

(ORDER LIST: 600 U.S.)

MONDAY, October 9, 2023

**CERTIORARI GRANTED**

22-9908 FAKEBLOCK, INC. AND FÜNKE, MAEBY, PETITIONERS V. AUSTERO, LUCILLE,  
RESPONDENT

The petition for writ of certiorari is granted limited to the following questions: 1) Whether an internet social media company has immunity, under the Communications Decency Act of 1996, 47 U.S.C. § 230, from state-law claims alleging infringement upon a celebrity's right of publicity? 2) Whether a computer-generated artificial-intelligence model that resembles a real-life celebrity infringes upon that celebrity's right of publicity or, conversely, is protected under the First Amendment?

UNITED STATES COURT OF APPEALS  
FOR THE FIFTEENTH CIRCUIT

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No. 20-9804

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LUCILLE AUSTERO,  
Plaintiff-Appellant,

v.

FAKEBLOCK, INC. and MAEBY FÜNKE,  
Defendants-Appellees

Filed: October 17, 2022

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Appeal from the United States District Court  
for the District of Newport Beach  
(D.C. No. 18-cv-5309)

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Before PING, Chief Judge, REINHOLD, ZUCKERCORN,  
JARVIS, LOBLAW, LIZER, and WALT, Circuit Judges.

**OPINION EN BANC**

ZUCKERCORN, Circuit Judge, Joined by REINHOLD,  
LOBLAW, and LIZER, Circuit Judges.

This appeal presents interesting questions of first impression about the complex intersection of technology, intellectual property, and free expression in the digital age. The plaintiff-appellant, Lucille Austero, is a famous actor, singer, and dancer who retired from performing and instead (unsuccessfully) ran for Congress.

Austero's opponent in that election, Lindsay Bluth, campaigned heavily on internet social-media platforms, such as Instagram, Twitter, and a relatively new service called FakeBlock. On FakeBlock, Bluth campaigned with the help of a short film, *Moonie Bares All*, that featured a supposedly fictitious character, "Moonie." Moonie was generated through the use of artificial-intelligence technology by defendant-appellee Maebly Fünke. Fünke then uploaded *Moonie Bares All* to FakeBlock.

Austero sued Fünke and FakeBlock in the District Court of Newport Beach, *see* 28 U.S.C. § 1332, alleging the AI model so closely resembles Austero as to infringe upon her right of publicity under state law. Both defendants moved for summary judgment, arguing Austero had no viable right-of-publicity claim and Fünke's AI creation is protected by the First Amendment. Further, FakeBlock asserted immunity under the Communications Decency Act ("CDA"). *See* 47 U.S.C. § 230. The court rejected FakeBlock's immunity claim but granted summary judgment to both defendants on the merits. Austero appealed.

We affirm in part and reverse in part. We agree FakeBlock is not entitled to immunity, so we affirm that part of the summary-judgment order. However, we hold the court erred by granting summary judgment on the merits of Austero's right-of-publicity claim. Accordingly, we REVERSE that part of the district court's order and REMAND for further proceedings.

## I.

## A.

The plaintiff, Lucille Austero, is a world-renowned actor, dancer, and singer. To date, she has acted on Broadway, on television, and in twenty-two movies, and she has released seven studio albums. Austero is among a select group of entertainers who have won Oscar, Emmy, and Tony awards.

A few years ago, Austero retired from acting and public performances. Her last acting role—except for two brief cameo appearances as herself—was in 2009, and she released her last album in 2010. Instead, following Newport Beach’s 2014 secession from California and recognition as the United States’s fifty-first state (and first city state),<sup>1</sup> Austero ran for office as a representative in the United States Congress in the 2018 elections. In that election, Austero ran against Lindsay Bluth.

Bluth’s daughter, Maebly Fünke, is a digital artist and programmer. She has particular interest in artificial intelligence, specifically, creating realistic AI-generated models.<sup>2</sup>

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<sup>1</sup> The March 28, 2014 “La Habra” earthquake caused the city of Newport Beach to physically separate from the California mainland. The Newport Beach citizens, frustrated about a perceived delay in “rescue” efforts (*i.e.*, shipping delays for silicone and other materials commonly used by plastic surgeons), voted to secede from California. California—evidently quite willing to shed itself of Newport Beach—acceded to the city’s request. Later that year, Congress voted to accept Newport Beach as the nation’s fifty-first state.

<sup>2</sup> Fünke’s software (called “Mommy, What Will I Look Like?”) originally was used to morph physical features from two photographs

In early 2018, Fünke developed an AI-generated, talking, singing, and dancing model which Fünke named “Moonie.” There are several physical similarities between Moonie and Austero. Both are approximately 5’4” tall, have the same body shape and proportions, and share similar hairstyles: short black hair with prominent bangs and styled in what has been described, at various times, as the “Sassoon” cut, “urchin” cut, or “pixie” cut.

In deposition, Fünke explained that Moonie was meant to represent the latest iteration of Fünke’s proprietary software. Fünke testified she purposefully used Austero as the “starting point” for Moonie’s appearance and voice because Austero has spoken and sung in multiple albums and acting roles, which Fünke’s software analyzed before creating Moonie’s voice.

Fünke testified her purpose in creating Moonie was two-fold. First, she wanted to create a realistic-looking simulacra to demonstrate and advertise her software’s capabilities to potential licensees. Second, Fünke wanted to assist her mother’s political campaign by revealing the “darker side” of a political candidate whom Fünke believed was receiving too favorable attention from the media.

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and thereby preview, for prospective parents, a child’s appearance. After that business failed, Fünke reworked her software to generate realistic looking AI models.

One of Fünke’s first forays in this medium was to create an ersatz identical twin, “Surely Fünke.” Unrelated to this lawsuit, Maebly Fünke has been criminally accused of using the wheelchair-bound “Surely” to fraudulently raise money for bogus charities to fight fake diseases.

To accomplish both of these goals, Fünke created a five-minute-long short film in which Moonie appears on stage in a burlesque outfit and begins tap dancing. Within about 45 seconds, Moonie stumbles while dancing, appears to lose her balance, and staggers to the side of the stage, where she braces herself against a set piece. After recovering her balance, Moonie then strips off her clothing. (Moonie’s nude body was intentionally pixelated to clear FakeBlock’s obscenity filter.) Moonie then sings, in slurred words, altered lyrics to the song “New York, New York” from the Leonard Bernstein musical and subsequent film *On the Town*. Moonie does not sing the verses to that song but instead repeats the chorus four times, each with slightly different lyrics. The lyrics generally refer to the singer’s wealth and substance dependency, and they suggest the singer thinks very little of the citizens and voters of Newport Beach.

On May 29, 2018, Fünke uploaded her film to a startup social-media website, FakeBlock. FakeBlock, Inc. is incorporated in Delaware but has its principal place of business in Irvine, California. At the time Fünke uploaded her short film, FakeBlock was still “in beta,” and only the three corporate officers had the authority or ability to upload videos to the site. The three officers were CEO George Maharis, CFO Paul Huan, and Fünke, the director of investor relations.<sup>3</sup>

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<sup>3</sup> These are not their actual job titles, but we use these titles to identify each officer’s role—as explained in deposition testimony—rather than the vague job titles utilized within FakeBlock (e.g., “Mr. Manager” for CEO Maharis and “P Hound” for CFO Huan).

Fünke titled her short film (and captioned her corresponding FakeBlock post) “Moonie Bares All!!!” Fünke also wrote “VOTE 4 LINDSAY BLUTH” on the post and provided an internet link to her mother’s campaign website. Fünke did not upload the film to any other website because, she testified, she was an investor in FakeBlock and wanted to draw attention to the new site.

*Moonie Bares All* drew significant attention in internet message boards. Viewers stressed Moonie’s “fails” while dancing and her striptease routine. (In fact, Fünke testified her motivation for that routine was to appeal to prurient internet users.)

On August 24, 2018, Austero sued FakeBlock in Newport Beach district court and sought an injunction to require FakeBlock to remove the video. An injunction ultimately proved unnecessary because CEO Maharis personally removed the video on August 27, 2018. That same day, Maharis terminated Fünke from her unpaid position with FakeBlock.

Austero lost the election.

## **B.**

After the election, Austero amended her pleadings to add Fünke as a defendant and to accuse both defendants of infringing upon Austero’s right of publicity under Newport Beach state law. Austero alleged Moonie so closely resembles Austero as to appropriate Austero’s identity and infringe on her right to profit from her likeness and identity.

After conducting discovery, both defendants moved for summary judgment. Both argued that Austero did not have a viable claim for infringement upon her right of publicity, as a matter of law, and that even if she did, *Moonie Bares All* is protected under the First Amendment. In addition, FakeBlock moved for summary judgment on its affirmative defense of immunity under section 230 of the Communications Decency Act. *See* 47 U.S.C. § 230.

The district court rejected FakeBlock's immunity claim but granted summary judgment to both defendants on the merits of Austero's right-of-publicity claim and signed a final judgment in defendants' favor. Austero appealed. FakeBlock did not cross appeal but nevertheless urges us to affirm summary judgment on its immunity claim. *See Wyo. v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1254 n.33 (10th Cir. 2011) (permitting appellee to defend judgment on any ground supported by the record without filing a cross appeal).

We conclude we have jurisdiction over this appeal from a final judgment. 28 U.S.C. § 1291.

## II.

### A.

We review a grant of summary judgment *de novo* under the same standards used by the district court. *In re La. Crawfish Providers*, 852 F.3d 456, 462 (5th Cir. 2017). We must determine whether any genuine issues of material fact remain for trial and whether the district court correctly applied the relevant substantive law.



FED. R. CIV. P. 56(a); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 799 (9th Cir. 2003). To the extent the movant also carries the burden of proof at trial, as with affirmative defenses, the movant can prevail on summary judgment only by establishing all of the essential elements of its claim or defense. *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

We must view the evidence in the light most favorable to the nonmovant and construe all reasonable inferences in her favor. *Id.* We cannot evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes. *Id.* Instead, we must decide whether a reasonable jury, applying all inferences in the nonmovant's favor, could reach a verdict for her. *Id.*

We begin by analyzing FakeBlock's claim of immunity under the CDA. The CDA, when first introduced, was intended to protect children from sexually explicit internet content. *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016).

Section 230, added at a later time, expresses altogether different objectives from the CDA as a whole. Instead, section 230 expressly recites Congress's purpose "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." 47 U.S.C. § 230(b)(2). Congress sought to accomplish this goal by conferring immunity upon interactive computer services as to some claims and in certain situations. The statute refers to these protections as the "Good Samaritan" subsection. 47 U.S.C. § 230(c).

First, “[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.” *Id.* § 230(c)(1). Second, no provider or user of an interactive computer service may be held liable because of “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 . . . .” *Id.* § 230(c)(2). A third protection states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).

The cause of action most commonly associated with the cases that have interpreted and applied section 230 is defamation. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009). However, “the language of the statute does not limit its application to defamation cases.” *Id.* Here, we must decide whether to apply section 230’s immunity provisions in the context of a state-law claim for infringement upon a celebrity’s right of publicity.

Newport Beach does recognize a common-law cause of action for infringement of the right to publicity, as that claim is phrased in the Restatement (Second) of Torts section 652C: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”

RESTATEMENT (SECOND) OF TORTS § 652C. Many states have adopted this version of the right-of-publicity cause of action. *See, e.g., In re Jackson*, 972 F.3d 25, 38 (2d Cir. 2020) (Connecticut); *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 830 (11th Cir. 2016) (Michigan); *Wagner v. Gallup, Inc.*, 788 F.3d 877, 889 (8th Cir. 2015) (Minnesota); *Schaefer v. Indymac Mortg. Servs.*, 731 F.3d 98, 104 n.6 (1st Cir. 2013) (New Hampshire); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013) (New Jersey); *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 638 (5th Cir. 2007) (Texas); *Showler v. Harper’s Magazine Found.*, 222 F. App’x 755, 762–63 (10th Cir. 2007) (Oklahoma); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 930 (6th Cir. 2003) (Ohio); *cf. Am. Guar. & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 615 (5th Cir. 2001) (guessing Mississippi would adopt section 652C if presented with appropriate case).

## B.

Absent application of a statutory exception—an issue we discuss later—FakeBlock enjoys immunity from Austero’s claim if (1) FakeBlock qualifies as a provider of an interactive computer service, (2) Austero’s claim is based on information provided by another “information content provider,” and (3) Austero’s claim would treat FakeBlock as the “publisher or speaker” of that information. *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007). Here, all parties agree FakeBlock provides an “interactive computer service,” as that term is defined by the CDA. 47 U.S.C. § 230(f)(2).

Further, it is undisputed that Austero seeks to hold FakeBlock responsible as a publisher or speaker of the content in question. Instead, the parties disagree about the second element of this three-part test. Austero contends her claim arises from information provided by FakeBlock *itself* because the person who created and shared the content was a corporate officer of FakeBlock.

### C.

We need not decide whether Maeby Fünke acted on her own behalf, or on FakeBlock's, because we hold Austero's claim qualifies for a statutory exception to section-230 immunity. Specifically, section 230(e)(2) states, "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2).

Austero contends her state-law claim for infringement upon her right of publicity qualifies as an "intellectual property" claim that is excepted from section-230 immunity. In response, FakeBlock argues (1) section 230(e)(2) does not apply to *state-law* claims but instead carves out an exception to immunity only for IP claims brought under *federal law*, and (2) Austero's claim for appropriation of her identity is not, in fact, an intellectual-property claim but instead a privacy-based claim outside the purview of section 230(e)(2).

There is a split among the circuit courts of appeals as to whether section 230(e)(2) applies to intellectual-property claims brought under state law. We now join those circuits that have concluded that it does.

**D.**

Our goal in statutory interpretation is to determine and give effect to Congress's intent. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). Because we presume Congress expresses its intent through the ordinary meaning of its language, we begin with the statutory text. *See Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021). Although we will focus on section 230(e)(2), we also consider section 230 as a whole, giving effect, if possible, to every word and every provision. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013). If possible, we must interpret section 230 so as to make all of its terms compatible, not contradictory. *See id.* Thus, we consider how subsection (e)(2) relates to section 230 as a whole. *See id.*

We focus on subsection (e)(2). But because this appeal questions the interplay between intellectual property and state law, we also will discuss subsection (e)(3), which states, "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." 47 U.S.C. § 230(e)(3).

Austero largely confines her arguments to the statutory text. She notes that, throughout section 230, Congress frequently uses modifying terms such as "federal laws," "federal statutes," "state law," and "local law," but that Congress purposefully chose not to include any such specific language within subsection (e)(2).

Austero argues the inclusion of these terms in other provisions confirms Congress knew how to limit the application of section 230's clauses to federal, state, or local law, but that Congress deliberately omitted such language within section 230(e)(2). Thus, she argues, section 230(e)(2) cannot be limited to *federal* IP claims.

FakeBlock also addresses the statutory language but argues that federal law is the *default* within section 230 and that Congress references state or local law only to the extent those laws are coextensive with federal law. FakeBlock also relies heavily upon Congress's stated findings and policy in section 230, arguing subsection (e)(2) must be interpreted as applying only to federal IP cases to properly effect Congress's stated purposes for section 230. *See* 47 U.S.C. § 230(a), (b). FakeBlock contends that, because intellectual-property laws differ greatly among the states, Congress's express intent would be utterly frustrated if interactive computer services could be exposed to liability under a multiplicity of confusing and conflicting state laws.

Both parties' arguments find support in the case law.

### 1.

The scope of section 230(e)(2) was first addressed by a circuit court of appeals in *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). In *Lycos*, the First Circuit effectively held, albeit without much discussion, that a well-pled state-law intellectual-property claim is covered by section 230(e)(2) and thus excepted from immunity. *See id.* at 422–23.

We do not find *Lycos* particularly instructive here, for two reasons. First, it does not appear any party in *Lycos* argued that section 230(e)(2) applied to state-law claims, and the First Circuit assumed it did without any substantive analysis. *See id.* Second, the court eventually affirmed the dismissal of UCS’s state-law claim on the merits, so its immunity discussion was dicta. *See id.* at 422–23, 425, 427.

Nevertheless, a district court in New Hampshire followed *Lycos* in *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008). That court did undertake the kind of detailed analysis that was missing from *Lycos*. *See id.* at 299–302. Specifically, that court ruled—as Austero argues here—that section 230 as a whole reflects that “where Congress wished to distinguish between state and federal law in § 230, it knew how to do so.” *Id.* at 300. The *Friendfinder* court also stressed the significance of the word “any” used in section 230(e)(2): “the modifier ‘any’ amounts to ‘expansive language [that] offers no indication whatever that Congress intended [a] limiting construction.’” *Id.* at 299 (citation omitted). Those two principles, taken together, prompted the district court to rule that the use of the word “any” in section 230(e)(2), accompanied by the use of the word “federal” elsewhere in the CDA, suggested Congress did not intend for those terms to be read interchangeably. *Id.* at 300. Subsequently, a New York district court reached the same conclusion, and for many of the same reasons. *Atl. Rec. Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009).

Finally, Austero’s interpretation of section 230(e)(2) has support from the Third Circuit’s opinion in *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021), which rejected the same arguments now advanced by FakeBlock:

[Facebook] suggests § 230(e) makes federal limitations the default and includes state laws only when specified. In other words, § 230(e)’s limitations are “directed to *certain* federal statutes and include state laws *only where they are coextensive with federal law.*” Because state-law rights of publicity do not mirror an analogous federal law, Facebook argues Hepp’s claim is not included in § 230(e)(2)’s intellectual property limitation.

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[T]he structural evidence [Facebook] cites cuts both ways. Facebook is correct that the explicit references to state law in subsection (e) are coextensive with federal laws. But those references also suggest that when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly. Because the evidence cuts both ways, the structure does not change the natural meaning. So the text and structure tell us that § 230(e)(2) can apply to federal and state laws that pertain to intellectual property.

*Id.* at 210–11. The *Hepp* court rejected Facebook’s arguments based on the stated policies because “policy considerations cannot displace the text.” *Id.* at 211.



## 2.

It is true, as FakeBlock says, that the conclusions reached by the First Circuit in *Lycos* and the Third Circuit in *Hepp* are not universally accepted. The Ninth Circuit reached the opposite conclusion in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007). However, the Ninth Circuit did not confine its review to the plain statutory language, instead opining what Congress *should have said* to better effectuate its stated policy goals:

While the scope of federal intellectual property law is relatively well-established, state laws protecting “intellectual property,” however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes. In the absence of a definition from Congress, we construe the term “intellectual property” to mean “federal intellectual property.”

*Id.* at 1118–19 (citations omitted).

The concerns expressed by the Ninth Circuit about an expansive reading of “intellectual property” in section 230(e)(2) are not unfounded.<sup>4</sup> Nevertheless, we agree with the Third Circuit that, with respect to Congress’ stated policy goals in section 230(b), the plain language used in subsection (e)(2) reflects the balance Congress decided to strike between those policy goals and the importance of state intellectual-property rights. *See Hepp*, 14 F.4th at 211. And it is not the job of courts to second guess those policy decisions by disregarding the plain statutory language. *See id.*; *see also Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (“The wisdom of Congress’ action, however, is not without province to second-guess.”); *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126 (1989) (“Our task is to apply the text, not to improve upon it.”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.”).

For these reasons, we join the First Circuit and the Third Circuit, and the district courts in New Hampshire and New York, in holding section 230 does not extend immunity to interactive service providers facing federal *or state* intellectual-property claims.

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<sup>4</sup> We would note that the particular state law at issue here is the same Restatement (Second) of Torts section that has been adopted by many other states, so, as applied to *this* case, the Ninth Circuit’s concerns about inconsistent state laws are less applicable here.

**E.**

Alternatively, FakeBlock argues Austero’s claim of infringement upon her right of publicity is not an “intellectual property” claim anyway. But although the right of publicity was originally intertwined with the right of privacy, courts have since recognized a distinction between the personal right to be left alone and the business right to control how one’s identity is used in commerce. *See Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996). The latter right involves a cognizable property interest. *Id.*; *see Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977); *Hepp*, 14 F.4th at 212–14; *see also Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006) (“[T]here appears to be no dispute that the right of publicity is a type of intellectual property right . . .”).

After all, the purpose of a right-of-publicity claim is not to soothe celebrities’ bruised feelings, but instead to protect their financial interests. *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1447 (11th Cir. 1998). Here, Austero does not seek to recover for damages to her psyche, but for dilution of her right to profit from her own publicity. Thus, Austero has stated an “intellectual property” claim for purposes of section 230(e)(2).

**F.**

We hold FakeBlock is not entitled to immunity against Austero’s state-law claims for infringement upon her right to publicity. Accordingly, we affirm the court’s denial of summary judgment on that basis.

### III.

We turn to the merits of Austero's claim. Austero alleges *Moonie Bares All* appropriates Austero's identity and thereby infringes upon Austero's right to profit from her own publicity. The defendants claim the film does not infringe upon Austero's publicity rights and that, to the extent of any similarity between the two, *Moonie Bares All* nevertheless is a form of expression (namely, a film) protected by the First Amendment.

#### A.

"[B]ecause of the general constitutional policy of maintaining uniformity in intellectual property laws, courts typically give attention to the entire available body of case law when deciding right of publicity cases." *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622–23 (6th Cir. 2000) (citations omitted). In Newport Beach, the common-law right of publicity is as stated in the Restatements. "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652C. Despite the apparent express limitation to "name or likeness," most courts have expanded this tort to encompass appropriation of any "aspect of identity or persona." See *Landham*, 227 F.3d at 624; *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) ("Since Prosser's early formulation, the case law has borne out his insight that the right of publicity is not limited to the appropriation of name or likeness.").

For example, courts have found unlawful appropriations of a plaintiff's identity where a defendant imitated that celebrity's singing voice, *see Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988); used the plaintiff's catchphrase, *see Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983); or recalled a unique occupation that, by definition, necessarily referred to that plaintiff, *see White*, 971 F.2d at 1399. Not all courts agree with that expansive reading of section 652C. *See White*, 971 F.2d at 1402 (Alarcon, J., dissenting) (“[A] cause of action for appropriation of the right to publicity requires proof of the appropriation of a name or likeness.”). Nevertheless, we agree with, and adopt, this expanded reading of section 652C for the reasons explained by the Ninth Circuit in *White*:

It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so. [Several cases] teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

*White*, 971 F.2d at 1398. Indeed, the apparent elements of an infringement claim brought under 652C are broader than mere name or likeness. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008).

Those elements, as listed in *Friendfinder*, include the following:

1. Plaintiff owns an enforceable right in the identity or persona of a human being;
2. Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use; and
3. Defendant's use is likely to cause damage to the commercial value of that persona.

*Id.* We need not address the third element because the defendants did not challenge that element in their summary-judgment motions.

We linger another moment to acknowledge the circuit courts of appeals also disagree about the permissible scope of a right-of-publicity claim vis-à-vis plaintiffs who primarily achieved their fame through acting. Some judges have argued that a "recognition of the distinction between a performer and the part he or she plays is essential for a proper analysis of" a publicity-rights claim. *See White*, 971 F.2d at 1404 (Alarcon, J., dissenting). We suspect this distinction is an outgrowth of the first element of a right-of-publicity claim; that is, courts must determine whether the "right" the plaintiff seeks to protect actually can be enforced by that actor, or instead, by whomever owns the rights to that character. *See Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997) (noting actors did not own rights to characters they played and such characters belonged to copyright owner).

But this is not an all-or-nothing rule. *See id.* (“[A]n actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character.”). Thus, the more precise inquiry requires that courts consider the association between the actor and the role. *See McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994). At some point, “the identity of a fictional character [may] become[] so synonymous with the identity of the actor playing the role that the actor may challenge the character’s exploitation.” *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000). Such an enforceable right may arise if the fictional figure was played exclusively by its creator. *McFarland*, 14 F.3d at 920.

*White* is a prime example of this. There, the Ninth Circuit ascribed significance to the fact that Vanna White was (and still is) the only actor who has ever played the role—a host turning letters on *Wheel of Fortune*—that was depicted in the relevant advertisement. *White*, 971 F.2d at 1399. *Landham* seems to stake out the same rule: “If the use of a fictional character also evokes the identity of the actor who played that character, he may challenge that use regardless of the fact that the actor’s personal notoriety was gained exclusively through playing that role.” *Landham*, 227 F.3d at 625. Nevertheless, although exploitation of a fictional character might evoke the actor’s identity as well, “the focus of any right of publicity analysis must always be on the actor’s own persona and not the character’s.” *Id.*

**B.****1.**

Austero concedes the defendants have not appropriated her name.

Whether defendants have appropriated Austero's likeness is a closer question. We begin with the acknowledged dissimilarities. That evidence came mostly from Fünke's expert witness on facial features, Marky Bark, who based his opinions on side-by-side comparison photos of Austero and Moonie. Mr. Bark described these dissimilarities, many of which represent hallmarks of AI-generated models<sup>5</sup>:

- Both Austero and Moonie have “pixie” haircuts; however, Moonie's hair is mostly “flat” across her head, unlike Austero's signature style (which features spiky hair, or as another witness described it, “points”);
- Austero has a beauty mark on her left cheek, but Moonie does not;

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<sup>5</sup> According to Bark, AI image-generating software sometimes causes visual anomalies during the creation process. Classic examples include uneven eyes, unnatural-looking teeth or hair, and missing, misshapen, or disproportionately sized body parts. In particular, AI image-generating software struggles to create realistic human hands. These visual anomalies contribute to produce a phenomenon known as “uncanny valley,” in which viewers of AI models usually can detect subtle, yet unsettling differences that trigger unease in the viewer. See, e.g., Rina Diane Caballar, *What Is the Uncanny Valley?*, IEEE SPECTRUM, <https://spectrum.ieee.org/what-is-the-uncanny-valley> (last visited Oct. 12, 2022).



- Moonie's nose features a prominent downward tip, but Austero's does not;
- Moonie's mouth is disproportionately large for her head;
- Austero's famous smile usually displays her teeth, but Moonie's smile does not;
- A close inspection reveals there are only four fingers on Moonie's left hand, and the skin on that hand displays inconsistent aging (*i.e.*, the skin on the back of the hand and three of the fingers is wrinkled, but the index finger is smooth); and
- Perhaps most noticeably, Moonie's eyes are rather wideset, and her right eye has an unnatural and asymmetric slant that is not only distinct from Austero's (symmetric) eyes but also dissimilar even from Moonie's left eye.

Thus, if our analysis were confined to comparing facial features only, we would agree with our dissenting colleague that a reasonable fact finder would not find enough of a physical resemblance to conclude that Fünke appropriated Austero's facial likeness for her Moonie character.

But our analysis does not stop at merely comparing facial features. The summary-judgment evidence suggests there are numerous other similarities between Austero and Moonie, including:

- Moonie’s skin color, hair color, hair style, height, body style, and body proportions are very similar to Austero’s;
- Moonie wears the identical outfit (*i.e.*, a halter vest, short shorts, a derby hat, garters, and lace-up boots) that Austero memorably wore in the movie *Cabaret*;
- Although Moonie’s tap dance is unlike Austero’s famous “Mein Herr” performance in *Cabaret*, it is remarkably similar to one of Austero’s tap-dancing performances in 1992 in the Radio City Music Hall;
- The name “Moonie” *may be* a play on the titular role played by Austero in the movie *Tell Me That You Love Me, Junie Moon*, in which Austero—like Moonie—strips off her clothes;<sup>6</sup> and
- Moonie’s performance captures all three aspects of what makes Austero’s fame somewhat unique: acting, dancing, and singing performances for which Austero has won an Oscar, an Emmy, and four Tony awards.

The parties dispute whether this evidence raises a fact issue regarding the defendants’ appropriation of Austero’s identity. But there is more.

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<sup>6</sup> Fünke claimed she selected the name “Moonie” because of the striptease the AI character performs in *Moonie Bares All*. See, e.g., *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1378 n.1 (3d Cir. 1992) (Sloviter, C.J., dissenting) (defining “moonie”).

## 2.

Much of the parties' disagreement centers on Moonie's vocal performance of the song "New York, New York." This is not the same song as "(Theme from) New York New York," which Austero sang in the film of the same name, which was subsequently made famous by Frank Sinatra, and which is played at the end of every New York Yankees home win. Instead, Moonie's "New York, New York" comes from the musical and movie *On the Town*. Nevertheless, it is not coincidental that *Moonie Bares All* features a song with the same name as one widely attributed to Austero. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (noting Nancy Sinatra once sued Goodyear Tire and Rubber Company for playing a song that was "closely identified with her").

Austero further stresses the alleged resemblance between her singing voice and Moonie's. In *Midler v. Ford Motor Co.*, the Ninth Circuit held a plaintiff's distinctive singing voice could be the subject of an appropriation claim even if the defendant merely *imitated* the plaintiff's voice. 849 F.2d at 463. Here, Austero presented expert testimony from Ann Veal, an opera singer and vocal-performance coach, who opined that "Moonie's voice *could very well* be Lucille's *current* voice digitally raised by one octave."<sup>7</sup>

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<sup>7</sup> Austero once was classified as a soprano. In 1997, Austero had vocal-cord surgery. Currently, she probably would be considered a mezzo soprano or perhaps an alto.

Fünke, for her part, refused to disclose the technique used to create Moonie’s singing voice, claiming privilege.<sup>8</sup> However, Fünke agreed that her software had attempted to capture all of Austero’s widely available vocal performances over the years and that those recordings were used as the “raw building blocks” for Moonie’s voice. Fünke claimed Moonie’s voice was purposefully digitally altered to be distinct from Austero’s.

### 3.

Thus, this case requires that we consider the legal propriety of a right-of-publicity case based on a Frankenstein monster of sorts. The evidence suggests Moonie was assembled from bits and pieces of Austero from various times and performances over her long career. Fünke’s AI creation does not precisely copy Lucille Austero at any time in her life; there is no version of Lucille Austero, ever, that quite matches Moonie. But we do not think *exactness* is the legal standard here. Instead, we must decide whether Austero has raised a fact issue that (1) she owns an enforceable right in her identity, and (2) defendants have, without her consent, used some aspect of identity or persona such that Austero is identifiable from defendants’ use. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 288, 304 (D.N.H. 2008).

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<sup>8</sup> Austero did not complain about Fünke’s nondisclosure until the summary-judgment hearing, and Austero does not complain on appeal that the district court abused its discretion by declining to give Austero a continuance to conduct such discovery.

## C.

This case appears to be one of first impression. We cannot find a case in which any court has grappled with these questions in the context of artificial intelligence. We believe the closest analogues, factually, are those cases in which courts have considered appropriation through video-game avatars and animatronic robots.

In *Wendt v. Host International, Inc.*, the Ninth Circuit addressed claims by two actors that the defendant violated their publicity rights “by creating animatronic robotic figures . . . based upon their likenesses without their permission and placing these robots in airport bars modeled upon the set from the television show *Cheers*.” 125 F.3d 806, 809 (9th Cir. 1997). The robots were not *identical* copies of the actors; nevertheless, the actors argued that a likeness “need not be identical or photographic.” *See id.* The Ninth Circuit agreed:

In *White*, we ruled that a robot with mechanical features was not a “likeness” under [a state statute]. However, we specifically held open the possibility that a manikin molded to Vanna White’s precise features, or one that was a caricature or bore an impressionistic resemblance to White might become a likeness for statutory purposes.

*Id.* at 810. The Court concluded, “Appellants have raised genuine issues of material fact concerning the degree to which the figures look like them . . . [and thus] whether or not appellees sought to appropriate their likenesses for their own advantage . . . .” *Id.* at 811.

We also find instructive several cases applying these principles to video game avatars. *See Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). All three cases involved the alleged appropriation of the identities of various college and professional football players for use in football video games. In each case, the alleged appropriation consisted of the defendant’s use of players’ general physical statistics (including height, body style and proportions, skin tone, hair style, and hair color) and other biographical information. *See Davis*, 775 F.3d at 1175–76 (“[E]ach [player] is described by his position, years in the NFL, height, weight, skin tone and relative skill level in different aspects of the sport.”); *Keller*, 724 F.3d at 1271 (“Every real football player on each team . . . has a corresponding avatar in the game with the player’s actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state.”); *Hart*, 717 F.3d at 166 (“[T]he digital avatar does closely resemble the genuine article[,] . . . match[ing] Appellant in terms of hair color, hair style and skin tone . . . [and] also accurately track[ing] Appellant’s vital and biographical details.”).

So it is here: Moonie matches Austero in height, body style, proportions, skin tone, hair color, and hair style. The AI model also wore the same costume as Austero, *see Hart*, 717 F.3d at 166 (“[T]he avatar’s accessories mimic those worn by Appellant during his time as a Rutgers player.”), and copied Austero’s tap-dance steps.

Interestingly, the Third Circuit suggests the existence of a sliding scale of similarity based on computer graphics resolution. See *Hart*, 717 F.3d at 166 & n.38. On one end, the court suggests right-of-publicity cases might not “extend into the bygone days of 8-bit graphics and pixilated representations.” *Id.* at 166 n.38. The other end of that spectrum is “the uncanny valley.” *Id.* at 166. The Third Circuit did “not believe that video game graphics must reach (let alone cross) the uncanny valley to support a right of publicity claim.” *Id.* Nevertheless, our case involves graphics that, per expert testimony, do approach the uncanny valley. If less-advanced graphics were sufficient in the three EA cases to support the claimants’ right-of-publicity claims, so, too, does the AI model in this case.

Our conclusion also finds support in the Ninth Circuit’s opinions in *Midler* and *White*. The robot in *White* indisputably was not Vanna White—any more than the doppelgänger voice in *Midler* was Bette Midler’s—but in both cases, the defendant intended to invoke and profit from those celebrities’ identities without paying a dime to either. Both cases found infringement of the plaintiffs’ *identities*, which is enough.

We appreciate our dissenting colleague’s efforts to distinguish Austero, personally, from the roles she played. But Austero’s claim here is not that Fünke appropriated Austero’s roles in *Cabaret; New York, New York*; or *Tell Me That You Love Me, Junie Moon*. It is that Fünke made use of those roles to identify Moonie as a stand-in for Austero, as Samsung did in *White*.

**D.**

Thus, after considering *Moonie Bares All* as a whole, we conclude Austero has at least raised a fact issue sufficient to avoid summary judgment on the first two elements of her right-of-publicity claim.

**IV.**

Finally, we address the defendants' affirmative defenses under the First Amendment. To prevail on summary judgment, both defendants were required to "establish beyond peradventure *all* of the essential elements of the claim or defense." *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021) (citation omitted).

Numerous courts have recognized the tension between the First Amendment and right-of-publicity claims. *See Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996); *see also Hart*, 717 F.3d at 152 (describing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977), as calling "for a balancing test to weigh the interest underlying the First Amendment against those underpinning the right of publicity"). Following *Zacchini*, courts began applying various balancing tests to resolve these claims. *Hart*, 717 F.3d at 152–53. Courts eventually developed three standardized balancing frameworks: the "predominant use" test, the trademark-based *Rogers* test, and the "transformative use" test. *See id.* at 153.



## A.

Under the “predominant use” test, courts must decide whether the “predominant purpose of the product is to make an expressive comment on or about a celebrity.” *Hart*, 717 F.3d at 154. This test is not widely-used, has been criticized as “subjective at best, arbitrary at worst,” and requires “judges to act as both impartial jurists and discerning art critics.” *Id.* We are ill-equipped, as judges, to decide if, and how much, various parts of *Moonie Bares All* contribute to the entire work’s expressiveness. *Id.*

The *Rogers* test is used most often when the alleged infringement involves matters, such as a person’s name or image, that are traditionally protected under trademark law. *Id.* at 155. But this case does not involve the user of Austero’s name or her literal image; thus, this test has little application here. *See id.* at 158.

Instead, we believe the “transformative use” test best fits this situation. The transformative-use test was created by the Supreme Court of California in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). The transformative-use test does not wholesale import other IP defenses, such as fair use or parody, as complete defenses to liability. But the test is flexible enough to accommodate both of those traditional defenses (and many others). *See Comedy III*, 21 P.3d at 807–08. In fact, this test fairly accounts for numerous traditional First Amendment defenses, including parody, factual reporting, fictionalized portrayal, lampooning, and subtle social criticism. *Id.* at 809. We thus think it appropriate to apply the transformative-use test to these facts.

## 1.

Courts must consider five factors in deciding whether a work is sufficiently “transformed into something more than a mere celebrity likeness or imitation.” *Comedy III*, 21 P.3d at 799. These factors are:

1. Whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized (and thus is transformative) rather than the celebrity’s depiction’s being “the very sum and substance of the work in question”;
2. Whether the work is primarily the defendant’s own expression—where such “expression” amounts to something more than just the celebrity’s likeness. That is, would a likely purchaser’s primary motivation be to buy a reproduction of the celebrity or instead the artist’s expressive work;
3. Whether the literal and imitative elements, or the creative elements, predominate;
4. Whether the economic value of the work derives primarily from the celebrity’s fame; and
5. Whether the artist’s skill and talent are manifestly subordinated to the overall goal of creating a conventional portrait of the celebrity.

*Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1274 (9th Cir. 2013).

*Comedy III* stakes out the opposite ends of the spectrum: (1) literal depictions or imitation of a celebrity for commercial gain fall on the infringement side, but (2) parody, lampoon, or “other distortions” of the celebrity figure usually fall on the First Amendment side of the spectrum. *Comedy III*, 21 P.3d at 808.

And indeed, other courts have followed that paradigm. Literal depictions of celebrities for commercial gain have been found to infringe on those celebrities’ rights of publicity. See *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1177–78 (9th Cir. 2015) (athlete’s likeness and biographical data); *Keller*, 724 F.3d at 1276 (same); *Hart*, 717 F.3d at 165–70 (same); *Hilton v. Hallmark Cards*, 599 F.3d 894, 910–11 (9th Cir. 2010) (celebrity’s likeness and catchphrase); *Comedy III*, 21 P.3d at 811 (literal depiction of Three Stooges).

By contrast, straight-up parodies, lampoons, or fanciful distortions have been found deserving of First Amendment protection. See *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003) (caricature half-human, half-worm cartoon figures based on real-life musicians and used in larger story); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972–76 (10th Cir. 1996) (parody caricatures of MLB players lampooned for greed); see also *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 n.2 (9th Cir. 2001) (stating, in dicta, that photographs of male actor’s head placed on different body wearing women’s clothing would qualify as transformative).

Of course, some cases fall somewhere in the middle of that spectrum. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (involving use of literal depictions of Tiger Woods but with added transformative meaning), cited in *Hart*, 717 F.3d at 161 (“*ETW* presents an archetypical example of a case falling somewhere in the middle of Transformative Use jurisprudence . . .”).

## 2.

We conclude this case does not fall in the middle of the transformative-use spectrum. Instead, parts of *Moonie Bares All* represent both ends of the spectrum.

We have little difficulty concluding that the song lyrics sung by Moonie qualify as parody and thus are protected by the First Amendment as a matter of law. The tune consists of the chorus from “New York, New York,” from *On the Town*. The original lyrics from the chorus are:

*New York, New York, it's a wonderful town,  
The Bronx is up and the Battery's down,  
The people ride in a hole in the ground,  
New York, New York, it's a wonderful town!*

Leonard Bernstein, *New York, New York*, on ON THE TOWN: ORIGINAL MOVIE SOUNDTRACK (1949).<sup>9</sup>

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<sup>9</sup> The summary-judgment record does not indicate whether Fünke obtained a license or other legal rights to use the *music* from the rights-holder, but we need not address that subject because the copyright owner is not a party to this suit.

The modified lyrics attack Austero as a candidate, lampooning her wealth and history of substance abuse, and launching the usual criticisms against politicians thought to be in favor of open borders (*i.e.*, that citizens' jobs will be taken from them and given to immigrants):

*Newport, Newport, it's a wonderful town,  
Voters love me even though I put 'em down,  
Don't know their ass from a hole in the ground,  
Newport, Newport, it's a wonderful town!*

*Newport, Newport, it's a celebrity's dream,  
Where I can find lots and lots of codeine  
The mobs suffer as I ride in a limousine,  
Newport, Newport, it's a celebrity's dream!*

*Newport, Newport, it's nothing but slobs!  
I like to tell 'em I'll fix all their probs,  
But all I'm gonna' do is give away their jobs;  
Newport, Newport, it's nothing but slobs!*

*Newport, Newport, it's a wonderful town,  
Voters love me even though I put 'em down,  
Don't know their ass from a hole in the ground,  
Newport, Newport, it's a wonderful town!*

These altered song lyrics provide social commentary on a public figure who chose to enter into politics. This qualifies as “core political speech” as to which “First Amendment protection is ‘at its zenith.’” *Buckley v. Am. Const'l Law Found., Inc.*, 525 U.S. 182, 183 (1999) (citation omitted).

But not all of *Moonie Bares All* merits such protection. We cannot disregard Fünke’s admission that another motivation for uploading her short film was to attract attention to her AI software and advertise its capabilities to realistically portray celebrities *like Austero*.

The transformative-use test yields a conclusion of infringement as to the parts of *Moonie Bares All* that depict Moonie wearing the same distinctive costume as Austero, copying Austero’s tap-dancing performance from the Radio City Music Hall, and imitating Austero’s voice.

Under the first element, Austero is not simply used as a “raw material” for these parts of the film; Austero is “the very sum and substance.” *Comedy III*, 21 P.3d at 809. On the second and fifth elements, although Moonie is Fünke’s artistic expression, that expression is nothing “other than the likeness of the celebrity.” *Id.* “[A] literal depiction of a celebrity, *even if accomplished with great skill*, may still be subject to a right of publicity challenge.” *Id.* (emphasis added).

Fünke argues, citing *Winter*, that fans who want to purchase videos of Austero would find *Moonie Bares All* unsatisfactory as a substitute for, say, *Cabaret*. See *Winter*, 69 P.3d at 479; accord *Hart*, 717 F.3d at 160. But that is not the correct inquiry because Fünke was not trying to sell *Moonie Bares All*; she was advertising the software that was used to *create* the film—and Fünke was implicitly selling the idea that her software might be used to create a realistic portrayal of celebrities, like Austero, so that other movie producers might create their own substitutes for *Cabaret* (or other works).

And for that reason, the third and fourth elements of the transformative-use test fall in Austero’s favor: the imitative elements predominate over Fünke’s creative elements, and the economic value of *Moonie Bares All* is the software’s capacity to create more celebrity depictions. For these reasons, we conclude the defendants did not conclusively prove that *Moonie Bares All*, considered as a whole, qualified as a transformative use of Austero’s likeness.

### B.

Defendants also contend that, because Austero is a political candidate running for political office, her publicity claim is barred by the public-interest defense. We disagree.

Under the common law public-interest defense, “no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010) (citation omitted). This defense applies to people who, through accomplishments or lifestyle, attract bona fide attention to their doings. *See id.* Presumably, a celebrity like Lucille Austero who decides to run for office would qualify as the kind of person to whom such defense might apply.<sup>10</sup>

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<sup>10</sup> Various states have enacted statutes regarding the use of imitative material, including “deep fakes,” for use in political campaigns. *See, e.g.*, TEX. ELEC. CODE § 255.004 (prohibiting creation, publication, or distribution of “deep fake” videos—defined as videos that “depict a

However, the defense is limited to “publishing or reporting” factual data. *Davis*, 775 F.3d at 1179; *Hilton*, 599 F.3d at 912. Here, defendants were not publishing or reporting factual data. *Moonie Bares All* was meant to entertain viewers and inform them about Fünke’s AI-generating software, not to publish facts about Austero.<sup>11</sup> See *Davis*, 775 F.3d at 1179; *Hilton*, 599 F.3d at 912.

### C.

For these reasons, we hold defendants did not conclusively prove their affirmative defenses under the First Amendment. The district court could not properly grant summary judgment on these arguments.

### V.

Accordingly, we affirm the district court’s denial of FakeBlock’s summary judgment based on immunity under the CDA. However, we hold the district court erred by granting summary judgment to defendants on the merits of Austero’s right-of-publicity claim against both defendants. Therefore, we REVERSE the judgment and REMAND for further proceedings.

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real person performing an action that did not occur in reality”—that are intended to injure political candidate or influence election); CAL. ELEC. CODE § 20010 (prohibiting distribution of materially deceptive audio or video media of candidate meant to injure candidate’s reputation or deceive voters). Newport Beach has no such statute.

<sup>11</sup> We already have held Moonie’s parody song is protected by the First Amendment, so we need not analyze the application of the public-interest defense as to that portion of the video.



PING, Chief Judge, with whom JARVIS, Circuit Judge, joins, concurring.

I join the Court’s opinion except for Parts II.C., II.D., and II.E. I agree FakeBlock has not conclusively proven its immunity from Austero’s claims. However, the Court should have resolved that question on narrower factual grounds rather than wade into the muddy waters presented by a circuit split. *See Zine v. Mukasey*, 517 F.3d 535, 540 (8th Cir. 2008) (“[W]e need not enter this thicket because the issue presented in this case can be resolved more narrowly.”).

Whether section 230(e)(2) exempts state-law intellectual-property claims from the CDA’s grant of immunity is not well-settled. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 n.9 (1st Cir. 2016) (“The application of the [subsection (e)(2)] exemption to the appellants’ state law claims for the unauthorized use of pictures is not free from doubt.”). Thus, this difficult question should be sidestepped if possible. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1324 (11th Cir. 2006) (“[T]he district court did not need to address the difficult issues of application of [subsection (e)(2)] of the CDA under the facts of this case.”).

Here, Austero does not seek to hold FakeBlock responsible “as the publisher or speaker of any information provided by another information content provider,” 47 U.S.C. § 230(c)(1), but instead for its *own speech*. And “an interactive computer service provider remains liable for its own speech.” *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007);

*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 297 (D.N.H. 2008) (“[T]he Act offers no protection to a service provider for publishing tortious content created by the provider itself.”).

Under section 230, an “information content provider” includes “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). “This definition ‘cover[s] even those who are responsible for the development of content only in part.’” *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (citation omitted); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 n.6 (N.D. Cal. 2006) (suggesting ISP might simultaneously be *both* an “information content provider” and an “interactive computer service provider”).

Here, the evidence is undisputed that the challenged video was uploaded to FakeBlock by its own corporate officer, Maebly Fünke. *See, e.g., Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 225 (3d Cir. 2007) (recognizing corporations can act only through agents and employees).

FakeBlock points to evidence that it thinks shows Fünke acted in her own interests. Specifically, Fünke admitted her primary motivations in creating *Moonie Bares All* and uploading it to FakeBlock were to advertise her software’s capabilities and assist her mother’s campaign. FakeBlock argues this testimony conclusively proved Fünke acted in her own personal capacity.

But for summary-judgment purposes, we cannot disregard the evidence that suggests Fünke did act in her capacity as a FakeBlock officer. She testified she uploaded her film only to FakeBlock, and no other site, because (1) she knew—and in fact intended—that her film go viral, and (2) she specifically wanted the expected web traffic to come to FakeBlock because of her investment in the site.

FakeBlock argues this testimony shows only Fünke's desire to benefit her personal investment. But Fünke's job duties, as director of investor relations, included advertising the site and attracting additional investors. Thus, this evidence raises a reasonable inference that Fünke acted in her corporate capacity by uploading a video that she hoped would draw more investors to FakeBlock. We must construe all reasonable inferences in Austero's favor. *See Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

FakeBlock stresses the fact that its CEO, George Maharis, terminated Fünke for uploading this video, and FakeBlock argues that evidence proves Fünke did not have corporate authority to do what she did. However, that argument fails to account for the timeline. Fünke uploaded her video on May 29, 2018. There it sat until August 27, 2018—three days after Austero filed her lawsuit—when Maharis finally deleted the video and fired Fünke. It is *at least* as likely, if not more so, that Fünke was terminated, not for acting outside her authority, but as part of FakeBlock's damage control following Austero's filing of a lawsuit against FakeBlock.

In summary-judgment practice, all reasonable inferences must be construed in the non-movant's favor. *See id.* The jury might well decide Fünke acted in her own personal interest, not in her capacity as an officer for FakeBlock. But it is not for us to evaluate witnesses' credibility, weigh the evidence, or resolve factual disputes. *See Guzman*, 18 F.4th at 160. Instead, our job, simply put, is to decide whether a reasonable jury, applying all inferences in Austero's favor, could find for her. *See id.*

Because the Court could have decided FakeBlock's immunity arguments on narrower grounds, the Court should not have undertaken to decide whether section 230(e)(2) also applies to state-law intellectual-property claims.

WALT, Circuit Judge, dissenting.

Something very dangerous is going on here. . . .  
Overprotecting intellectual property is as harmful  
as underprotecting it. Creativity is impossible  
without a rich public domain.

*White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513  
(9th Cir. 1993) (Kozinski, J., dissenting).

The Court has made a huge mistake.

*Moonie Bares All* is crude, and to the extent it might  
be seen as mocking Lucille Austero’s past history of  
substance abuse—from which she reportedly has  
recovered—or her current struggles with vertigo, it is  
distasteful and perhaps even cruel. Nevertheless, even  
“vulgar forms of expression fully qualify for First  
Amendment protection.” *Hilton v. Hallmark Cards*, 599  
F.3d 894, 910 (9th Cir. 2010) (citation omitted). “It makes  
no difference that [*Moonie Bares All*] may have few  
redeeming features . . . or that an ordinary [viewer] may  
find it distasteful. The compass of the First Amendment  
covers a vast spectrum of tastes, views, ideas, and  
expressions.” *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123,  
138 (2d Cir. 1984) (citation omitted).

Even had Austero made out a prima facie case of  
infringement upon her right of publicity—and I do not  
believe she has—*Moonie Bares All* is sufficiently  
transformative as to be entitled to First Amendment  
protection. Further, the Court has missed an opportunity  
to promote predictability in the law by adopting the  
Ninth Circuit’s strict interpretation of section 230(e)(2).

Exposing interactive computer services to potential liability under fifty-one distinct sets of state-law intellectual-property regimes is directly contrary to Congress's stated intent, but that is not its only cost. Companies like FakeBlock will have no choice but to censor every photograph, painting, drawing, sound recording, and video, lest somebody claim a violation of state law *somewhere*. Social-media companies generally do not have a sufficient number of employees to perform these tasks. Thus, the new rule in this circuit likely will stifle free speech on the internet.

Finally, although some right-of-publicity claims might truly involve *intellectual* property, Austero's does not. Accordingly, FakeBlock is immune from her claims.

Because the Court reaches the wrong result on all of these questions, I respectfully dissent.

## I.

### A.

Every court that has considered section 230 has emphasized the necessarily broad nature of the immunity granted therein. *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (“[C]lose cases . . . must be resolved in favor of immunity . . .”) (citation omitted); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–19 (1st Cir. 2007); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *see also Atl. Rec. Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 699 (S.D.N.Y. 2009). Such broad approaches are well-founded:

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. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.

*Zeran*, 129 F.3d at 331 (citation omitted).

The majority's position is not as tenable as it suggests. The majority states, "we join the First Circuit and the Third Circuit, and the district courts in New Hampshire and New York, in holding section 230 does not extend immunity to interactive service providers facing federal *or state* intellectual-property claims." *Ante* at 17. But the First Circuit softened its stance on this question following its 2007 opinion in *Lycos*.

In 2016, the First Circuit assumed *without deciding* that the plaintiff's state-law claims qualified for the (e)(2) exception. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 (1st Cir. 2016). In a footnote, the First Circuit threw more water on *Lycos*: "The application of the exemption to the appellants' state law claims . . . is not free from doubt. At least one court of appeals has suggested that state law intellectual property claims are not covered by this exemption." *Id.* at 26 n.9 (citing

*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 & n.5 (9th Cir. 2007)). In addition, the First Circuit described its own precedent, *Lycos*, as lacking “detailed analysis.” *Backpage.com*, 817 F.3d at 26 n.9. So the only true circuit split is between the Third Circuit and the Ninth Circuit. See *Hepp v. Facebook*, 14 F.4th 204, 217–19 (3d Cir. 2021) (Cowen, J., dissenting).

Moreover, the majority places more emphasis on *Hepp* than is warranted; the Third Circuit itself stressed the narrowness of its holding. 14 F.4th at 214. In fact, *Hepp* dealt only with a statutory cause of action, not Pennsylvania’s common law, and the Third Circuit further stated, “[W]e express no opinion as to whether other states’ rights of publicity qualify as intellectual property as a matter of law.” *Id.*

To the extent the majority seeks refuge in two district-court opinions, a district court in the Eleventh Circuit reached the opposite conclusion. See *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433, at \*11 (S.D. W. Va. Feb. 19, 2008) (“CDA immunity exists for . . . right of publicity claims . . . .”) (citing *Perfect 10*, 488 F.3d at 1118–19).

In my view, the Ninth Circuit’s interpretation of section 230(e)(2) is the better-reasoned rule of law. See *Perfect 10*, 488 F.3d at 1118–19; see also *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019) (following *Perfect 10* by holding section 230(e)(2) applied only to “claims pertaining to an established intellectual property right *under federal law*”) (emphasis added).



The majority appropriately bases its interpretation of section 230(e)(2) in the literal text of the statute, but that is only the starting point in proper statutory construction. “It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute . . . .” *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). Here, the majority erred by failing to properly consider whether its interpretation would frustrate Congressional intent:

In the usual case, where the language of the statute is clear, that is the end of the analysis. But, we can never forget that what we are searching for is Congressional intent. *While the language employed by Congress is usually a sure guide to Congress’ intent, it is not an infallible proxy.* We must bear in mind Learned Hand’s admonition that “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”

*Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992) (citations omitted) (emphasis added). This advice is particularly pertinent when construing a fairly-recent and complex statute that “produces an unexpected result and when there is strong reason to doubt that Congress intended that result.” *Id.*

So it is here. In section 230, Congress explained both its findings and its intended policy. The stated policy included, among other things, Congress's desire:

- (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*; [and]
- (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[.]

47 U.S.C. § 230(b) (emphases added).

Given these policy concerns, Congress cannot have intended to grant immunity from a wide range of state and federal laws—including state criminal laws—and yet create an enormous escape hatch under the nebulous and unending category of state “intellectual property” laws. *See Hepp*, 14 F.4th at 220 (Cowan, J., dissenting). The majority’s expansive interpretation would eviscerate the immunity system set forth by Congress, undermine its stated findings and policies, and arrest the “continued development of the Internet.” *Id.*; 47 U.S.C. § 230(b). The majority should have expanded its analysis beyond the literal statutory language and more seriously considered congressional intent. *Bob Jones Univ.*, 461 U.S. at 586.

The majority seeks to assuage FakeBlock’s serious concerns about inconsistent and multifarious state-law liability by noting Newport Beach has adopted the same Restatement-based right-of-publicity claim as many other states. But the rule of law adopted by the majority does not affect only right-of-publicity claims; it extends to *all* state-law “intellectual property” claims. “[S]tate laws protecting ‘intellectual property,’ however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.” *Perfect 10*, 488 F.3d at 1118; *see Hepp*, 14 F.4th at 223 (Cowan, J., dissenting) (“The appearance of near-uniformity in the adoption of some version of the right of publicity belies the degree to which the exact courts of the right differ significantly from jurisdiction to jurisdiction.”) (citation omitted).

The Court should adopt the interpretation of section 230(e)(2) that “effectuates rather than frustrates the major purpose of the legislative draftsmen.” *D.B. v. Cardall*, 826 F.3d 721, 739 (4th Cir. 2016) (quoting *Shapiro v. United States*, 335 U.S. 1, 31 (1948)); *accord United States v. Bryant*, 996 F.3d 1243, 1257–58 (11th Cir. 2021). Here, that means following the Ninth Circuit’s example and concluding that section 230(e)(2) “is limited to federal intellectual property laws and—at most—state laws only where they are co-extensive with such federal laws.” *Hepp*, 14 F.4th at 226 (Cowan, J., dissenting).

**B.**

Further, Lucille Austero’s right-of-publicity claim, as pleaded, does not constitute an intellectual property claim. *See* 47 U.S.C. § 230(e)(2).

The majority approaches this subsidiary question as an all-or-nothing affair: either *all* right-of-publicity claims constitute “intellectual property” claims, or *none* do. I submit there is a middle ground between these extremes. Specifically, there may be some right-of-publicity claims that truly seek to protect “products of the human intellect.” *Intellectual Property*, BLACK’S LAW DICT. (11th ed. 2019). Those that do, properly could be described as “intellectual property” claims. But many right-of-publicity claims (like Austero’s here) do not qualify because they do not seek to protect any *intellectual* product, but instead, such items as “name or likeness.” RESTATEMENT (SECOND) OF TORTS § 652C.

**1.**

Most of the courts that have classified the right of publicity as an “intellectual property” claim for purposes of section 230(e)(2), including a majority of this Court, have relied on this language from *Zacchini*:

[T]he State’s interest [in permitting a “right of publicity” claim] is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.

*Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). However, that sentence does not proclaim that all rights of publicity are *ipso facto* intellectual property of the same ilk as “patent and copyright law.” Instead, it stands for the unremarkable proposition that states have a valid interest in protecting individuals’ rights to profit from their own publicity. *See id.* That principle can be true *without* elevating such claims to the level of “intellectual property.”

The majority focuses on the underlying nature of a right-of-publicity claim as a *financial* injury, not an injury to the plaintiff’s psyche. That is fine. But all that means is that a right-of-publicity claimant may have a property claim, but not all “property claims” are *intellectual*-property claims. *See, e.g., Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 497 (2d Cir. 2020) (addressing “property claims” of plaintiffs seeking recovery for injury to real property). Instead, this question warrants a deeper inquiry than that conducted by the majority.

## 2.

Here, Congress did not define “intellectual property” for purposes of section 230. Nevertheless, we could consider the definition of “intellectual property” used by Congress in other statutes. *See Leiba v. Holder*, 699 F.3d 346, 354–55 (4th Cir. 2012). This approach does not always work—sometimes it produces absurd results, as discussed in *Leiba*—but it would be an appropriate starting place.

In the Bankruptcy Code, Congress defined “intellectual property” as including trade secrets; protected inventions, processes, designs, or plants; patent applications; plant varieties, works of authorship; or protected mask works. 11 U.S.C. § 101(35A). As others have noted, that definition is incomplete as it omits trademarks. *See Sunbeam Prods., Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372, 375 (7th Cir. 2012). But elsewhere, Congress implicitly defined “intellectual property” in a more inclusive sense that nevertheless *still omits* rights of publicity:

A foreign country denies adequate and effective protection of intellectual property rights if the foreign country denies adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such foreign country to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights, trade secrets, and mask works.

19 U.S.C. § 2242(d)(2). Thus, the Court need not resort to dictionaries to confirm that Congress does not use the term “intellectual property” to mean right-of-publicity claims.

But even if we were to consult dictionary definitions, Austero’s claim fares no better. In *Hepp*, the Third Circuit apparently glossed over the actual *definition* from *Black’s Law Dictionary* in favor of the posited *examples* of “intellectual property.” *See Hepp*, 14 F.4th at 212

(“*Black’s Law Dictionary* defines ‘intellectual property’ to include ‘publicity rights.’”). Actually, *Black’s* defines “intellectual property” as “[a] category of intangible rights protecting commercially valuable *products of the human intellect*.” *Intellectual Property*, BLACK’S LAW DICT. (11th ed. 2019) (emphasis added). *Black’s* second definition for “intellectual property” is like the first: “[a] commercially valuable product of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention, or a trade secret.” *Id.* Under these definitions, Austero’s claim is not one seeking recovery for injury to her *intellectual* property.

### 3.

The more precise inquiry here is not whether a right-of-publicity claim involves an injury to property or psyche, but whether the plaintiff’s *specific claim* involves alleged infringement upon commercially valuable *products of the human intellect*. That was the approach suggested by the district court in *Backpage.com*:

Although certain publicity rights are akin to “intellectual property” rights, a person’s image is not a “product of the human intellect.” “[T]he right of publicity flows from the right to privacy,” which is an intangible right of a different nature. Despite the Doe plaintiffs’ attorney’s contention at oral argument that a photograph may be copyrightable, it does not follow that the underlying image is *ipso facto* protectable *under intellectual property law*.

*Jane Doe No. 1 v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 n.13 (D. Mass. 2015) (citations omitted) (emphasis added).

Here, to the extent Austero owns a protectable interest in her likeness, her claim is based upon Moonie’s alleged physical resemblance to Austero.<sup>1</sup> Austero’s physical appearance is not a product of her intellect. *See id.* Perhaps her haircut reflects her stylist’s intellectual property, but that question is not before us. And of course, Moonie’s staggered walk and drunken vocal delivery—allegedly reflecting Austero’s chronic vertigo and past history of substance abuse, respectively—do not amount to any protectable “proprietary interest” constituting “the reward of [Austero’s] endeavors.”<sup>2</sup> *Zacchini*, 433 U.S. at 573.

Simply put, some, but not all, right-of-publicity claims actually allege infringement upon the plaintiff’s *intellectual* property claims. Austero’s do not; therefore, her claim is not exempt from section-230 immunity.

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<sup>1</sup> I do not see much physical resemblance except for possibly similar haircuts, but Austero hardly has a monopoly on pixie haircuts. *See* Erin Mayer, “The 34 Most Iconic Pixie Cuts of All Time,” REDBOOK, <https://www.redbookmag.com/beauty/hair/advice/g2109/iconic-pixie-cuts/> (last visited Oct. 15, 2022). Otherwise, Jamie Lee Curtis, Halle Berry, Winona Ryder, and countless other women have reason to worry.

<sup>2</sup> This is not to suggest that Hal Smith, who played “Otis” on *The Andy Griffith Show*, Foster Brooks (also well known for his television portrayals of a lovable drunk), Dudley Moore (*Arthur*), or Jack Elam (*High Noon*, *Cat Ballou*, *Cannonball Run*) could not have presented cognizable intellectual-property claims for their conscious acting decisions.



## C.

Judge Ping’s thoughtful concurrence does not provide an alternate route to affirmance of the district court’s immunity ruling. Although we must construe reasonable inferences in the non-movant’s favor, *see Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021), necessarily there must be some *evidence* giving rise to such inferences. Here, there is not.

The concurring opinion erroneously assumes FakeBlock acted as an ordinary, rational company with clearly defined job duties. For example, both the majority and concurring opinions ignore the company’s juvenile job titles (*i.e.*, “Mr. Manager” and the loathsome sobriquet “P Hound”) in favor of “CEO” and “CFO” because my colleagues choose to assume these individuals performed the kinds of job duties typically expected of chief executive officers and chief financial officers. Here, there is no evidence they *actually* did so. FakeBlock was not a well-run, ordered company; it was a ragtag, unsophisticated start-up conceived in a UC Irvine dorm room and run by college students on a shoestring budget.

The concurring opinion focuses on Maeby Fünke’s role within the company. Apparently, she had no job title within FakeBlock (not that job titles meant anything in this company). Instead, the evidence suggests Fünke shoehorned her way into FakeBlock by investing a small amount of her own money, by openly stumping for FakeBlock during an unrelated speech at a Hollywood industry function, and by using her influence within Hollywood to attempt to convince others to invest, too.

But critically, Austero presented no evidence that it was Fünke's corporate *responsibility* to raise investment funds for FakeBlock, or even evidence that Fünke had any duties at all. Certainly there is insufficient evidence about Fünke's job duties from which any jury could conclude that Fünke necessarily acted on FakeBlock's behalf when she uploaded the offending video. Without such evidence, the district court should have granted summary judgment to FakeBlock on its immunity claims. *See Guzman*, 18 F.4th at 160.

The concurrence stresses the fact that Fünke was among a small group of individuals with the authority and ability to upload videos to FakeBlock. But Austero adduced no evidence about *why* Fünke had such authority. The concurrence simply assumes Fünke had such upload authority because she was a "corporate officer." But nobody testified to that, and the evidence does not support that conclusion. In fact, the evidence suggests Fünke's primary skill—besides grifting, allegedly, *see ante* 4 n.2—was as a computer programmer. Because FakeBlock was still in the beta-testing phase at the time, it is more likely that Fünke was given access to assist in error-testing the site.

The fact that Fünke occasionally posted material to FakeBlock is not evidence that she necessarily did so *in a corporate capacity*. There was evidence that Fünke had made other posts, and uploaded other videos (including several short films supportive of her mother's political campaign) that had nothing to do with her alleged job duties of securing additional investors.

As to the offending video itself, Fünke did not testify that she uploaded the video to FakeBlock to attract additional investors; she testified she wanted to attract traffic to FakeBlock to further and advance her *own* monetary investment in the company. Notably, Fünke's accompanying post said nothing about FakeBlock. Her post instead described Fünke's own personal, proprietary software, and it prompted viewers to click on a link to an external website, to wit: her mother's campaign website.

Thus, the summary-judgment evidence does not support the concurrence's alternate path to affirming the district court's immunity ruling.

## II.

On the merits, the Court need not have addressed the defendants' First Amendment affirmative defenses because Austero did not prove a *prima facie* case of infringement upon protectable property rights.

### A.

The Court's erroneous outcome is a predictable result from its decision to embark on the wrong road at the outset. The Supreme Court of Newport Beach has not adopted the alleged "elements" of a right-of-publicity claim which the majority undertakes to consider. Indeed, the only support offered by the majority for those "elements" is a district court opinion from New Hampshire that cited to a *treatise* as support. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008).

In that regard, the majority erred by making an *Erie* guess at Newport Beach state law without a sufficient supporting basis. The Supreme Court of Newport Beach has never identified the elements of a right-of-publicity claim. Neither has any other Newport Beach state court. Thus, before the Court could make any *Erie* guess, it should have consulted decisions from other jurisdictions to determine the “majority” rule. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 311 (5th Cir. 2010). Instead, the Court apparently consulted only one lonely district-court opinion. That court did not suggest that the elements stated in the treatise even reflected *New Hampshire* law. *Friendfinder*, 540 F. Supp. 2d at 304.

This case involves a close question of first impression with “scant on-point precedent,” and thus, “any *Erie* guess would involve more divining than discerning.” *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 202 (5th Cir. 2020). Rather than make an *Erie* guess, the majority should have asked the Supreme Court of Newport Beach to identify the elements of a right-of-publicity claim in this state. *See Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 18 F.4th 802, 804 (5th Cir. 2021).

The majority’s erroneous *Erie* guess matters because the *Friendfinder* court’s statement of elements greatly expands the scope of a right-of-publicity claim beyond that adopted by the Newport Beach Supreme Court: “One who appropriates to his own use or benefit the *name* or *likeness* of another is subject to liability to the other for invasion of his privacy.” RESTATEMENT (SECOND) OF TORTS § 652C (emphasis added).

Before the rampant and unjustified expansion of right-of-publicity claims by courts to encompass “identity or persona,” the law was that “a cause of action for appropriation of the right to publicity requires proof of the appropriation of a name or likeness.” *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1402 (9th Cir. 1992) (Alarcon, J., dissenting). For the reasons explained by Judge Alarcon, the *White* majority’s expansion of the tort to also cover appropriation of “identity” was not supported by state or federal law. *See id.* at 1402–04.

Because there is no dispute that *Moonie Bares All* does not use Austero’s name, the only proper question for the Court was whether Austero raised a fact issue about Fünke’s appropriation of Austero’s *likeness*. *See* RESTATEMENT (SECOND) OF TORTS § 652C.

Judge Alarcon properly identified the common thread within the cases relied upon by the *White* majority. “The common theme . . . is that identifying characteristics unique to the plaintiffs were used in a context in which they were the only information as to the identity of the individual.” *White*, 971 F.2d at 1404. Thus, the appropriate takeaway is that “where identifying characteristics unique to a plaintiff are the only information as to the identity of the person appearing in an ad, a triable issue of fact has been raised as to whether his or her identity [has] been appropriated.” *Id.*

Under those standards, Austero raised no fact issue sufficient to avoid summary judgment. Nothing about *Moonie Bares All* appropriates a unique, protectable interest.

**B.**

Considered in light of Judge Alarcon's dissenting opinion, the three EA cases involving video game football make sense. In all three cases, "identifying characteristics unique to the plaintiffs were used in a context in which they were the only information as to the identity of the individual." *White*, 971 F.2d at 1404.

The plaintiff in *Hart* was Ryan Hart, who "was a quarterback, player number 13, with the Rutgers University NCAA Men's Division I Football team for the 2002 through 2005 seasons." *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013). Hart stood 6'2" tall and weighed 197 pounds. *See id.* This biographical information is important because, in EA's *NCAA Football 2006* game, Rutgers's (unnamed) quarterback, player number 13, also was 6'2" tall and weighed 197 pounds. *See id.* at 146. Thus, this biographical information was the *sine qua non* for Hart to demonstrate that EA had used identifying characteristics unique to *him* because that data was the only information that demonstrated Hart's identity. *See White*, 971 F.2d at 1404.

So it was in the EA lawsuit involving former Arizona State starting quarterback Samuel Keller. *See Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1272 (9th Cir. 2013) ("In the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller.") *Id.*

And the same was true in the *Davis* case involving EA's *Madden NFL* game: the game's avatars included historical players with unique identifying information that necessarily identified those avatars as specific historical football players. *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1176 (9th Cir. 2015).

The majority misreads these cases as somehow suggesting biographical data such as height, weight, build, hair color, and hair style somehow constitute enough to demonstrate appropriation of a celebrity's *likeness*. Thus the majority ascribes significance to Moonie's estimated height and body proportions as being similar to Austero's. However, the correct takeaway from the EA cases is that Austero's 5'4" height and approximate body proportions could be significant only if her height, weight, proportions, hair color, and hair style *uniquely identified* her such that Moonie necessarily *must be* Lucille Austero and could not be anyone else.

But of course, Austero does not own a monopoly in being 5'4."<sup>3</sup> In fact, the average height among all American woman, aged 20 and up, is *5 foot 4 inches tall*. "What Is the Average Height for Women?," CLEVELAND CLINIC, <https://health.clevelandclinic.org/what-is-the-average-height-for-women/> (last visited Oct. 15, 2022). Neither is Austero uniquely the only 5'4" woman with black hair cut into a pixie hairstyle.

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<sup>3</sup> This further exemplifies the fallacy in classifying her alleged physical appearance as "intellectual" property.

## C.

## 1.

Perhaps to distinguish Austero from every other short-cut, raven-haired American woman of average height, the Court takes pains to compare Moonie's costume with that worn by Austero in *Cabaret*. But Austero has no protectable interest in the role she played in *Cabaret* or the outfit picked out for her by the film's costume designer. *See White*, 971 F.2d at 1404 (Alarcon, J., dissenting) ("A recognition of the distinction between a performer and the part he or she plays is essential for a proper analysis . . . . [T]hose things which Vanna White claims identify her . . . are, instead, attributes of the *role* she plays."). As the Sixth Circuit explained:

[W]e share . . . [the] unwillingness to give every individual who appears before a television or movie camera, by occupation or happenstance, the right as a matter of law to compensation for every subtle nuance that may be taken by someone as invoking his identity without first being required to prove significant commercial value and identifiability. Such a holding would upset the careful balance that courts have gradually constructed between the right of publicity and the First Amendment and federal intellectual property laws, undermining the right's viability.

*Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626 (6th Cir. 2000).



**2.**

For the same reason, Austero has no protectable interest in the similarity between the name “Moonie” and the “Junie Moon” role Austero played fifty-two years ago. The rights to that name presumably belong to the copyright owner. *See Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997).

For what it’s worth, there is almost no similarity between Moonie and Junie Moon. The Junie Moon role played by Austero featured a different haircut than Moonie *or* Austero (currently); in addition, the movie character Junie Moon suffered from significant facial scarring that was central to the plot of that story. Although Austero appeared nude in that movie, there is no evidence that anybody would associate Moonie’s strip tease with Austero’s nude scenes in *Tell Me That You Love Me, Junie Moon*. That movie was a financial flop, and it is not a well-known movie (much less one commonly associated with Austero).

**3.**

As to Moonie’s allegedly pilfering dance steps from Austero, it may be that Austero could pursue a copyright claim against Fünke if Austero’s previous tap-dance performance was indeed copyrightable as a “choreographic work.” *See, e.g., Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986). But we need not and should not extend right-of-publicity claims to encompass rights that may be protected by other forms of intellectual property, like copyright.

## 4.

Turning to Moonie's voice, the majority cites *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), in support of its conclusion that Austero raised a fact issue as to the similarity between her singing voice and Moonie's. But *Midler* is not on all fours with this case.

It is undisputed that Moonie's voice does not match Austero's voice from any time period, ever. The best evidence Austero can summon is her expert Ann Veal's speculation that *maybe* Moonie's voice might be Austero's current voice but possibly digitally altered to be an octave higher. Although we must draw all reasonable inferences in Austero's favor, *see Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021), Veal's testimony does not give rise to a *reasonable* inference because it is based upon a mere possibility. *See GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1200–01 (10th Cir. 2022).

Even crediting Veal's insufficient testimony, it still would not raise a fact issue here. In *Midler*, the Ninth Circuit relied heavily on the fact that "a number of people" and "many personal friends" believed the imitative voice "sounded exactly" like Midler. *See Midler*, 849 F.2d at 461–62. Even if there might be some possible link between Moonie's voice and Austero's, it is doubtful that anybody watching *Moonie Bares All* would really believe they were hearing Austero's (much lower) voice. There simply is no evidence to support any such conclusion. And unlike *Midler*, the song sung by Moonie was not commonly associated with Austero, who was known for singing a *different* "New York, New York."

**D.**

I am concerned about the majority's erroneous preoccupation with Fünke's supposed intent in creating Moonie. The majority's conclusion with respect to the transformative-use doctrine apparently relies on part of one answer to one deposition question. Even then, the majority misconstrues that answer. Fünke did not testify she intended for viewers to license her software because of its capability to realistically portray *celebrities*, but instead, *humans in general*. If a future licensee misuses Fünke's software to appropriate some celebrity's protectable publicity interest, courts can and should intervene at that time.

Fünke's intent is irrelevant here. Even if Newport Beach had adopted the "elements" proposed by the majority, nothing in those elements says anything about the defendant's intent. Whether Fünke intended to appropriate Austero's likeness is entirely irrelevant for purposes of this appeal.

**E.**

Finally, although the Court did not need to consider the transformative-use test to decide this appeal, in my view, the Court misapplied that test by purporting to cut *Moonie Bares All* up into halves and analyze those sections independently. There is no authority in American jurisprudence for a court to slice up a short film into pieces and conduct a frame-by-frame *JFK* Zapruder-like analysis to each segment.

If *Moonie Bares All* is about Lucille Austero, then the entire short film qualifies as parody and thus is protected by the First Amendment. That the lampooning does not begin immediately does not change the analysis. Surely, a filmmaker should be entitled to have a few seconds to set the scene and introduce the parody subject in a subtle fashion, rather than having to affix a name tag to one's subject at the outset of every parody.

If *Moonie Bares All* had been the subject matter of a skit on *Saturday Night Live*, this Court would not hesitate in labeling that skit as parody. See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1520 (9th Cir. 1993) (Kozinski, J., dissenting). Instead, by arbitrarily chopping *Moonie Bares All* in half and protecting only the latter half, the majority does precisely what Judge Kozinski predicted in his dissent from the Ninth Circuit's refusal to grant *en banc* rehearing in *White*: "Under the majority's opinion, it's now a tort for [filmmakers] to remind the public of a celebrity." *Id.*

### III.

For all of these reasons, and for the reasons explained by both of the two dissenting opinions in *White*—including the excellent dissenting opinion authored by Judge Kozinski, I respectfully dissent from the Court's opinion and judgment.