

violation of the plaintiff's right of publicity; and denied as to Count VII.

BACKGROUND

The defendant corporations operate a number of affiliated "web communities" where members can meet each other through on-line personal advertisements, including "AdultFriendFinder.com," which bills itself as "the World's Largest SEX and SWINGER Personal Community." To participate, a user registers by entering a variety of personal information, creating an on-line profile that can be viewed by other members of the community. Portions of these profiles, known as "teasers," also appear on Internet search engines and as advertisements on other websites unaffiliated with the defendants'.

In June 2005, a profile of a female member under the screen name "petra03755" was created on the AdultFriendFinder site. The profile identified the member as a recently separated 40-year old woman in the Upper Valley region of New Hampshire who was seeking "Men or Women for Erotic Chat/E-mail/Phone Fantasies and Discreet Relationship."¹ To create the profile, "petra03755" entered a

¹ The Upper Valley region of New Hampshire encompasses a number of towns along or near the Connecticut River in Sullivan and Grafton Counties, including Hanover, the home

variety of information on her sexual proclivities into an on-line form provided by the website. She also provided biographical data, such as her birth date, height, build, and hair and eye color, and submitted a nude photograph, purportedly of herself.

The plaintiff alleges she had nothing to do with creating the profile, that she does not engage in the "promiscuous sexual lifestyle" or the "perverse" sexual activities it describes, and that the photograph does not depict her. Nevertheless, she claims that the biographical information and photo "reasonably identified" her as "petra03755" to people in her community. The plaintiff does not know the true identity of the user who created the profile--only that he or she accessed the AdultFriendFinder website through the Dartmouth College computer network using an e-mail address provided by Yahoo!. The plaintiff complains that the defendants "took special pains" to ensure the anonymity of those posting on the AdultFriendFinder site and did nothing to verify the accuracy of any of the information posted.

The plaintiff says that she did not learn of the profile until more than a year after its creation, when an acquaintance let on that she had been discussing it with other members of the plaintiff's circle who believed the profile to be hers. In the

of Dartmouth College.

meantime, the plaintiff alleges, the profile deceived consumers into registering for the defendants' on-line dating service in order to meet her. After the plaintiff contacted the defendants about the offending profile, they agreed to remove it from the AdultFriendFinder site. As a result, when other members thereafter attempted to access the profile, the site displayed the message, "Sorry, this member has removed his/her profile." The plaintiff asserts that this message was itself false in communicating that she was a member of the service and that the profile had been hers in the first place.² She further faults the defendants for doing nothing to inform other users that the profile "had in fact been bogus and false."

For several months after the plaintiff's initial complaints, the profile allegedly continued to appear, with slight modifications, on other similar websites operated by the defendants.³ In addition, the defendants allegedly caused

² The plaintiff also alleges that the defendants later identified "petra03755" as a "Standard Member" of one of their affiliated sites, LesbianPersonals.com.

³ At oral argument, the plaintiff did not identify any differences between these "modified" profiles and the original version that appeared on the AdultFriendFinder site, other than a change in "petra03755"'s age from 40 to 41 or "early 40s." No other difference is apparent from either the samples of the teasers attached as exhibits to the complaint or the allegations of the complaint itself.

portions of the "petra03755" profile to appear as "teasers" on Internet search engines and advertisements on other third-party websites, including "sexually related" ones. The search engines retrieved the teasers when users entered search terms matching some of the information in the profile, including true biographical information about the plaintiff. The advertisements appeared when the third-party website recognized a user's location as near the Upper Valley region of New Hampshire. Through hyperlinks, these teasers and advertisements served to direct Internet traffic to the defendants' own websites, allegedly increasing their profitability.

The plaintiff's complaint sets forth eight numbered counts against the defendants:

- "Invasion of Property/Intellectual Property Rights" (Count I);
- Defamation (Count II);
- "Intentional/Negligent/Reckless Conduct" (Count III);
- "Dangerous Instrumentality/Product" (Count IV);
- Intentional infliction of emotional distress (Count V);
- Violation of the New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A (Count VI);
- False designations in violation of the Lanham Act, 15 U.S.C. 1051 et seq. (Count VII); and
- "Willful and Wanton Conduct" (Count VIII).

She claims a variety of harm: damage to her reputation; further alienation from her husband, embarrassment, loss of "important employment opportunities," resources expended investigating and rectifying the false profile, and emotional distress, including anxiety over the lingering effect of the false profile, which has allegedly necessitated psychological treatment. In addition to compensatory damages, the plaintiff seeks injunctive relief requiring the defendants to notify the public of the circumstances giving rise to the appearance of the profile on their websites, among other remedial measures.

ANALYSIS

I. Applicable legal standard

"A complaint should not be dismissed unless it is apparent beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Stanton v. Metro Corp., 438 F.3d 119, 123-24 (1st Cir. 2006) (internal quotation marks omitted). In ruling on a motion to dismiss for failure to state a claim, the court must accept the well-pleaded factual allegations of the complaint as true, drawing all reasonable inferences in the plaintiff's favor. Id. at 123. Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved

consistent with the allegations.” Cepero-Rivera v. Fagundo, 414 F.3d 124, 129 (1st Cir. 2005) (internal quotation marks omitted). The burden is on the defendant to make this showing. See, e.g., Directv, Inc. v. Treesh, 487 F.3d 471, 475 (6th Cir. 2007), cert. pet. filed, No. 07-1004 (S. Ct. Jan. 31, 2008).

II. Whether the Communications Decency Act bars the plaintiff's state-law claims

Under the Communications Decency Act (“CDA”), “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” 47 U.S.C. § 230(c)(1), defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service,” id. § 230(f)(3). The CDA further dictates 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). These provisions bar state law claims against interactive computer services for publishing content obtained from another information content provider. See Universal Comm’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007); see also Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v.

Craigslist, Inc., ___ F.3d ____, 2008 WL 681168, at *4 (7th Cir. Mar. 14, 2008); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120 (9th Cir. 2003); Green v. Am. Online (AOL), 318 F.3d 465, 470-71 (3d Cir. 2003); Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). But the CDA also provides that it "shall [not] be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(2).

The defendants argue that all of the plaintiff's state law theories of recovery are barred by the CDA. The plaintiff responds that the Act does not bar her state law claims because (1) they arise out of the defendants' own statements, which are not protected by the Act, and (2) her claim for invasion of privacy is premised on a "law pertaining to intellectual property" unaffected by the Act. The Court will address these contentions in turn, assuming for purposes of the defendants' first argument that § 230(2)'s "intellectual property exception" does not apply to the plaintiff's claims.

A. The state law claims (other than invasion of privacy)

In Universal, the First Circuit instructed that "Section 230 immunity should be broadly construed" so as to effectuate what it identified as "Congress's 'policy choice . . . not to deter harmful online speech through the . . . route of imposing tort

liability on companies that serve as intermediaries for other parties' potentially injurious messages.'"⁴ 478 F.3d at 418-19 (quoting Zeran, 129 F.3d at 330-31 (ellipses by the court)). To achieve this goal, the court reasoned, § 230 "immunity extends beyond publisher liability in defamation law to cover any claim that would treat [a service provider] 'as the publisher,'" id. at 420, regardless of the plaintiff's theory of action, id. at 418.

This immunity, as construed by the First Circuit, plainly extends to a number of the acts and omissions alleged in the plaintiff's complaint. For purposes of the appearance of the profile on the AdultFriendFinder website, the plaintiff does not question that each of the defendants qualifies as a "provider or user of an interactive computer service" or that "petra03755" qualifies as "another information content provider" within the meaning of § 230. Thus, because the only role the defendants

⁴ Congress made this choice, the court explained, because this species of liability would tend to chill speech over the Internet, "given the volume of material communicated through such intermediaries, the difficulty of separating lawful from unlawful speech, and the relative lack of incentives to protect lawful speech." Universal, 478 F.3d at 419-20. Furthermore, the court observed, Congress also worried that intermediary liability could have the opposite effect: discouraging service providers from undertaking voluntary measures to screen content with the fear of lawsuits accusing them of carrying out those efforts negligently. Id. at 420.

played in the initial appearance of the profile was as the publisher of information supplied by "petra03755," the plaintiff cannot call the defendants to answer for that under state law. See, e.g., Carafano, 339 F.3d at 1122-24 (dismissing complaint against on-line dating service for unknown party's posting of unauthorized and defamatory profile of plaintiff); Zeran, 129 F.3d at 328 (affirming dismissal of complaint against service provider for defamatory statements posted by others); Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998) (dismissing claim against service provider for disseminating another's statements).

The Universal opinion makes clear that the bar on publisher liability also extends to the plaintiff's charges that certain features of the AdultFriendFinder service facilitated the submission of false or unauthorized profiles. The plaintiff in Universal argued that the postings on the defendant service provider's message boards did not qualify as "information provided by another" under § 230(f)(3) because the provider had "rendered culpable assistance" in creating the postings "through the construct and operation of its web site," including a feature that allowed a single individual to post under multiple screen names. 478 F.3d at 420. In rejecting this argument, the Court of Appeals called this feature "standard" for such sites,

reasoning that imposing liability on that basis here would “eviscerate Section 230 immunity.” Id. Under Universal, then, § 230 bars the plaintiff’s claims that the defendants acted wrongfully by encouraging the anonymous submission of profiles or by failing to verify that a profile corresponded to the submitter’s true identity.⁵ The plaintiff offers no argument to the contrary.

The same is true of the plaintiff’s claim that the defendants contributed to the lascivious nature of the profile by allowing the user to select from a pre-set menu of “sexual responses” in creating it. The Universal court relied on the Ninth Circuit’s decision in Carafano that an Internet dating service did not forfeit its § 230 immunity by providing a questionnaire that one of its users had completed with false information about the plaintiff to create an unauthorized and defamatory profile. 478 F.3d at 420 (citing Carafano, 339 F.3d at 1124-25). The Carafano court rejected the argument that furnishing the questionnaire--or, for that matter, organizing users’ responses into profiles as part of the site’s sophisticated searching and matching functions--amounted to the

⁵ Indeed, the Universal court ruled that the defendant there did not exceed its privileges as a service provider even through its practice of taking legal action to protect the anonymity of its subscribers. 478 F.3d at 421.

"creation or development of information" under § 230(f)(3) necessary to transform the service provider into an "information content provider" unprotected by the CDA.⁶ 339 F.3d at 1124-25. Despite these practices, the Ninth Circuit reasoned, "'the underlying misinformation' that formed the basis for the complaint was contained entirely in the responses provided by the user," rather than originating with the defendant itself. Universal, 478 F.3d at 420 (quoting Carafano, 339 F.3d at 1125).

This reasoning, adopted by the First Circuit in Universal, is also fatal to the plaintiff's claim arising from the defendants' alleged "first-party statements" in posting the profile on websites besides AdultFriendFinder, whether as such or in the form of "teasers" or other advertisements. Section 230 immunity depends on the source of the information in the allegedly tortious statement, not on the source of the statement itself. Because "petra03755" was the source of the allegedly injurious matter in the profile, then, the defendants cannot be held liable for "re-posting" the profile elsewhere without impermissibly treating them as "the publisher or speaker of []

⁶ Like the questionnaire alleged here, the questionnaire at issue in Carafano offered a "menu of 'pre-prepared responses'" to a variety of "detailed questions." 339 F.3d at 1125.

information provided by another information content provider.”⁷
47 U.S.C. § 230(c)(1). The CDA shields the defendants from precisely that kind of liability. See Chicago Lawyers’ Comm., 2008 WL 681168, at *4 (“What § 230(a)(1) says is that an online information system must not ‘be treated as the publisher or speaker of any information provided by’ someone else.”); accord Universal, 478 F.3d at 422 (rejecting claim that “would depend on treating [provider] as the publisher of [another’s] postings”).

Furthermore, as the First Circuit also held in Universal, a service provider’s privilege as a “publisher” under the Act protects more than the mere repetition of data obtained from another source, but extends to the provider’s “inherent decisions about how to treat postings generally.” 478 F.3d at 422. So the plaintiff cannot escape the bar of § 230 through her claims that the defendants wrongfully identified the profile as “hers” when they removed it from the AdultFriendFinder site, or that they falsely stated that “this member” was the one who had removed it.

⁷ That the defendants allegedly learned that the profile was false and unauthorized before re-posting it does not bring their conduct outside the protections of the Act. As the First Circuit held in Universal, “[i]t is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech” under § 230. 478 F.3d at 420 (citing Zeran, 129 F.3d at 332-33). The plaintiff does not argue to the contrary.

The allegedly tortious nature of those statements proceeds solely from the association they create between the plaintiff and the content of the profile. Again, that content did not originate with the defendants, but with an unknown third party.⁸ Like the defendant in Carafano, the defendants here were "not responsible, even in part, for associating certain . . . responses with a set of physical characteristics, a group of . . . answers, and a photograph," and so "cannot be considered an 'information content provider' under the statute because no profile has any content

⁸ To the extent that the plaintiff claims that the defendants injured her merely by identifying her--or, more accurately, a person reasonably believed to be her--as a member of their services, that information likewise originated with the third party who filled in the profile with biographical information corresponding to the plaintiff's and therefore cannot serve as the basis of a claim unscathed by § 230. Moreover, the plaintiff does not claim that the defendants' statements identifying the user who created the profile as such "are anything but standard for message boards and other web sites." Universal, 478 F.3d at 420. As noted supra, the First Circuit has held that premising liability on the standard features that service providers use in identifying and organizing data from other sources would effectively gut the protections of the Act. Id.; see also Global Royalties, Ltd. v. Xcentric Ventures, LLC, No. CV-07-0956, 2008 WL 565102, at *3 (D. Ariz. Feb. 28, 2008) (reading § 230 to bar claim that service provider failed to remove defamatory statement despite its author's request because, otherwise, "any time anyone purporting to be the author of a particular content requested retraction, website operators would still have an incentive to simply remove the speech," in contravention of § 230's purposes).

until a user actively creates it.” 339 F.3d at 1124; see also Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 717-18 (Cal. Ct. App. 2002) (ruling that § 230 barred claims arising from on-line auction site’s endorsements of certain sellers where site automatically generated endorsements based on data from users).

A service provider’s immunity as a publisher also extends to its “exercise of a publisher’s traditional editorial functions” with respect to third-party information, “such as deciding whether to publish, withdraw, postpone or alter” it. Zeran, 129 F.3d at 330; accord Universal, 478 F.3d at 422 (ruling that § 230 shielded service provider’s “editorial decision” as to defamatory third-party posting). A number of courts have reasoned that construing the CDA more narrowly would frustrate what they see as one its primary objectives by discouraging service providers from voluntarily regulating third-party contributions to their websites. See Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003); Ben Ezra, Weinstein, & Co., 206 F.3d at 985-86; Zeran, 129 F.3d at 330; Blumenthal, 992 F. Supp. at 51-52. Rather than risking lawsuits over allegedly failed efforts toward that end, these courts have reasoned, service providers would simply disallow--or allow--all third-party speech regardless of content, transforming the Internet into a highly sterile--or highly

polluted--medium, in contravention of the policies the Act was explicitly intended to further. See also 47 U.S.C. § 230(b).

Under the CDA, then, the plaintiff cannot recover from the defendants for re-posting the profile with what she describes as "slight" modifications, as other courts have ruled in rejecting similar claims. See Batzel, 333 F.3d at 1031 (holding that service provider's "minor alterations" to defamatory material from another source do not "rise to the level of 'development'" necessary for liability under § 230(f)(3)); Ben Ezra, Weinstein, & Co., 206 F.3d at 985-86 (rejecting argument that service provider's deletion of some, but not all, inaccurate data about plaintiff from another source "transforms Defendant into an 'information content provider'"); Blumenthal, 992 F. Supp. at 52 (ruling that service provider's exercise of "editorial control" over defamatory third-party content fell within § 230 immunity).

As the plaintiff points out, the Act offers no protection to a service provider for publishing tortious content created by the provider itself. See Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1262-1263 (N.D. Cal. 2006) (ruling that § 230 did not bar misrepresentation claims arising out of dating service's alleged creation of false profiles which induced plaintiff to maintain his membership there); Hy Cite Corp. v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005) (ruling that §

230 did not bar claims premised on service provider's creation of its own comments and other defamatory content to accompany third-party postings on its website).⁹ But, as the foregoing discussion makes clear, a service provider's exercise of its

⁹ The court acknowledges that certain aspects of these rulings suggest an even narrower view of § 230 immunity, but declines to follow them because they contradict the First Circuit's Universal decision. In Anthony, the court ruled that the immunity did not extend to an on-line dating service's circulating "profiles of actual, legitimate former subscribers whose subscriptions had expired, thus giving the misleading impression that these individuals are still available for dates." 421 F. Supp. 2d at 1260 (internal quotation marks omitted). Though recognizing that "third parties created these profiles," the court reasoned that "[b]ecause [the plaintiff] posits that [the defendant's] manner of presenting the profiles--not the underlying profiles themselves--constitute [sic] fraud, the [Act] does not apply." Id. at 1263. Insofar as this reasoning suggests that a service provider can be held liable despite the CDA simply for "presenting" data from another information content provider, it is inconsistent with Universal, as discussed supra.

In Hy Cite, the court ruled that the defendants' generalized solicitation of reports for their website from third parties "could support a finding that Defendants are responsible for the creation or development" of the data in the reports. 418 F. Supp. 2d at 1149 (internal quotation marks and ellipse omitted). But in Universal, the court of appeals expressed doubt about "a culpable assistance exception to Section 230 immunity," and held that, even if such an exception existed, it would require the defendant to engage in "clear expression or other affirmative steps taken to foster unlawful activity." 478 F.3d at 421 (internal quotation marks omitted). The practice alleged in Hy Cite would not seem to meet that standard. In any event, the plaintiff here has not alleged anything even approaching it.

editorial prerogatives as to information from another content provider does not transform the service provider into the content provider under § 230. While, in some cases, whether the service provider has exceeded its editorial privileges may present a close question, see, e.g., Hy Cite, 418 F. Supp. 2d at 1149, the plaintiff herself characterizes the defendants' modifications to the profile as "slight," and does not allege that they contributed to its injurious character.¹⁰ Because the plaintiff seeks to hold the defendants liable as the publisher or speaker of information provided by another content provider, her state-

¹⁰ Again, the only modification the plaintiff has identified is a minimal change in "petra03755"'s age, see note 2, supra. At oral argument, the plaintiff characterized this as a "very minor edit," but argued that it nevertheless showed that the defendants had "consciously" decided whether to re-post the profile, thus transforming the re-postings into their own statements for purposes of § 230. Claiming that the re-postings had been automatically generated, the defendants disputed this point, but it is irrelevant to the question of § 230 immunity anyway. As just discussed, that immunity depends on the source of the information in the injurious statement, not the source of the statement itself, see, e.g., Universal, 478 F.3d at 420, and the source of that information was the creator of the profile, despite the "minor edits" to it allegedly made by the defendants, see, e.g., Batzel, 333 F.3d at 1031. In light of this reality, the CDA does not allow liability against the defendants on the theory that they adopted the third party's statements by consciously--or unconsciously--deciding to re-post them on other sites. See, e.g., Chicago Lawyers' Comm., 2008 WL 681168, at *4.

law claims set forth in Counts II-VI and VIII are barred by the CDA. See 47 U.S.C. §§ 230(c)(1), (e)(3).

B. The invasion of privacy claim

The CDA provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2). Relying on this provision, the plaintiff argues that the CDA does not affect her state-law claims for invasion of privacy, which she characterizes as an infringement of her intellectual property rights. The defendants respond that § 230(e)(2) does not apply to intellectual property rights granted under state--as opposed to federal--law.

In Universal, however, the court of appeals stated, in reference to a claim under Florida’s trademark dilution statute, that “[c]laims based on intellectual property laws are not subject to Section 230 immunity.” 478 F.3d at 422-23. The defendants characterize this pronouncement as non-binding dicta, noting that the court ultimately decided that the plaintiff had not pled a claim for relief under the Florida statute.¹¹ Id. at

¹¹ At oral argument, the defendants sought to characterize this disposition as reflecting the Universal court’s “concern” over the use of state-law intellectual property claims to circumvent CDA immunity. That is inaccurate and, in any event, irrelevant in light of the

425. Because the court of appeals would have upheld the dismissal of the plaintiff's state-law claim regardless of its interpretation of 47 U.S.C. § 230(2), its statement in that regard arguably fits the usual definition of dicta, i.e., observations in a court's opinion which are not essential to the outcome of the case before it. See, e.g., Arcam Pharm. Corp. v. Faria, 513 F.3d 1 (1st Cir. 2007).

court's contrary dicta. While the district court in Universal had ruled that the "trademark claim was effectively a defamation claim in the guise of an antidilution claim" and therefore within the scope of CDA immunity, the court of appeals chose to "reason somewhat differently, holding that even though Section 230 immunity does not apply, the claim was properly dismissed as a matter of trademark law." 478 F.3d at 423 n.7 (internal quotation marks and ellipse omitted). That holding was based on the conclusion that the plaintiff's theory of trademark liability--that its trade name had been diluted when the defendant service providers allowed messages which criticized the plaintiff's business by that name to appear on their message boards--"would raise serious First Amendment concerns." Id. at 423. To avoid these concerns, the court of appeals construed the Florida anti-dilution statute to exclude conduct "simply referring to [a] company [by its] trade name." Id. at 425. That it ultimately dismissed, on grounds unrelated to the CDA, a particular state-law intellectual property claim which survived CDA immunity cannot support the inference that it would read the CDA to bar all such claims if squarely presented with the issue. This conclusion is confirmed by the Universal court's statement, albeit in dicta, that such claims "are not subject to Section 230 immunity." Id. at 422-23.

Nevertheless, just as the First Circuit accords considerable deference to dicta in Supreme Court opinions, see, e.g., SEC v. Rocklage, 470 F.3d 1, 7 n. 3 (1st Cir. 2006), this court "accords substantial deference to the considered dicta of the court of appeals." Buchanan v. Westinghouse Elec. Corp., No. 90-370, 1993 WL 836970, at *1 (D.N.H. Aug. 17, 1993); accord Patsy's Italian Rest., Inc. v. Banas, 508 F. Supp. 2d 194, 211 (E.D.N.Y. 2007); Guyon v. Basso, 403 F. Supp. 2d 502, 509 (E.D. Va. 2005); Max M. v. Thompson, 585 F. Supp. 317, 324 (N.D. Ill. 1984). This court will follow First Circuit dicta over the contrary holding of another appeals court, then, absent a particularly compelling reason to do otherwise.

There is no reason to disregard the dicta from Universal here. As an initial matter, other courts have joined the First Circuit in assuming, at least, that § 230(e)(2) excepts state as well as federal intellectual property laws from the scope of the Act's immunity provision. See Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1324 (11th Cir. 2006); Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001). In support of their more restrictive reading, the defendants rely on the Ninth Circuit's decision in Perfect 10, Inc. v. CC Bill, LLC, 488 F.3d 1102 (9th Cir.), cert. denied, 128 S. Ct. 709 (2007). There, noting the absence of "an express definition of 'intellectual

property'” in the Act itself, the Ninth Circuit “construe[d] the term ‘intellectual property’ to mean ‘federal intellectual property.’” Id. at 1118-19 (footnote omitted). Even putting the contrary First Circuit dictum from Universal aside, this court does not find the Ninth Circuit’s resolution of the statutory interpretation question to be persuasive.

“Statutory interpretation begins with the language of the statute. Where . . . that language is clear and unambiguous, the inquiry is at an end.” Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 8 (1st Cir. 2007) (citing United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989)). Here, the language of § 230(e)(2) itself does not suggest a limitation to federal intellectual property law, but states simply that “[n]othing in this section shall be construed to limit or expand any law relating to intellectual property” (emphasis added). As the Supreme Court has noted in another context, the modifier “any” amounts to “expansive language [that] offers no indication whatever that Congress intended [a] limiting construction.” Harrison v. PPG Indus., 446 U.S. 578, 589 (1980) (reading phrase “any other final action” in Clean Air Act, 42 U.S.C. § 7607(b)(1), “to mean exactly what it says, namely, any other final action”); see also Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831, 835-37 (2008) (reasoning that phrase “any other law

enforcement officer" in Federal Tort Claims Act, 28 U.S.C. § 2680(c), "suggests a broad meaning"). The Ninth Circuit made no attempt to reckon with the presence of the term "any"--or for that matter, the absence of term "federal"--in § 230(e)(2) when limiting it to federal intellectual property laws.

Nor did the Ninth Circuit make any effort to reconcile its reading of § 230(2) with other limiting provisions of § 230 which specifically identify federal or state law as such. See 47 U.S.C. §§ 230(e)(1) ("Nothing in this section shall be construed to impair the enforcement of [named federal criminal statutes] or any other Federal criminal statute"), (e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section") (emphases added). The content of these provisions indicates that, where Congress wished to distinguish between state and federal law in § 230, it knew how to do so. See Voicenet Comms., Inc. v. Corbett, No. 04-1318, 2006 WL 2506318, at *4 (E.D. Pa. Aug. 30, 2006).

In ruling that § 230(e)(1)'s removal of "any other Federal criminal statute" from the scope of the Act did not extend to state criminal law, the Voicenet court reasoned that "[i]f Congress had wanted all criminal statutes to trump the CDA, it could have written [§ 230(e)(1)] to cover 'any criminal statute'"

just as it had written § 230(e)(2) to cover “any law pertaining to intellectual property.” Id. Conversely, the use of “any” in § 230(e)(2), in contrast to the use of “federal” elsewhere in the CDA, suggests that Congress did not intend the terms to be read interchangeably. “It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Duncan v. Walker, 533 U.S. 167, 173 (2001) (internal quotation marks and bracketing omitted) (declining to read “federal” into section of statute where it did not appear because Congress had “denominat[ed] expressly both ‘State’ and ‘Federal’ . . . in other parts of the same statute”); accord United States v. Councilman, 418 F.3d 67, 74 (1st Cir. 2005) (calling this rule “simply a particular application of the classic principle *expressio unius est exclusio alterius*”).

Rather than tying its limiting construction of § 230(2) to the language of the CDA, the Ninth Circuit purported to draw on what it viewed as the purposes of the CDA’s immunity provision, reasoning:

While the scope of federal intellectual property law is relatively well-established, state laws protecting ‘intellectual property,’ however defined, are by no means uniform 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.

Perfect 10, 488 F.3d at 1118 (citing 47 U.S.C. §§ 230(a), (b)).

However salutary this "goal" might be on its own merits, it is not among those "expressed" in § 230. While the text of § 230 identifies one of its purposes as freeing the Internet from "government regulation," 47 U.S.C. § 230(a)(4), this plain language restricts regulation by any government, not just those of the states. One of § 230's announced policies, in fact, is "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." Id. § 230(b)(2) (emphasis added); see also Zeran, 129 F.3d at 330 ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.") (emphasis added). As the presence of § 230(e)(2) indicates, however, Congress also believed that laws protecting intellectual property rights should nevertheless remain in effect--that the potential costs to those rights, in essence, outweighed the benefits of the alternative.

The Perfect 10 court did not identify any other support for its view that the CDA was passed out of a concern for the threat that diverse state laws might have on the development of the Internet. Thus, while Congress often acts to protect interstate commerce from the burden of nonuniform state laws, there is nothing in the language of § 230 effecting that protection here. “Courts are not free to disregard the plain language of a statute and, instead, conjure up legislative purposes and intent out of thin air” under the guise of statutory interpretation. Ruiz, 496 F.3d at 8 (footnote omitted).

Aside from its inconsistency with the statutory language, Perfect 10's reasoning has an additional weakness ignored in the opinion and not convincingly addressed by the defendants here: its assumption that the intellectual property laws of the several states so differ from each other, and from their federal counterpart, that complying with the state laws would burden service providers in a way or to a degree that complying with the federal law would not. The assumption appears shaky at best. “In general, federal and state trademark and unfair competition law can coexist and cooperate without conflict,” 3 Thomas J. McCarthy, McCarthy on Trademarks and Unfair Competition § 22:2, at 22-8 (4th ed. 1992), because “[i]n most states, the state statutes are given the same meaning and interpretation as the

mainstream principles of common law and federal common law," id. § 22:1, at 22-7 (footnote omitted). This is the case in New Hampshire, where courts have regularly looked to federal trademark law in developing state standards. See, e.g., Optical Alignment Sys. & Inspection Servs. v. Alignment Servs. of N. Am., 909 F. Supp. 58, 61-62 (D.N.H. 1995); Auto Body Specialists, Inc. v. Vallee, 127 N.H. 382, 384 (1985).

To be sure, state intellectual property law can differ from federal in particular respects. See, e.g., Attrezzi, LLC v. Maytag Corp., 436 F.3d 32, 40-41 (1st Cir. 2006) (giving effect to New Hampshire law allowing for attorneys' fees in infringement action as a matter of course, despite higher standard imposed by federal law). But neither the Ninth Circuit nor the defendants here offer a single example of how "any particular state's definition of intellectual property," Perfect 10, 488 F.3d at 1118, meaningfully enlarges its protections beyond those conferred by federal law, or how intellectual property regimes "vary widely from state to state" in substance, id. at 1119 n.5. This court has no reason to believe that reading § 230(e)(2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law--an obligation that

persists under even Perfect 10's construction of the CDA.¹² That court's view that "inclusion of rights protected by state law within the 'intellectual property' exemption would fatally undermine the broad grant of immunity provided by the CDA," 488 F.3d at 1119 n.7, is simply unsupported.

Thus, even if it were free to disregard the plain language of § 230(e)(2), this court cannot accept the defendants' claim at oral argument that allowing state-law intellectual property claims to survive the CDA would have a "devastating" impact on the internet. Despite the general consensus before the Perfect 10 decision that the CDA did not shield service providers from state intellectual property law, both the internet and so-called "e-commerce" remain alive and well, and show no signs of imminent collapse. See Laurin H. Mills & Leslie Paul Machado, "ISP Immunity Provision Is Broadly Interpreted: But One Exception Exists When a Violation of Trademark Law Is Alleged," Nat'l L.J., April 15, 2002, at C19. Indeed, while protecting third-party intellectual property rights no doubt presents some challenges for service providers like the defendants, those challenges would appear to be simply a cost of doing business on-line. They

¹² Indeed, the present case serves as an effective counterexample since, as discussed infra, the plaintiff's state right of publicity claim and federal Lanham Act claim almost entirely overlap.

certainly cannot support judicially rewriting the CDA, in any event.

Accordingly, and in line with the First Circuit's dictum in Universal, this court disagrees with the Ninth Circuit's decision in Perfect 10 that § 230(e)(2) exempts only federal intellectual property laws from the operation of § 230. Consistent with its text, § 230(e)(2) applies simply to "any law pertaining to intellectual property," not just federal law. See Gucci, 135 F. Supp. 2d at 413; see also Mills & Machado, supra (calling Gucci "correctly decided" in light of "express statutory language" which "specifically carved out intellectual property claims").¹³

The court must now consider whether, aside from its origin in state law, Count I of the plaintiff's complaint arise from a "law pertaining to intellectual property" under the CDA.¹⁴ This count, entitled "Invasion of Privacy/Intellectual Property

¹³ Predicting that this reading will "inspire some strained trademark claims as creative plaintiffs' attorneys attempt to circumvent the § 230 immunities," this article proposes its own creative response: an argument that § 230(e)(2) does not apply to trademark claims at all because they "are not 'intellectual property' claims." This proposition strikes the court as dubious, see infra, but, in any event, it need not be considered here because the defendants have not advanced it.

¹⁴ The plaintiff also does not argue that § 230(e)(2) exempts any of her state-law claims aside from those asserted in Count I.

Rights,” asserts four separate theories against the defendants: (1) that they have intruded on her solitude, (2) that they have publicly disclosed private facts about her, (3) that they have given her publicity so as to place her in a false light, and (4) that they have appropriated her identity for their own benefit or advantage. These theories correspond to the four privacy torts acknowledged by the New Hampshire Supreme Court in Hamberger v. Eastman, 106 N.H. 107, 110 (1964) (quoting William L. Prosser, Prosser on Torts § 112, at 832 (3d ed. 1964)), and later adopted in the Restatement (Second) of Torts §§ 652A-E (1977). See J. Thomas McCarthy, The Rights of Publicity and Privacy § 1:24 (2d ed. 2000) (hereinafter “McCarthy, Rights of Publicity”).

While the plaintiff objects to the dismissal of any part of Count I on the ground that it asserts “intellectual property rights” under § 230(e)(2), her argument and authorities on that score address only the fourth theory, commonly known as a “right of publicity” claim. See, e.g., Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983). As the plaintiff points out, “the right of publicity is a widely recognized intellectual property right.” Almeida, 456 F.3d at 1322 (citing authorities). Such a claim therefore arises out of a “law pertaining to intellectual property” within the meaning of the statute. See 1 McCarthy, Rights of Publicity, § 3:42

(opining that § 230 immunity does not apply to claim for infringement of right to publicity by virtue of § 230(e)(2)).

The other three torts encompassed by the "right of privacy" rubric, however, do not fit that description. Unlike a violation of the right to publicity, these causes of action--intrusion upon seclusion, publication of private facts, and casting in false light--protect "a personal right, peculiar to the individual whose privacy is invaded" which cannot be transferred like other property interests. Restatement (Second of Torts) § 625I & cmt. a; see also Lambert v. Garlo, 484 N.E.2d 260, 263 (Ohio Ct. App. 1985) ("The right of privacy is not a property right, but rather an incident personal in its nature.") (internal quotation marks and ellipse omitted); 1 McCarthy, Rights of Publicity, §§ 10:3-10:5; accord Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc., 270 F.3d 298, 325 (6th Cir. 2001). The plaintiffs' claims under these branches of the privacy doctrine, then, do not sound in "law pertaining to intellectual property," and she offers no authority or argument to the contrary. While § 230(e)(2) exempts her right of publicity claim from the immunity provision of the CDA, then, that provision applies with full force to the other

invasion of privacy claims asserted in her complaint.¹⁵ See 1 McCarthy, Rights of Publicity, § 3:42.

The defendants also argue that, in any event, the plaintiff has not stated a claim for violation of her right to publicity.¹⁶ New Hampshire recognizes a cause of action for infringement of the right to publicity as set forth in the Restatement (Second) of Torts. Remsberg v. Docusearch, Inc., 149 N.H. 148, 157 (2003). Under this rule, “[o]ne 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.” Id. (quoting Restatement (Second) of Torts § 652C (1977)). “The

¹⁵ The plaintiff also does not argue that § 230 immunity does not otherwise extend to these invasion of privacy claims, which would, like the other state-law causes of action in her complaint, appear to depend on treating the defendants as the publisher or speaker of tortious matter supplied by a third party. See Carafano, 339 F.3d at 1122-1124 (ruling that § 230 barred invasion of privacy claims against service provider without discussing application of § 230(e)(2)).

¹⁶ The defendants did not raise this argument until their reply memorandum. Ordinarily, this court does not consider theories advanced for the first time in reply. See, e.g., M & D Cycles, Inc. v. Am. Honda Motor Co., 208 F. Supp. 2d 115, 122 (D.N.H. 2002); L.R. 7.1(e)(1) (restricting reply “to rebuttal of factual and legal arguments raised in the objection”). While the court will nevertheless consider the defendants’ argument here, counsel are reminded that all theories of relief, even alternative ones, should be raised in the opening brief.

interest protected by the rule . . . is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.’”¹⁷ Id. (quoting Restatement (Second) of Torts § 652C, cmt. a).

Because the right of publicity thus safeguards the beneficial use of a plaintiff’s identity, the defendants argue, the plaintiff cannot succeed on this theory unless she pleads that her identity has lost commercial value as a result of the defendants’ use of it. They provide no authority, however, that supports their strict view of the pleading requirements for such

¹⁷ The Remsberg court ultimately concluded that the defendant’s conduct in providing a third party with biographical data about the decedent--most notably her place of employment, which enabled the third-party to shoot and kill the decedent as she left work--was not actionable as a violation of her right to publicity, because “[a]n investigator who sells personal information sells [it] for the value of the information itself, not to take advantage of the person’s reputation or prestige.” 149 N.H. at 158. For the first time at oral argument, the defendants sought to liken themselves to the defendant in Remsberg, insisting that the challenged materials contained “mere information” about the plaintiff. The plaintiff alleges, however, that the defendants did “take advantage of [her] reputation and prestige”--at least as they were falsely represented in the profile--by using the profile to advertise their site. Unlike the defendants in Remsberg, then, the defendants here did more than simply make personal information about the plaintiff available for a price. The defendants’ Remsberg argument is untimely and unpersuasive.

a claim. As the defendants note, the treatise they cite lists the elements of "a prima facie case for liability of infringement of the right to publicity" as:

(1) *Validity*. Plaintiff owns an enforceable right in the identity or persona of a human being; and

(2) *Infringement*.

(A) Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use; and

(B) Defendant's use is likely to cause damage to the commercial value of that persona.

1 McCarthy, Rights of Publicity, § 3:2 (footnotes omitted). The treatise also explains, however--just two sentences later--that "evidence of some quantifiable commercial damage" is not "an essential element of proof of liability for infringement of the right of publicity." Id. Instead, "[s]ome damage to the commercial value of an identity is presumed once it is proved that defendant has made an unpermitted use of some identifiable aspect of identity in such a commercial context that one can state that such damage is likely," though "commercial damage ultimately must be proved and quantified" if the plaintiff seeks to recover for it. Id.

Contrary to the defendants' argument, then, the allegations of the plaintiff's complaint align with the elements of a claim for violation of her right of publicity as set forth in the

McCarthy treatise.¹⁸ The plaintiff alleges that the defendants made an unauthorized use of identifiable aspects of her persona in the form of the profile itself and the portions of it that appeared as advertisements and "teasers" on other websites and, furthermore, that the defendants did so in an effort to increase the profitability of their businesses. These allegations suffice to state a claim for infringement of the plaintiff's right to publicity. See Villalovos v. Sundance Assocs., Inc., No. 01-8468, 2003 WL 115243, at *4 (N.D. Ill. Jan. 13, 2003) (denying motion to dismiss right of publicity claim arising out of unauthorized use of non-celebrity plaintiff's first name and address in personal advertisement seeking sexual partners despite defendant's argument that use did not injure value of plaintiff's identity). The damages available to the plaintiff, if and when she proves these allegations, present an issue for a later stage

¹⁸ Because the defendants rely solely on the McCarthy treatise for the elements of a right of publicity claim, and because the defendants did not advance this argument until their reply memorandum, the court will assume for purposes of this motion that McCarthy's view comports with New Hampshire law, reserving a final decision on this issue for later in the proceedings if necessary.

of the proceedings. See 1 McCarthy, Rights of Publicity, § 3:2. The motion to dismiss the right of publicity claim is denied.¹⁹

III. The Lanham Act claim

Count VII of the plaintiff's complaint asserts "False Designations" in violation of the Lanham Act, 15 U.S.C. §§ 1051 et seq. As the plaintiff points out, her allegations in support of this count essentially track the language of § 43(a)(1) of the Lanham Act, which provides that:

Any person who, on or in connection with any goods or services . . ., uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or cause mistake, or to deceive as to the affiliation,

¹⁹ At oral argument, the defendants hinted at other challenges to the plaintiff's right of publicity claim on grounds asserted in neither their opening nor reply memorandum, including that they had made merely an "incidental use" of her persona and that holding them liable for such a claim would violate the dormant Commerce Clause doctrine. As has been noted, see notes 16-17, supra, arguments omitted from a party's opening memorandum--let alone its reply memorandum--are ordinarily not considered, out of fairness to adverse parties and the court. Though the court has been willing to show some solicitude in taking up the defendants' untimely arguments, that leeway cannot extend to entirely new theories raised for the first time at oral argument, and even then only fleetingly. These additional arguments will therefore not be considered here.

connection, or association of such person with another person, or as to the origin, sponsorship, or approval of her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any such person who believes that he or is she is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). As the plaintiff makes clear in her objection to the motion to dismiss, her complaint presses claims for both false designation under subsection (A) and false advertising under subsection (B).

In support of their motion to dismiss, the defendants principally argue that the plaintiff has not pled the elements of a false advertising claim under the Lanham Act. The elements of such a claim are:

- (1) the defendant made a false or misleading representation of fact in a commercial advertisement about his own or another's product or service;
- (2) the misrepresentation is material;
- (3) the misrepresentation deceives, or has the tendency to deceive, a substantial segment of its audience;
- (4) the defendant placed the misrepresentation in interstate commerce; and

- (5) "the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products" or service.

Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 310-11 (1st Cir. 2002).

The plaintiff has alleged each of these elements in her complaint. She claims that the defendants, through the use of the profile in "teasers" and other advertisements placed on the Internet, falsely represented that she was a participant in their on-line dating services; that these misrepresentations deceived consumers into registering for the defendants' services in the hope of interacting with the plaintiff; and that she suffered injury to her reputation as a result--including, she believes, opportunities at employment. The plaintiff has therefore stated a false advertising claim under the Lanham Act. See Benson v. Paul Winley Record Sales Corp., 452 F. Supp. 516, 517-18 (S.D.N.Y. 1978) (granting relief to musician on false advertising theory based on defendant's misrepresentation of album, which featured "sexually suggestive moaning of woman," to be his work, because consumers would "associate [musician] with the blatant sexual appeal of the . . . album and mistakenly believe that [he] endorses 'X Rated' material," causing "irreparable injury to [his] professional and personal reputation").

Indeed, as McCarthy explains, "many instances of the unpermitted use of a person's identity will make a misleading and false inference of endorsement, approval or sponsorship and hence trigger false advertising concerns in addition to infringing upon the right of publicity. In such cases, plaintiff will have valid allegations of both false advertising and infringement of the right to publicity." 1 McCarthy, Rights of Publicity, § 5:19. That is the case here, where plaintiff alleges that the defendants made unauthorized use of her identity in marketing their websites, creating the false--and, from her perspective, harmful--impression that she was affiliated with them. She has therefore stated claims for both infringement of her common-law right to publicity and false advertising under the Lanham Act.

The plaintiff has likewise stated a claim for false designation under § 43(a) of the Lanham Act. In relevant part, this subsection prevents a defendant from using the plaintiff's name in commerce in connection with services in a way likely to cause confusion as to "the affiliation, connection, or association" of the parties or the plaintiff's "sponsorship or approval" of the defendant's "services, or commercial activities." 15 U.S.C. § 1125(a)(1)(A). The defendants' unauthorized use of a plaintiff's identity for marketing purposes "falls directly" within this language, which "makes it clearer

than ever that § 43(a) is an appropriate vehicle for the assertion of the claim of falsely implying the endorsement of a product or service by a real person.” 1 McCarthy, Rights of Publicity § 5:31.

The defendants argue--again, initially in their reply memorandum, see notes 16-17, 19, supra--that only a celebrity can maintain this sort of “false endorsement” claim under the Lanham Act, because any other plaintiff lacks a commercial interest in his or her identity akin to the trademark rights protected by the Act.²⁰ They provide no authority directly supporting this view, however, citing instead a string of cases considering false endorsement claims by celebrities under the Lanham Act and observing that they are “not aware of any reported cases involving false endorsement claims that do not involve a celebrity.” The plaintiff, naturally, does not cite any such

²⁰ In the alternative, the defendants argue that the plaintiff cannot succeed on her false endorsement claim under the Lanham Act because she has not alleged that her identity has commercial value that was diminished as a result of their actions. But the court has already rejected that identical argument with regard to the plaintiff’s state-law right of publicity claim, see Part II. B, supra, and the defendants do not provide any additional authority or argument suggesting that the same analysis would not also apply under the Lanham Act.

cases in her objection, since at the time she filed it the defendants had not yet made this argument.

McCarthy, for one, believes that "under the proper circumstances, any person, celebrity or noncelebrity, has standing to sue under § 43(a) for false or misleading endorsements." 1 McCarthy, Rights of Publicity, § 5:22. And there does not appear to be any authority from the First Circuit on this point one way or the other. For purposes of this motion, then, the court rules that the plaintiff's claim for false designation under 15 U.S.C. § 1125(a)(1)(A) does not fail simply because she is not a "celebrity."

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss (document no. 9) is GRANTED in part and DENIED in part as follows: Counts II-VI and VIII of the complaint are dismissed in their entirety; Count I of the complaint is dismissed except insofar as it asserts a claim for violation of the plaintiff's right of publicity; and the motion is denied as to Count VII.

SO ORDERED.



Joseph N. Laplante
United States District Judge

Dated: March 27, 2008

cc: W. E. Whittington, Esq.
Ira P. Rothken, Esq.
Jared R. Smith, Esq.
James P. Bassett, Esq.
Jeffrey C. Spear, Esq.