

I. GAL v. Cy

Gettalife.com (“GAL”) may bring against Cy several breach of contract actions, a DMCA §1201 “circumvention” action, a DMCA §1202 Anti-Tampering action, and get the government to bring a CFRAA §1030(a)(2) criminal “access with info” action.

A. Breach of Contract Claims

Because Cy was a registered user of GAL, he was bound by its TOS. Although the Browsewrap TOS were likely unenforceable, *Specht*, Cy’s express manifestation of assent by clicking “I Agree” made GAL’s Clickwrap TOS clearly enforceable against Cy. *Davidson*. Therefore any violations of its TOS (that are not unconscionable) would satisfy a breach of contract claim.

Cy may have violated TOS #1 and #2, and likely violated #3 and #6. First, Cy’s logging in as Christian could qualify as “registering using another person’s name” under a very broad reading of TOS #1; we only know that he hacked the password and logged in, but additional facts as well as a GAL-supplied definition of “registered” would help determine potential liability. Second, if the self-portrait is a Picasso-like reinterpretation of Cy’s actual appearance, his photo would not look like his actual self; Cy would thus violate #2. Third, Cy’s defamation of Roxanne breaches TOS #3. Cy also fails to get §230 immunity because the information was provided by Cy himself, not “another information content provider,” thereby exempting him from the republishing protections of §230/*Drudge*.

Cy’s violation of relevant trademark, copyright, and privacy rights may allow GAL to pursue claims against Cy’s violation of Christian’s copyright rights of reproduction, display, distribution, and possibly derivative work. Christian’s painting is clearly copyrightable as an

original work of creative authorship, fixed in a tangible medium, and sufficiently permanent. Christian therefore has exclusive rights to (*interalia*) reproduce, display, distribute, and prepare derivative works. Any digital image taken of the portrait would also be copyrighted, although we have no facts describing who took the photo; if Cy took it, that fixation to memory card, RAM, and possibly cache would be yet another Reproduction violation.

Cy uploaded Christian's copyrighted image and Displayed it (§101) to the GAL-world. Any copy into RAM/cache/hard drive would also be a Reproduction violation, and Cy is not eligible for the *Amazon/Ticketmaster* Fair Use exception because he is copying copyrighted information for a non-fair use. If the image was on his hard drive, he would also be liable for distribution under the *Amazon* Server Test. An argument could also be made that GAL's ovaling of the photo transformed the image, qualifying it as a §101 derivative work; although copyright infringement is strict liability and motive is irrelevant, GAL—not Cy—altered the underlying work, possibly exempting Cy from liability because the making of the derivative work was by another party (although one could certainly argue that it was subject to Cy's control).

Cy also has no Fair Use defenses because his reproduction was not for §107 protected purposes (criticism, research, etc.). He fails to even reach the 4.5 factor *LA Times* test, but if he did courts would find that the work was creative, his use was non-transformative and non-commercial (but personally profiting by dating), he used the "heart" of the copyrighted image and essentially all of it (automatically cropped), but with little effect on the market; he would lose with the three factors weighing heavily against him.

B. DMCA §1201(a)

Christian is likely liable here for circumventing a technical measure effectively controlling access to a work. Even if imperfect, GAL's password-protected accounts/profiles effectively control access during the ordinary course of operation. *DeCSS*. The passwords limit access to at least two copyright-protected works: Christian's personally-provided info, GAL's licensed right to display and reproduce Christian's info, and any copyright interest GAL may have in the overall webpage display. By hacking/guessing GAL's digital lock, Cy obtained access in violation of §1201(a). Cy would clearly be liable as there is no statutory Fair Use exception, his use would not be protectable under the First Amendment, and he is not Reverse Engineering for interoperability,

C. §1202(b) Anti-Tampering

Cy may be liable under the Anti-Tampering Act.

Cy uploaded the photo with the watermark and copyright notice, but GAL automatically cropped out the entire notice and most of the watermark. Because the process is automatic and (assumably) unavoidable, there is no evidence that Cy intended this removal. Unless some manifestation of assent or other affirmative action evidenced an intent to alter the photo, he is not liable under §1202(b)(1).

If the photo is displayed and distributed from his computer (Server Test), however, GAL could argue that this was "distribution" of the photo to the GAL-public. If so, Cy should have known (especially after several months) that both copyright marks had been removed or altered, meaning he would have distributed the photo with knowledge of the infringement and without authorization, thus violating §1202(b)(3).

D. CFAA §1030(a)(2)

GAL could also request that prosecutors bring a criminal CFAA claim against Cy for his unauthorized access of a computer/server without authorization. CY fulfills each element: he hacked the password/lock, meaning he knowingly accessed GAL's protected server without authorization; he also obtained Christian's profile information. If all the info available were already publicly available, Cy *might* have a colorable defense, but the statute says nothing about "private" information; it merely prohibits unauthorized access of information from a protected computer. Assuming a strict reading of the statute, Cy could be found criminally liable for hacking and accessing Christian's personal and locked page.

E. Other Federal and State Statutes

Finally, GAL could investigate the viability of claims under applicable state privacy laws.

It could also investigate Cy's liability under the federal Electronic Communications Act that prohibits unauthorized access of stored electronic communications. GAL likely has an internal messaging or email system for users to contact each other. If so, any unauthorized access (via hacking and violating TOS) of Christian's stored emails/messages, possibly even if unviewed (because the statute merely prohibits access), may violate the ECA.

II. Christian v. GAL

Christian can attempt to bring a variety claims for direct and secondary copyright infringement.

A. Direct Infringement

To prevail, Christian must show that he owns the copyright (registered and assumed from facts), the infringing photo is a copy (here, a cropped version of the original), and the copy violates one of his exclusive rights. Because of the §512 statutory defenses (outlined below), GAL is unlikely to be directly liable for the display, distribution, and perhaps reproduction and derivative works, of Christian's portrait.

Assuming no statutory defenses (see below), GAL could be held liable for Public Display. First, it is likely that the infringing material is on its servers (see *Amazon Server Test*), although it is also possible that GAL merely deep-links to a photo saved on another photo-saving service or even Christian's computer, thereby escaping direct liability. Second, the infringing material is provided "to the public" generally, even if viewed privately (*Frena*). Although the material is not provided to the entire internet, its availability on a widely dispersed and possibly global website is likely sufficient. The possible server storage of the photos may also violate Christian's Distribution rights, however this is a stretch because GAL is not offering the photos for sale/lease/lending.

Christian has a slightly better argument for GAL's direct infringement of his derivative work right because GAL automatically crops photos that must generally be copyrighted (whether or not registered). The incorporation of the earlier work into an unauthorized new format may violate his derivative work right.

Finally, Christian may argue that GAL improperly reproduced his work via copies into backup servers, RAM, etc. This automatic copying violates *MAI* and is without statutory defense under 17 USC §117's exception for authorized computer maintenance. If temporary, it may nonetheless be fair use under *Amazon* because it is automatic, transformative (linking photo with online persona and actions), no more than necessary, and has a minimal effect on the market; on the other hand, it is commercial, GAL is aware of the process, and GAL could take steps to avoid hosting copyright-infringable materials on its servers. On balance of these factors and considering recent case law, this is form of reproduction is likely fair use.

B. Secondary Liability

If Cy infringed, Christian could pursue secondary infringement claims against GAL because of its Vicarious, Inducement, or Contributory liability (unless GAL meets a DMCA exception). Each of these assumes that Cy did, in fact, infringe, thereby providing the basis for secondary liability.

1. Vicarious

Without additional supporting facts, Christian cannot show that GAL Vicariously Infringed by having the right and ability to control/supervise and receiving a direct financial benefit. Under pre-DMCA common law, GAL's TOS permitting remedial actions would have showed an ability to control access and police conduct that could have opened GAL up to liability. *Netcom*. Although that would be fulfilled, there is no evidence that GAL is receiving a direct financial benefit from Cy's infringement or others like him, particularly because this infringement (hacking another user's account and uploading a purportedly-representative

photo of and by that user) is unlikely to be widespread in GAL-world. GAL is not directly infringing because of the lack of financial benefit and DMCA override (below).

2. Inducement

GAL clearly did not Induce infringement because it has made no statements or actions expressing a desire/purpose to promote infringement. *Grokster*. In fact, its TOS #6 expressly prohibits any copyright infringement.

3. Contributory

GAL may be contributorily liable under pre-DMCA common law if Cy infringed, GAL substantially participated, aided, or materially contributed to Cy's infringement, and GAL knew or had reason to know of it. *Netcom*. As to participation, the use of GAL's servers to reproduce and publicly display (and possibly distribute) the material could qualify under *Netcom's* lax standard of substantial participation. GAL's photo-cropping program certainly played an integral role in any derivative work infringement, further increasing the chances of liability. GAL lacked knowledge of this specific act of copyright infringement, however. At the time of Cy's infringement, GAL had no actual knowledge because no one had notified it and no employees screen each posting. GAL likely also lacked constructive knowledge because it would have had no way to know that Cy was posting copyrights held by Christian, particularly because he was logged in *as* Christian! The best argument for knowledge is that GAL knew its photo-cropping would substantially alter users' copyrighted photos. (Presumably, most photos uploaded by users would be subject to copyrighted, even if unregistered.) However, even this is subject to an implied license to do so (presumably the copyright-holder would upload his photo and affirmatively permit it to be cropped) as well as §512 Safe Harbors.

C. §512(i) Safe Harbor Eligibility

GAL need only meet one safe harbor provision to receive immunity, but it must first show it has adopted, reasonably implemented, and informed subscribers of a policy to terminate repeat infringers and that it “accommodates and does not interfere with standard technical measures. The first prong is likely met because GAL’s TOS #7 informs subscribers that misuse (impliedly, of the other TOS) is grounds for account termination. Assuming this notice either references a fuller “policy” or that this alone qualifies as one, GAL’s termination clause in the TOS seems sufficient to cover termination of repeat infringers. Additionally, because this term is on each page (browsewrap notice) and users manifest assent to it upon registration (clickwrap contract), subscribers should be deemed “informed.”

The second prong provides some complications. “Standard technical measures” includes measures “used by copyright owners to identify or protect copyrighted works.” Because GAL automatically removed the entire blue copyright notification, as well as removing most of the watermark, it likely interferes with those standard technical measures. Although GAL could argue that checking each photo for copyright notification would “impose substantial costs” and “burdens” on the ISP, §512(i)(2)(C), the argument seems unavailing because it could simply allow users to upload any photo shape, let them choose which shape/crop continues to help protect its copyright marks, etc. Because of this second prong, GAL may not fulfill §512’s prerequisites and may be liable under *Netcom*’s common law contributory liability rule (above).

1. §512(a) Safe Harbor

Assuming GAL meets §512(i), GAL cannot get §512(a) protection for any direct copying because it is not a narrowly-defined “ISP.” Sections (a)/(k)(1) require the ISP to provide network connectivity/routing/wires, which GAL does not, exempting it from protections here.

2. §512(c) Safe Harbor

Assuming GAL meets §512(i), GAL should qualify for §512(c) protections for storage of user-directed material. First, GAL is an “ISP” that provides “online services or network access.” §512(k)(2). GAL also received no directly attributable financial benefit from the infringing activity (see above). It also had no actual or constructive knowledge of Cy’s infringement. If Christian provides proper notification of Cy’s infringing material, GAL must expeditiously remove or disable access to it to get protections. §512(c)/(g). If GAL meets these requirements, GAL should be insulated from direct and secondary liability regarding the storage on its servers/network of the copyright-infringing photo uploaded by Cy.

D. §230 Bar

GAL may also defend by using 47 USC §230: because the infringing material was provided over the internet and possibly developed by another service provider (Cy), that material may be immune. Although intended for defamation, §230 has been extended to negligence, bootlegging, erroneous stock information, and more, thus providing another possible defense for GAL. §230’s applicability would hinge on whether the photo was provided and developed by Cy only, or whether GAL substantially changed the nature of the work. Cy clearly intended to publish the photo for online viewing/use, making him a “provider.” See *Batzel*. Unless Cy himself photographed the portrait and uploaded the picture,

or unless he obtained it from another "published" and "developed" source *over the internet*, Cy should not receive §230 protections; he seems to have merely published the photo, not "developed" it, thus eliminating liability protections. GAL's cropping, on the other hand, may surpass the allowable "minor alterations" in development allowed, *Batzel*, and instead fringe on "substantive involvement." *Drudge*. If that would be sufficient to make GAL the developer, GAL's §230 immunity would fail; if not, GAL should be immune for merely republishing and re-displaying that image.

III. Christian v. Cy Website

A. Protectable Trademark

To win a case of trademark infringement, Christian must show that his trademarked domain name is valid and protectable, infringed (though Likelihood of or Initial Interest Confusion, Dilution by Blurring or Tarnishment, or Secondary Liability), and without applicable defense.

To be protectable, Christian's mark must first have inherent or acquired distinctiveness. His mark may be suggestive of his goods' attributes ("Christian's Art," like "Facebook"). It could also be viewed as generic because it is nonspecific and brings to many people's minds artwork about Jesus, disciples, etc., not artwork by Christian; if found to be generic, Christian would have no action for trademark infringement because a generic mark is by definition not distinctive. If "ChristianArt" has, through sufficient time and commerce, become associated in the public mind with his goods, Christian's mark may qualify as acquired-ly distinctive and permit a trademark cause of action.

An actionable trademark claim also requires the mark to be used in commerce, associated with goods, and identifying the source of origin of those goods. Christian clearly meets these elements because he uses the mark to sell identify and sell his artwork in the "real world" as well as online.

Additionally, Christian must distinguish between his mark generally and use of it or a derivative of it as a domain name. Although the jury is still out on whether a domain name can itself be trademark-able (*compare Cardservice* and *Panavision*, valuing communications with customers, value as "corporate asset," and need to protect trademarked name against

tarnishment, *with Bucci*, describing them as mere source identifiers without communicative message), Christian's trademark of the name in a business, and possibly even brick-and-mortar context, is certainly protectable. Cy's website may not be viewed as a trademark, however, and if "purely technical" or otherwise not "trademark use" he has a complete defense.

B. Traditional Trademark Infringement

If Christian owns his mark (assumed) and it is protectable (above), Christian must show that Cy infringed through traditional Likelihood of Confusion ("LOC"), Initial Interest Confusion ("IIC") (if accepted in his jurisdiction), or Dilution.

In LOC and IIC, Christian, the senior user of the mark, would have to sue Cy, the junior user, alleging its use in commerce and customer confusion as to the source of goods or affiliation/sponsorship between the two companies, as well as resulting harm. If LOC, this confusion is at the point of sale or is otherwise not dispelled when viewing/using the website; in IIC, the confusion need only be temporary and would be dispelled upon viewing of more of the webpage or at the time users purchased Cy's art. Generally, cybergripping, consumer commentary, and even intent to inflict economic harm are not "commercial," however Cy is clearly using the trademarked name "in commerce" because he is using the website to sell his own art. He also posts links to Christian's website, which while competitive is nonetheless in commerce. Regarding confusion, relevant *Playboy* factors include the strength of Christian's mark to identify his goods (unknown, but if not famous or distinctive this could be minimal), similarity between the marks (Cy's incorporates Christian's, but the "-sucks" may dispel similarity), competitive proximity between their products (both personally-produced art), and the intent/bad faith of Cy. Although "meanness" is not bad faith, competitive confusion can be.

Bihari. Despite the weight of these factors against Cy, it is probable that the “-sucks” will be sufficient to dispel any LOC/IIC.

C. Common Law/§1125 Dilution

Christian may bring a Trademark Dilution claim if he is the owner of a famous and distinctive mark that is harmed by Cy’s secondary commercial use after it became famous and is likely to cause dilution by blurring or tarnishment. *Panavision/§1125*. If Christian’s mark is famous he may resort to Tarnishment, requiring commercial use harming the reputation of his mark because of negative associations of Cy’s; actual or potential confusion is irrelevant. If Christian’s mark is nationally famous, even in a niche art market, Cy’s use of the commercial “-sucks” website may be actionable. If Christian’s mark is not famous, his only Dilution recourse is to claim that his mark’s distinctiveness has been blurred based on the similarity between their marks and products, renown/distinctiveness of each mark, recognition-level of Christian’s mark, Cy’s intent to create an association with Christian’s mark, predatory intent, and consumer sophistication. These factors could go either way. Cy’s use of “ChristianArt” to direct users to Christian’s webpage would be nominative fair use, as would any legitimate comparison of their artistic products. §1125(c)(3). His other uses are more questionable, however Cy’s First Amendment right to free speech may tilt the balance in his favor.

D. §1125(d)(1)(A) ACPA

Christian could also bring a §1125(d)(1)(A) civil action against Cy for cyberpiracy. Assuming the domain name is trademark-able, Christian need only show that Cy registered/used a domain name that, at the time of registration, was identical or confusingly similar (or if also famous at the time of registration, was dilutive (see above)) and that he had a

bad faith intent to profit from the ChristianArt mark. Cy used/registered the site ChristianArtSucks.com, and a majority of courts agree that “-sucks” website *are* “confusingly similar” under §1125, *page 250* (although that determination is highly debatable). Cy’s bad faith may be implied from factors such as his awareness of the ChristianArt mark, *Sporty’s*, diversion and trading on goodwill of ChristianArt, *Madonna*/§1125(d)(1)(B)(i), and the full incorporation of “ChristianArt” into his domain name. Cy’s intent to profit is clear from his commercial use of the site to sell his own paintings.

Christian is likely to succeed under §1125 unless he convincingly raises the “Pure Heart Empty Head” defense of believing he had reasonable grounds to believe his use was fair use and lawful. §1125(d)(1)(B)(ii). He may succeed here because so many gripe sites are unactionable, even when they incorporate the full name; admittedly, however, protected gripe sites are non-commercial and certainly not in direct competition with the holder of the senior mark. He could also argue for the brightline rule of *TMI v. Maxwell* that gripsites are *not* cybersquatting and that an intent to inform others of harm experienced is not the “paradigmatic harm” the ACPA was intended to fix. Cy is unlikely to win, however, because his site is commercial and he much of the complaining is about Christian personally; the complaints directed at Christian’s art are unlikely to fulfill *TMI* because they are not originating from a harmed purchaser nor are they the “sum-total” of the site.

If Christian succeeds here (or under Dilution) he can get the ChristianArtSucks.com website enjoined, forfeited, cancelled, or transferred to him. §1117(a)/§1125(d)(1)(C). ACPA violations can also get him statutory damages of \$1,000-100,000, §1117(d), as well as any of Cy’s profits, Christian’s lost revenue or other damages, and the costs of the action. §1117(a).

Additionally, if personal jurisdiction is unavailable, Christian may proceed *in rem*. §1125(d)(2)(A).

Finally, under the ACPA, Christian cannot bring an action against the ChristianArtSucks.com domain *registrar* unless it had a bad faith intent to profit from the registration. If the registrar routinely permits or encourages such activity, Christian might have a viable claim against it as well.

E. UDRP

Christian has a very strong case against Cy under the UDRP: even a ACPA-acceptable gripe site may be attacked under the UDRP. Cy must submit to a mandatory arbitration proceeding if Christian complains that Cy's mark is identical or confusingly similar to his mark (see above), Cy has no rights or legitimate interests in the domain name, and the website was registered/used in bad faith (with/without intent to profit). §4a/<http://www.icann.org/udrp/udrp.htm>. The burden would be on Cy to show that his goods were commonly known by ChristianArtSucks.com (unlikely) or that he had legitimate fair or noncommercial use of the domain name without intent for commercial gain (also unlikely). Because one of the two pages on ChristianArtSucks.com sells Cy's paintings, the site is clearly commercial, leaving only Fair Use. As described above, that claim is unlikely to be successful. Furthermore, his use is likely in Bad Faith (without needing to consider First Amendment speech claims). It is very possible that his domain name was designed to "lure" those searching for "ChristianArt" to his own competing website. The "-sucks" does not overcome this problem, nor would Cy's links to ChristianArt.com.

Although ChristianArtSucks.com would not be suspended during litigation, the UDRP has the advantage of being usable for marks that are not famous and may be only locally/state known. Additionally, by filing a complaint, Cy ***MUST*** submit to arbitration. Monetary damages are not available, but the UDRP remains advantageous because it provides the quickest disposition of the domain name.

IV.

No, Roxanne cannot win a defamation case against GAL. Although GAL would have been liable under the *Stratton/Cubby/Zeran* common law rule and would be liable if this were in print medium, 46 USC §230 overrode this “publisher/distributor liability” with completely liability protection. Under §230, GAL is an ISP providing/enabling interactive computer access by multiple GAL-world users to its computer server. Cy, a non-employee of GAL, was wholly responsible for creating the defamatory content that was published on the internet. Cy intentionally “provided” the comment for online publication by typing and posting it outside his “house.” *Batzel*. GAL therefore meets all the requirements for §230 immunity.

V.

Yes: Cy himself posted a copyrighted work [(the original or a copy of) an original work of authorship that was fixed in a sufficiently stable, tangible medium], potentially (depending on the facts) violating Christian's rights to reproduce, display, and possibly distribute the work. (Note that if Christian attacks Cy's post because of distribution or public display, the photo must be on Cy's computer/server.) Cy has no first sale doctrine, implied license, fair use, authorization, or other right or defense to do so, and §230 immunity would extend only to GAL, not Cy as the poster of the material.

VI.

To defeat the *Craigslist* presumption of §230 immunity, FHA's best option is to argue that GAL is a partial-developer of the information. *See Roommates.com*. The more direct and specific the questions on the GAL questionnaire (as well as any multiple choice options), the more likely GAL is to lose its immunity because it, too, "develops" the information and the information is no longer solely provided by the user.

FULL DISCLOSURE

Total Word Count: 4,051