that, in light of the small number of available frequencies, a handful of wealthy individuals could take control of those frequencies and thus dominate public discourse. Faced with that concern, Congress created the Federal Radio Commission in 1926 and then the Federal Communications Commission in 1934 and gave them the authority to regulate radio in “the public interest, convenience, or necessity.”

Under the authority of this legislation, the FCC licensed those who could use radio (and later television) frequencies, and in 1946 it adopted the Fairness Doctrine, which required the holders of broadcast licenses both to present controversial issues of public importance and to do so in a manner that was fair and balanced. Although such a regulation of newspapers would clearly have violated the First Amendment, the Supreme Court in *Red Lion Broadcasting Co. v. FCC* held that the Fairness Doctrine was consistent with the First Amendment, in part because of the distinctive power wielded by these means of communication. One can imagine a scenario in which similar legislation might someday be enacted and upheld with respect to such internet sites as Facebook, Twitter, and Google in order to address some of the challenges described by Wu.

Other issues identified by Wu, like threats and mass harassment designed to deter people from expressing their views on the internet, might also be
addressed by legislation, although that would require careful analysis of how to define precisely what speech should be forbidden. Although this problem is certainly magnified on the internet, it is worth noting that it has always existed in society. Individuals who take positions that offend others in their community have always been vulnerable to condemnation by others, and such personal condemnation by neighbors, friends, employers, and co-workers might be far more daunting than mass condemnation by strangers, especially once people get used to such behavior. And, yet, we lived with it.

One of the most vexing issues concerns the proliferation of intentionally false information on the Internet. On the one hand, it seems easy to say that government should have the authority to punish intentionally false statements that are designed to mislead others. Although the Supreme Court has rejected the idea that intentionally false statements are automatically unprotected by the First Amendment, and that such speech can be restricted only if it can be shown to cause significant harm—as would be true, for example, with defamation, perjury, and fraud—\(^4\) one might readily argue that widespread lies that are intended to distort public discourse rise to that level of harm. Even if that is so, however, there may be good reasons not to make such speech actionable. After all, putting the power to prosecute such statements in the hands of public officials is a recipe for potential disaster, because those officials will likely prosecute only those false statements that harm their own positions.

In the end, of course, the primary response to most of the dangers identified by Wu must rest in the people themselves. The First Amendment assumes the existence of a populace that is reasonably educated, thoughtful, responsible, and intelligent. Most of the dangers Wu identifies can be addressed by the people themselves, if they take the time to understand the contemporary distortions in the marketplace of ideas and figure out how to compensate for them.

This has, of course, always been true. If citizens are too lazy, too ignorant, and too indifferent to learn how to cope with these risks of distortion, then democracy is doomed anyway. If we rely on the people themselves to figure out whether or not to go to war, whom to elect as president, and whether to
support candidates who want tax reform, health care reform, or environmental reform, then surely they can figure out how to deal with distortions in the marketplace of ideas—once those distortions are brought to their attention. Right?

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PUBLIC FIGUREHOOD IN THE DIGITAL AGE

DAVID LAT AND ZACH SHEMTOB

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INTRODUCTION

“I’M FAMOUS – on MySpace.”1

The T-shirt slogan may be tongue-in-cheek, but it reflects an important truth: the digital age, marked by the rise of new media and social networking, is radically transforming what it means to be “famous.”2 What implications does this have for the legal understanding of what it means to be a public figure?

The concept of “public figurehood” has been explored most extensively in the context of defamation law.3 In the landmark case of

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3. This certainly has implications outside of the defamation context, most notably with respect to privacy torts, but we confine our analysis here to libel and slander.
New York Times Co. v. Sullivan, the Supreme Court ruled that public officials must establish “actual malice” when suing for defamation. A second major case in this area, Gertz v. Robert Welch, Inc., holds that the New York Times rule applies not just to public officials, but to “public figures” as well. Gertz—as interpreted and applied by lower courts as the basis for developing various tests for public figurehood—continues to be good law.

As we shall argue, profound changes to the media landscape have rendered Gertz obsolete. We do not develop a new standard from whole cloth, however, but believe that Justice Brennan’s plurality opinion in Rosenbloom v. Metromedia, decided several years before Gertz, provides a superior framework for approaching defamation claims in the digital age.

The question of who is or is not a public figure, far from being an abstract academic inquiry, has very real implications for the media, old and new alike, and for public discourse. In the words of Justice Brennan, “the rules we adopt to determine an individual’s status as ‘public’ or ‘private’ powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish.”

In Part I, we review the relevant case law concerning who constitutes a public figure. In Part II, we provide a more detailed discussion of the Rosenbloom case. In Part III, we explain why Justice Brennan’s opinion in Rosenbloom is particularly well-suited for addressing public figurehood in a world of instant and pervasive communication.

I. THE PUBLIC FIGURE CONCEPT IN DEFAMATION LAW: FROM NEW YORK TIMES TO GERTZ

Before we turn to focus specifically on Gertz, Rosenbloom, and their divergent approaches to public figurehood, a brief survey of the key Supreme Court decisions is in order. This background will make clear why public figure status matters and how the concept has evolved in the case law over time.

In 1964, in New York Times Co. v. Sullivan, the Supreme Court set forth important First Amendment limitations on the defamation torts of libel and slander. The Court held that public officials cannot recover...
damages for defamation absent proof that the statement in question was made with “actual malice.” In his opinion, a ringing endorsement of free speech values in a democracy, Justice Brennan wrote:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.9

This was a profoundly important development, as explained by Judge Robert D. Sack:

Against the backdrop of centuries of Anglo-American law permitting regulation of speech to protect reputation, this statement—protecting speech about public matters irrespective of its impact on reputation—was revolutionary. . . . It set a single standard for libel suits by public officials against the press in every court in the nation. Implicitly, it subjected all actions for defamation to constitutional scrutiny.10

The plaintiff in *New York Times* was a public official (L.B. Sullivan, one of three elected city commissioners in Montgomery, Alabama).11 In the 1967 case of *Curtis Publishing Co. v. Butts*,12 the Court extended the *New York Times* rule to “public figures” as well as public officials. The case involved a private individual, a university athletic director and former head football coach, who was accused in a newspaper article of conspiring to fix a football game. The Court issued a confusing raft of separate opinions in *Curtis*, but in a concurrence in the result, which was controlling on this issue, Chief Justice Warren expressed the view that the *New York Times* standard should apply to cases involving “public figures” as well as “public officials.”13 As Chief Justice Warren sensibly noted, “differentiation between ‘public figures’ and ‘public officials’ and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred.”14

Due to the fragmentation of the Court, *Curtis* did not generate a definitive rule on applicability of the *Times* standard to plaintiffs who are

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9. *Id.* at 279-80.


13. *Id.* at 164 (Warren, C.J., concurring in the result).

14. *Id.* at 163.
not public officials. That ruling came several years later, when the Court decided *Gertz*—which remains the governing law in this area some thirty-five years later.

As set forth in Justice Powell’s opinion for the Court, *Gertz* presented “the extent of a publisher’s constitutional privilege against liability for defamation of a private citizen.”16 The *Gertz* Court held that the “actual malice” rule of *New York Times* does not apply to private persons (in this case, an attorney who represented a party in high-profile litigation).

Justice Powell noted that “[t]heoretically, of course, the balance between the needs of the press and the individual’s claim to compensation for wrongful injury might be struck on a case-by-case basis.”17 But such an approach would present the following difficulty:

[It] would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.18

In other words, the *Gertz* approach finds some of its justification in concerns of efficiency and ease of application.

In reaching the conclusion that private-figure plaintiffs should not have to comply with the rigorous *New York Times* standard when suing for defamation, the *Gertz* Court drew distinctions between different types of defamation plaintiffs. It began with what could be described as *Gertz’s* first rationale:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.19

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16. *Id.* at 325.
17. *Id.* at 343.
18. *Id.* at 343-44.
19. *Id.* at 344.
It then offered a second justification:

[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. . . . [P]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery. 20

In light of these differences, the Gertz Court declined to extend the New York Times standard to defamation suits brought by private individuals.

Having concluded that the Times rubric applies only to suits brought by public figures, the Gertz Court identified two ways of attaining public figure status:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. 21

The first designation describes a “pervasive” or “all-purpose” public figure, and the second designation describes a “limited purpose” public figure. 22 In determining whether a private individual should be subject to the New York Times “actual malice” standard, a court must consider the “nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” 23

Taken together, New York Times and Gertz provide much of the framework against which defamation claims are evaluated today. As noted by Judge Sack, “[t]he New York Times and Gertz cases have affected the vast majority of defamation cases decided after them,” with state and lower federal courts filling in many of the gaps left by these cases. 24

20. Id. at 345. A somewhat crisper formulation was offered by the Supreme Court in Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 164 (1979): “[P]ublic figures are less deserving of protection than private persons because public figures, like public officials, have ‘voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”


22. SACK, supra note 10, § 1:5 at 1-33 to -34.


24. SACK, supra note 10, § 1:2.6 at 1-20. For example, based on Gertz, lower courts have developed tests for limited-purpose public figure status. See, e.g., Carr v. Forbes, Inc., 259 F.3d 273, 280 (4th Cir. 2001) (utilizing a five-factor test).
II. THE ROAD NOT TAKEN: ROSENBLOOM V. METROMEDIA

In the decade between *New York Times*, decided in 1964, and *Gertz*, decided in 1974, the Supreme Court decided the case of *Rosenbloom v. Metromedia, Inc.* In his plurality opinion, Justice Brennan described the issue presented in *Rosenbloom* as follows: “whether the *New York Times’* knowing-or-reckless-falsity standard applies in a state civil libel action brought not by a ‘public official’ or a ‘public figure’ but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest.”

As in *Curtis Publishing*, the Court in *Rosenbloom* was fragmented, with no opinion garnering a majority of the justices. In a plurality opinion, representing the views of three justices, Justice Brennan rejected the distinction between public and private figures in the defamation context, expressing the view that the *New York Times* standard should apply to all reports of events of “public or general concern.” But because Justice Brennan in *Rosenbloom* was joined by only two other justices, his opinion did not represent a definitive pronouncement by the Court on whether the rule of *New York Times* applies to defamation suits brought by private individuals. As a result, *Gertz*—in which the Court tackled essentially the same issue, but with an opinion that spoke for a majority of the Court—essentially supplanted Justice Brennan’s *Rosenbloom* opinion as the controlling framework.

Justice Brennan articulated the following rule in *Rosenbloom*: “We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.” Because it does not draw distinctions between types of plaintiffs, this rule is clearer and easier to apply than what would later replace it in *Gertz*.

The *Rosenbloom* plurality reached its conclusion through the following reasoning:

1. Free speech is critical to a self-governing society, and it reaches “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”

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26. Id. at 31-32.
27. Id. at 52.
28. Id. at 43-44.
29. Id. at 41 (citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).
2. The distinction between “public” and “private” is eroding/increasingly blurred.30

3. Freedom of the press isn’t just about political speech. “Comments in other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest.”31

4. It makes little sense for free speech guarantees to turn on the fame or obscurity of the individuals involved:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved. The public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.32

Accordingly, Justice Brennan concluded that constitutional protection applies “to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”33

Justice Brennan then proceeded to refute the arguments of the petitioner. He rejected the distinction between “public” and “private” figures in the First Amendment context:

Drawing a distinction between ‘public’ and ‘private’ figures makes no sense in terms of the First Amendment guarantees. The New York Times standard was applied to libel of a public official or public figure to give effect to the Amendment’s function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge.34

He then made a broader argument about the elusive nature of “privacy”:

We have recognized that ‘(e)xposure of the self to others in varying degrees is a concomitant of life in a civilized community.’ Voluntarily or not, we are all ‘public’ men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area

30. Id. at 41-42.
31. Id. at 42.
32. Id. at 43.
33. Id. at 43-44.
34. Id. at 45-46.
of matters of public or general concern. Thus, the idea that certain ‘public’ figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction.35

As we will explore in the next section, this argument has only grown stronger in the intervening years.

III. WHY ROSENBLOOM, NOT GERTZ, OFFERS THE BEST STANDARD FOR DECIDING DEFAMATION CLAIMS IN THE DIGITAL AGE.

Widespread use of the Internet has rendered *Gertz* not only obsolete but legally incoherent for two primary reasons: (1) changes in the media landscape have undermined *Gertz’s* self-help rationale, and (2) the digital age has blurred, if not eliminated, the entire public/private distinction this case relied upon. While *Gertz* may have made sense in a particular social and historical context, Justice Brennan’s opinion in *Rosenbloom* holds far greater relevance today.

A. Changes in the media landscape have undermined *Gertz’s* “self-help” rationale.

The *Gertz* Court argued that public figures have better access to the channels of communication, and therefore a better ability to counteract false statements: “Private individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”36 Based on this language from *Gertz*, lower courts determining public figure status would consider such factors as the individual’s “access to channels of effective communication.”37

This analysis reflects a very different—and outdated—media environment. When *Gertz* was decided in 1974, false charges could only be countered through access to a printing press, radio station, or television network—modes of communication that ordinary citizens generally could not tap into. In 2011, however, methods of communication have expanded and changed dramatically. Thanks to the phenomenon of blogging and the rise of social networks like Twitter and Facebook, ordinary citizens have historically unprecedented access to effective communication channels. One can refute false charges not just through newspapers, radio, or television, but through a proliferation of online outlets as well. Aggrieved subjects of media coverage no longer

35. *Id.* at 47–48 (internal citations omitted).
need a newspaper to print retractions of letters to the editor; instead, these subjects can go out and tell their own side of the story on a blog or social networking site. 38 (Indeed, if false rumors started online, refuting them online may be the most effective response.)

Because the marketplace of ideas is so robust in the digital age, greater freedom can be granted to the media, both old and new. The constitutional relevance of such changes in the media environment was recognized by justices even prior to Gertz. For example, Justice Harlan, whose jurisprudence was frequently less press-friendly than that of some of his colleagues, acknowledged that “falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas.”39

Of course, even in the digital age, famous celebrities still have greater access to communication channels than ordinary citizens. For example, Ashton Kutcher has more than six million followers on Twitter,40 while the average Twitter user has only 126 followers.41 Yet this still fails to legitimate Gertz’s rationale. First, perfect equality is not required. In the words of Justice Marshall:

[D]ifficulty in reaching all those who may have read the alleged falsehood surely ought not preclude a finding that [the plaintiff] was a public figure under Gertz. Gertz set no absolute requirement that an individual be able fully to counter falsehoods through self-help in order to be a public figure. We viewed the availability of the self-help remedy as a relative matter in Gertz, and set it forth as a minor consideration in determining whether an individual is a public figure.42

38. This enhanced ability to refute allegations may be relatively new. But the importance of the “privilege of reply, also known as the privilege to speak in self-defense or to defend one’s reputation,” traces its roots back to the common law. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1559 (4th Cir. 1994).


40. See http://twitter.com/Aplusk.


42. Time, Inc. v. Firestone, 424 U.S. 448, 486 (1976) (Marshall, J., dissenting); see also Carr v. Forbes, 259 F.3d 273, 282 n.2 (4th Cir. 2001) (“Of course, the Arizona and South Carolina media do not have the international readership of Forbes magazine. However, a court does not ask whether a defamation plaintiff has ever had access to a media outlet with the
Second, even if an aggrieved party might not initially have a large audience, reaching prominent speakers who do have sizable followings is no longer difficult. Thanks to advances in communications technology, getting one’s side of the story before someone who does have a major bully pulpit might be as simple as sending an e-mail or “tweeting at” that individual. And the “crowdsourced” nature of news these days, in which thousands of citizen-journalists get involved in exploring all sides of an issue, also helps to ensure that multiple viewpoints are represented, especially with respect to the most controversial issues of the day.

The case of Shirley Sherrod, a former official at the U.S. Department of Agriculture, illustrates how disparities in access to media channels matter much less today than in the past. Sherrod had a much smaller audience than conservative activist Andrew Breitbart, publisher of the website BigGovernment.com, who posted portions of an edited video suggesting that Sherrod had acted in a racially discriminatory manner. In the ensuing controversy, Sherrod was forced to resign from her government job. Yet correcting the record in the digital age was easy: once the NAACP released the full video, Media Matters was quickly able to deconstruct the alleged smear campaign. This not only led to an apology to Sherrod from President Barack Obama and an offer to return to the Department of Agriculture from Secretary Tom Vilsack, but widespread sympathy for Sherrod’s plight and outrage against Breitbart.43

B. The digital age has significantly eroded the "public figure" versus "private figure" distinction.

The Gertz Court, above all else, drew a sharp distinction between public figures and private figures. Public figures “have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them,” unlike private figures. Moreover, “[p]rivate individuals are not only more vulnerable to injury than public officials and public

same size readership of the allegedly defamatory publication; such an inquiry would effectively prohibit widely read publications from ever commenting on local controversies. Our inquiry is rather whether the evidence demonstrates that the defamation plaintiff had access to channels of effective communication to respond to the allegedly defamatory statements. Carr clearly had such access.”).

figures; they are also more deserving of recovery.” The Rosenbloom plurality opinion, by Justice Brennan, expressed a very different view: “Voluntarily or not, we are all ‘public’ men to some degree.”

Justice Brennan’s words ring even more true in the digital age. First, what the Gertz framework may have once offered in clarity or ease of administration no longer makes up for what it sacrifices in terms of accuracy. In the age of “microcelebrity,” fame—along with its associated benefits and burdens—is distributed along a spectrum, not according to a dichotomy. One way of thinking about this is through Chris Anderson’s “long tail” rubric. Instead of a world with a few huge celebrities and millions of “nobodies,” we now live in a world with a “long tail” of minor celebrities (e.g., reality TV stars, prominent bloggers). As Anderson notes, “not all celebrities are Hollywood stars. As our culture fragments into a million tiny microcultures, we are experiencing a corresponding rise of microcelebrities.”

Second, and on a closely related note, the Gertz approach fails to take into account the rise of “niche celebrity.” Thanks to the rise of highly targeted blogs, interest groups within social networks, or even social networking sites for specific interest groups, becoming a “celebrity” within a particular area of interest, trade or profession, or geographical location is startlingly easy.

A good example of a niche celebrity, related to the blog that one of us founded, Above the Law (www.abovethelaw.com), might be Evan Chesler. Chesler is the presiding partner of Cravath, Swaine & Moore, one of the nation’s most powerful and prestigious law firms.

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44. There’s a reason why people try out by the thousands for reality shows (i.e., the chance to be humiliated on national television). Fame has its privileges. See Waldbaum v. Fairchild Publ’ns, 627 F.2d 1287, 1294-95 (D.C. Cir. 1980) (“Fame often brings power, money, respect, adulation, and self-gratification. It also may bring close scrutiny that can lead to adverse as well as favorable comment. When someone steps into the public spotlight, or when he remains there once cast into it, he must take the bad with the good.”).

45. See Thompson, supra note 2 (“Microcelebrity is the phenomenon of being extremely well known not to millions but to a small group – a thousand people, or maybe only a few dozen.”); Sorgatz, supra note 2 (“The point is that renown is no longer the exclusive province of a select few. Nano-celebrity is there for the taking, if you really want it.”); Jason Tanz, Internet Famous: Julia Allison and the Secrets of Self-Promotion, WIRED, July 15, 2008 (noting that blogger Julia Allison “may not be famous by the traditional definition,” but that “to a devoted niche of online fans – and an even more devoted niche of detractors – she is a bona fide celebrity”).


47. Id.; see also Nicholas Lemann, Amateur Hour, The New Yorker, Aug. 7, 2006, at 44 (“Most citizen journalism reaches very small and specialized audiences and is proudly minor in its concerns. David Weinberger, another advocate of new-media journalism, has summarized the situation with a witty play on Andy Warhol’s maxim: ‘On the Web, everyone will be famous to fifteen people.’”).

48. Evan R. Chesler, Cravath, Swaine & Moore L.L.P.,
not a public official, and he is not, by the traditional analysis, a general-purpose public figure. It would even be difficult to cast him as a limited-purpose public figure, since he is generally not trying to influence the resolution of any issue of public concern. Chesler's decisions in leading Cravath are just decisions he makes in the course of doing his job—like the attorney in *Gertz*.

But Evan Chesler is, within the legal profession and the world of large law firms, a definite niche celebrity, a figure of great interest in this particular field. How should he be covered? The legal profession is wealthy, powerful, and prominent, and he is a leading figure within it. Why shouldn't he have to demonstrate "actual malice" with respect to reporting that covers his leadership of Cravath?

There are hints in prior case law that fame within a community or a sector can be constitutionally significant. As stated by the Court in *Rosenblatt v. Baer*, "[t]he subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant."50

Niche celebrity might also be relevant in terms of evaluating the damage inflicted by falsehoods, a consideration identified by the *Gertz* Court in establishing greater protection for private individuals. The Supreme Court's major defamation precedents often involved plaintiffs with local or limited fame who were covered by giant news outlets with national or international reach, like the *New York Times* or *Time* magazine. Damages in such cases could be high, as at least one court has noted:

Dissemination to a wide audience creates special problems. For example, an individual may be well known in a small community, but the publication covers a larger area. In such a situation, it might be


49. A possible exception to this might be the use of the billable hour as the dominant billing method for lawyers, if one considers this to be an issue of public concern. Chesler has mounted a vigorous critique of the billable hour, speaking out and writing against it in widely read, mainstream-media publications. *E.g.*, Evan Chesler, *Kill the Billable Hour*, FORBES, Jan. 12, 2009, at 26.

50. *Rosenblatt v. Baer* 383 U.S. 75, 83 (1966); *see also* Lorain Journal Co. v. Milkovich, 474 U.S. 953, 963 (1985) (Brennan, J., dissenting from denial of certiorari) (arguing that a high school wrestling coach was a limited purpose public figure because of his involvement in "a public controversy of concern to residents of the local community [that was] as important to them as larger events are to the Nation"); *id.* at 964-65 (arguing that the Court's commitment to free speech "applies as much to debate in the local media about local issues as it does to debate in the national media over national issues," and that "[t]his Court's obligation to preserve the precious freedoms established in the First Amendment is every bit as strong in the context of a local paper's report of an incident at a local high school as it is in the context of an advertisement in one of the Nation's largest newspapers supporting the struggle for racial freedom in the South").
appropriate to treat the plaintiff as a public figure for the segment of
the audience to which he is well known and as a private individual for
the rest. In any event, the defamation’s audience may be relevant in
assessing damages, for injury may be less if the audience does not
know of the victim and will have no occasion to interact with him in
the future.51

Of course, this gives rise to another question: Why are niche
publishers—who might cover matters that are important to just a limited
group of people, or even matters of debatable importance—entitled to
full First Amendment protection? The response can be found in the
Supreme Court’s decision in *Time, Inc. v. Hill*, which takes a
commendably broad view of free speech:

> The guarantees for speech and press are not the preserve of political
expression or comment upon public affairs, essential as those are to
healthy government. One need only pick up any newspaper or
magazine to comprehend the vast range of published matter which
exposes persons to public view, both private citizens and public
officials. . . .

> Freedom of discussion, if it would fulfill its historic function in this
nation, must embrace all issues about which information is needed or
appropriate to enable the members of society to cope with the
exigencies of their period. No suggestion can be found in the
Constitution that the freedom there guaranteed for speech and the
press bears an inverse ratio to the timeliness and importance of the
ideas seeking expression.52

One might argue that providing niche publishers with broad
constitutional protection fails to consider Google and other search
engines, which effectively take what might have been a niche publication,
read by a limited audience, and broadcast it to a much wider range of
readers. But using one of these search engines already places the user in
“niche” territory. Unlike the front page of the *New York Times* or another
general-interest newspaper, where a reader might come across a
defamatory falsehood about someone the reader had never heard about
before and had no prior interest in, a search engine isn’t putting in front
of the user information that the user wasn’t already looking for in a
targeted way.

Finally, technology has eroded privacy in so many different ways. As
Justice Brennan declared in *Rosenbloom*, “[v]oluntarily or not, we are all
‘public’ men to some degree.” Or as Justice Brennan wrote in the earlier

case of *Time, Inc. v. Hill*:

Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.53

In this day and age—of blogs, where our private misadventures can be written about at length; of streaming video and YouTube, where said misadventures can be seen and heard by total strangers; of Facebook, where “friends” can post pictures of us, against our will (maybe we can “de-tag,” but we can’t remove); of full-body scanners at the airport—Justice Brennan’s words ring more true than ever, for better or worse. We are more “public” and more interconnected than ever.

Of course, one could imagine a regime in which people who went out of their way to protect their privacy—e.g., Howard Hughes-like hermits, who eschew Facebook and Twitter, don’t leave home often, etc.—might be treated differently under the law, and given more favorable treatment as defamation or privacy-tort plaintiffs. But the default rule—for average people, who take no extraordinary measures to protect her privacy—would treat them as fairly public individuals.

**C. Objections to adoption of the Rosenbloom rule can be overcome.**

The most obvious counterargument is that adopting the *Rosenbloom* rule and applying the “actual malice” standard even to private individuals, as long as the subject matter is of public or general concern, would create a regime too favorable to publishers, speakers, and defamatory speech at the expense of private citizens. There are several responses to this position.

First, the experiences of various states suggest that *Rosenbloom* is a workable standard. At least three states, Colorado, Alaska, and Indiana, have essentially adopted the *Rosenbloom* approach, and two others, New Jersey and New York, have standards similar to *Rosenbloom*.54 There is no indication that the *Rosenbloom* rule has proven unworkable or resulted in excessive defamatory speech in these jurisdictions.

Second, to the extent that *Rosenbloom* results in a more favorable regime for publishers and speakers, it simply reflects the law evolving to

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53. *Id.*

accommodate advances in communications technology. Free speech and First Amendment concerns receive strong legal protection in the online context—perhaps most notably thanks to Section 230 of the Communications Decency Act of 1996, which insulates operators of interactive computer services from being held liable for defamatory content provided by third parties.\(^5\) As the Ninth Circuit stated in *Batzel v. Smith*, construing Section 230:

Congress made this legislative choice [of enacting Section 230] for two primary reasons. First, Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce. Section 230(a), “Findings,” highlights that:

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.\(^5\)

Applying old rules to new media does not make sense as a policy matter. It would prevent society from reaping the full rewards of new communications technologies by inhibiting speech. As the Fourth Circuit explained in *Zeran*:

Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.\(^5\)

Accordingly, by enacting Section 230, Congress replaced the traditional tort law doctrine of republication liability with a new framework for the online world. It’s a compromise that seems to have worked fairly well; almost 15 years after its enactment, Section 230 is alive and well.

Finally, adoption of the *Rosenbloom* rule is not the most extreme pro-media/pro-free-speech position one could take. Justices writing decades ago articulated stronger viewpoints. For example, Justices Black

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6. Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003); see also Zeran v. America Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997) (“The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”).
7. Zeran, 129 F.3d at 331 (citations omitted).
and Douglas expressed the view that even the New York Times standard infringes on free speech unconstitutionally—despite the fact that it is a standard that makes it very difficult for libel plaintiffs to prevail.  

CONCLUSION

Justice Brennan’s observation that “we are all ‘public’ men to some degree,” from a 1971 opinion, has proven prescient. Some 35 years later, writers in the Internet age would observe that “[w]e are all public figures now.” The legal understanding of who is a public figure must now catch up.

On a somewhat optimistic note, there are some indications that libel lawsuits are decreasing—perhaps as a result of some of the changes in the media landscape discussed above. It appears that the number of libel cases going to trial has declined:

The number of libel cases going to trial has dropped to the point where it’s not worth doing the survey on an annual basis, said Sandy Baron, the executive director of the Media Law Resource Center. Ms. Baron was speaking about the annual-and now biannual-survey of libel and privacy trials that her firm rounds up and produces into a study. In the most recent study, the Media Law Resource Center found that libel trials in the 2000s were down more than 50 percent from the 1980s. In the 1980s, the center found 266 trials; in the ’90s, that number dropped to 192; in the past decade it dropped to 124. In 2009, only nine surfaced.

What’s behind the change? Perhaps the Web, which has (1) created a flood of content, making any individual negative publication less prominent, and (2) given aggrieved parties more outlets for responding to criticism they see as unfair.

58. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring) (explaining that “I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials”); Time, Inc., 385 U.S. at 374, 398 (1967) (Black, J., concurring) (predicting that the New York Times “doctrine too is bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press”); id. at 401 (Douglas, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 334, 356 (1974) (Douglas, J., dissenting) (“I have stated before my view that the First Amendment would bar Congress from passing any libel law.”).


61. Id. (citing a media lawyer who stated, “[p]eople who used to feel frustrated that they couldn’t get their viewpoint across now can” by “put[ting] their response on a Web site” or “find[ing] an outlet that will publish it”).
It is too early to know, however, whether the recent decline in libel trials will be a lasting development. Rather than assume this to be the case, society is far better served by recognizing and revisiting the archaic legal precedent surrounding modern defamation law. Only by rejecting *Gertz* and adopting Justice Brennan’s more fluid *Rosenbloom* position, treating us all as public figures to some degree, can such law begin to make sense in the age of new media and social networks.