

I.

GettaLife has several causes of action against Cyrano de Law: (A) Breach of contract, (B) Violation of 17 U.S.C. § 1201(a), (C) Trespass to Chattels, (D) Violation of 18 U.S.C. § 1030, and maybe a (E) Violation of the CAN-SPAM Act.

A. Contract

A breach of contract is proper when (a) a valid contract exists, (b) a party bound by such contract breaches the contract, and (c) damages accrue to one of the involved parties. Here, the primary inquiry is whether a contract actually existed between Cy and GettaLife.com.

There are three varieties of online contracts: shrinkwrap contracts, clickwrap contracts, and browsewrap contracts. ProCD. A shrinkwrap contract is a contract where a buyer of goods or services receives the terms of use following shipment of the goods. Id. A clickwrap contract requires a website user to scroll through the terms of use before making a purchase. Id. And a browsewrap contract involves posting the terms of use on the site that the consumer makes the purchase, but does not require viewing before making a particular purchase. Id. Each type of online contract can be a valid contract, but the facts surrounding a particular case might deem any of them unconscionable or invalid for lack of mutual asset. Bragg.

Here, GettaLife.com required each of its users to click an “I Agree” button that was located on the same page as the terms of use. The particular placement of the button in regard to the terms of use is unclear. If the terms were located above the button and the user had to scroll through the terms before clicking the button, then the contract in question would be closer to a clickwrap contract. However, if the terms of use were located after the button and did not require the user to scroll through the terms before clicking the button, then the contract in question would be closer to a browsewrap contract. Assuming that facts resemble a clickwrap contract, a contract was more than likely reached between GettaLife and Cyrano.

Cy violated several provisions of the contract: He signed in as Christian, he represented that he looked different than he was, he defamed Roxanne, he arguably harassed Roxanne, and he arguably violated Christian’s copyrights, trademark rights, and privacy rights.

However, Cy is not bound by the contract if a court determines that the terms are unconscionable. Bragg. Procedural unconscionability deals with terms that oppress or prevent the other party from any opportunity to make a choice, whereas substantive unconscionability pertains to unfair terms or costly terms. Id. The doctrine operates on a sliding scale so that an enormous presence of one type minimizes the requirement of the other and vice-versa. Id.

Here, the terms only limit Cy’s ability to participate in behavior that is already not accepted, i.e. harassment, misrepresentation, defamation, etc. Furthermore, the only potential loss incurred by Cy for violating these terms is account termination (\$15.95 per month subscription fee). Because terms only restrict Cy’s behavior to conduct that is already expected in society and the loss incurred by Cy for violation of the terms is

minimal, it is probably that a court will not find the contract to be unconscionable. Therefore, Cy breached the contract and owes GettaLife damages.

B. 17 U.S.C. § 1201

17 U.S.C. § 1201(a)(1)(A) provides that no person shall circumvent a technological measure that effectively controls access to a copyrighted work. A copyrightable work is a work of creative spirit that is fixed in a tangible medium. MAI v. Peaks. A computer's RAM is a tangible medium. Id. To "circumvent a technological measure" means to bypass, a technological measure, without the authority of the copyright owner. 17 U.S.C. § 1201(a)(3)(A). Furthermore, a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, with the authority of the copyright owner, to gain access to the work. 17 U.S.C. § 1201(a)(3)(B).

Here, the virtual world that GettaLife created is a copyrightable work because it is "fixed" in GettaLife's servers and is a creative work at the core of the Copyright Act. GettaLife's password protection "effectively controlled" access to the site by requiring each user to enter a unique password before commencing use. Cy "circumvented" the password protection by correctly guessing Christian's password. Because GettaLife's virtual world was a copyrightable work that was "effectively controlled" by password and Cy "circumvented" the password protection by correctly guessing Christian's password, Cy violated 17 U.S.C. § 1201(a)(1)(A).

However, Cy might argue that the password protection system did not effectively control access to the work because he was able to hack in the system through Christian's account. But the Court in Universal City Studios rejected this same argument, when the court stated that allowing the argument to succeed would undermine the purpose of the Act. Thus, Cy is in violation of 17 U.S.C. § 1201(a)(1)(A).

C. Trespass

A trespass to chattels occurs when a party intentional interferes with another's property that results in damages. CompuServe. Damages occur when a chattel is impaired as to its condition, quality or value and chattels include the company's servers and its possessory interest in customers' business. Id.

Here, Cy intentionally interfered with GettaLife's property when he violated with its terms of use. *See* Breach of Contract, *supra*. Damages resulted when Cy used more of GettaLife server capacity than was allotted to him by using Christian's account. Furthermore, Cy caused Roxanne to stay online all day, which resulted in her losing her job. Because Cy intentionally interfered with GettaLife's property and caused damages to accrue to GettaLife and its customers, Cy is liable for trespass to chattels.

On the other hand, Cy could argue that there is no evidence that the extra use of the servers actually caused performance of the servers to decline. However, if other users in a larger magnitude replicated this behavior, then the result could be disastrous to GettaLife. Thus, a trespass to chattels claim is proper against Cy.

D. 18 U.S.C. § 1030

Under 18 U.S.C. § 1030(a)(2), whoever intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer if the conduct involved an interstate or foreign communication, shall be punished. Furthermore, 18 U.S.C. § 1030(a)(4) provides that whoever knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value greater than \$5,000 per year shall be punished. Moreover, 18 U.S.C. § 1030(a)(5) states that whoever (i) knowingly causes the transmission of a program, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer, (ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage, or (iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage, shall be punished. However, § 1030(a)(2) is limited only to federal actions because one of its essential components is involvement in interstate commerce. EF Cultural.

Here, Cy intentionally accessed the computer without authorization because he circumvented password protection so that he could pick up girls. He obtained information from a protected computer because he obtained information about girls that would not have anything to do with him until he posed as Christian. He also caused damage by utilizing server capacity that was not allocated to him under GettaLife's terms of use. Because Cy intentionally accessed GettaLife without authorization and obtained information regarding Roxanne and other girls, GettaLife may bring a cause of action against him for violation of § 1030(a)(2) so long as the activity between GettaLife and Cy was not intrastate. Furthermore, because Cy intentionally accessed GettaLife and caused damage to GettaLife's servers, GettaLife may also bring a cause of action against Cy for violation of § 1030(a)(5)(iii).

GettaLife might also bring a cause of action against Cy for violation of § 1030(a)(4), but it will be much more difficult. Not only does the (a)(4) require a \$5,000 threshold, but it also requires scienter. While Cy's behavior is definitely unbecoming and probably could qualify as misrepresentation, it probably will not qualify as fraud, which is an essential element to (a)(4). In conclusion, GettaLife probably has a cause of action against Cy for violation of (a)(2) and (a)(5), but probably not for violation of (a)(4) and (a)(2) is limited to causes of action brought in federal court. Therefore, GettaLife should probably bring suit in federal court so that it can bring two suits rather than one suit under § 1030.

E. CAN-SPAM

The CAN-SPAM Act prohibits deceptive and offensive content and requires accountability and responsiveness on the part of the sender. However, the only entities that are given a cause of action under the CAN-SPAM Act are the FTC, state attorneys general, and internet service providers that are harmed.

Here, GettaLife's ability to bring suit against Cy for violation of the CAN-SPAM Act hinges on its ability to convince a court that it is an internet service provider. While the courts have interpreted this term broadly, GettaLife only provides services to subscribing

customers and does modify the information that they upload into its virtual world. Thus, GettaLife probably does not have a cause of action against Cy under the CAN-SPAM Act unless it can convince another party to pursue action.

II.

Christian has several potential claims against GettaLife.com: (A) copyright infringement, and (B) Breach of contract. The following analysis will separately examine each claim.

A. Copyright

To bring a cause of action for direct copyright infringement, a plaintiff must prove that he owns the copyright in question, that the material at issue is a copy, and that the copy violates an exclusive use entitled to him under § 106. Exclusive uses entitled to copyright owners under § 106 include the reproduction right, the display right, the right to create derivative works, the distribution right, the right to perform a work publicly, and the right to perform by digital audio transmission. However, these exclusive rights are limited by the Fair Use Doctrine, Free Republic, the First Sale Doctrine, and other statutory immunities granted to potential infringers, 17 U.S.C. § 512. Furthermore, if direct infringement is proven, then other parties also may be held secondarily liable for the direct infringement of others. Netcom.

Here, Christian is the copyright owner of the picture that was uploaded by Cy. The representation of the picture on GettaLife is a copy fixed in a tangible medium because computer RAM is a tangible medium. MAI. Furthermore, GettaLife displaying the picture in their virtual world violates Christian's display right, distribution right, and his right to create derivative works. Because Christian owns the underlying work, and Cy uploaded a copy of it into GettaLife's virtual world where it was displayed, distributed, and modified into a derivative work, Christian has a cause of action against Cy for direct infringement.

However, Cy might argue that the copyrighted work of Christian is a substantially similar to a representation of Brad Pitt and, if so, then the laws of copyright do not grant Christian any exclusive rights.

Assuming that the court does not accept Cy's argument, then Cy might argue that his use of Christian's copyright constituted fair use. To qualify for a fair use defense, a defendant must prove the purpose and character of the use was transformative in nature, that the nature of the copyrighted work is not at the core of copyright, that not much of the work was used, and that the effect of use on the market for, or the value of the copyright was minimally effected.

Here, the transformative nature of Cy's use is not much. The process of uploading the work onto GettaLife merely changed the picture from a square to an oval surrounded by a frame. Thus, this factor weighs in favor of Christian. Furthermore, the nature of the copyrighted work is probably not at the core of copyright because it is so similar to a picture of Brad Pitt. Thus, this factor weighs in favor of Cy. Moreover, Cy used the entire self-portrait of Christian, so this factor weighs in favor of Christian. Finally, placing a picture of Christian on a virtual world probably does not effect the market for or value of Christian's work, but it could have some impact. Thus, this factor also weighs in favor of Christian. Because the majority of the factors weigh in favor of Christian, Cy is not entitled to a defense under the Fair Use Doctrine.

Cy might also argue that he is entitled to a defense under the First Sale Doctrine, but because Cy did not purchase a copy of the picture from Christian, he is not entitled to the First Sale Doctrine defense.

Because Cy is probably liable for direct copyright liability, then GettaLife may also be held liable for copyright infringement under a theory of secondary liability. There are four forms of secondary liability: inducement liability, contributory liability involving substantial non-infringing use, contributory liability not involving substantial non-infringing use, and vicarious liability.

Under inducement liability, the secondary party must advertise infringing use, instruct others how to infringe, or create a product that will be used primarily to infringe. Here, there is no evidence that GettaLife advertised to its users that they had the ability to infringe copyright, instructed others how to infringe, or created the virtual world of GettaLife to infringe. Thus, secondary liability on a theory of inducement is not likely.

Under a theory of contributory liability involving substantial non-infringing use, the secondary party must know or have reason to know of the infringing use and have the ability to stop it. Here, prior to GettaLife performing discovery, there is no evidence indicating that GettaLife knew anything about Cy uploading Christian's picture on the site. Because GettaLife did not know about Cy uploading the picture, then it was not provided notice and cannot be held liable.

Under a theory of contributory liability not involving substantial non-infringing use, the party does not need notice. The only requirement for liability is that the second party has the ability to stop the infringement. Here, there is no evidence of rampant infringement by the users of GettaLife. Because there is no evidence of rampant infringement by the users of GettaLife, Gettalife cannot be held secondarily liable under a theory of contributory liability not involving substantial non-infringing use.

However, under a theory of vicarious liability, knowledge is not a requirement. The only essential elements are proving the second party has control over the direct infringers and the second party is receiving a financial benefit attributable to the infringement. Here, GettaLife has the right to terminate Cy's account if he violates its terms of use. Roxanne notified them that he was violating the terms of use by harassing her and defaming her. While this violation is not directly linked to the direct copyright infringement of Cy, a court would probably determine that GettaLife had control over Cy's actions. Furthermore, GettaLife is receiving a financial benefit that is directly attributable to the infringement because it is charging Christian's account \$15.95 per month. Because GettaLife has control over the Cy's activities and it is receiving a financial benefit that is directly attributable to the infringement, GettaLife is probably liable under a theory of vicarious liability.

On the other hand, GettaLife might be able to escape liability under one of the DMCA Safe Harbors. Under 17 U.S.C. § 512, internet service providers are entitled to four liability safe harbors so long as they can satisfy the requirements: 17 U.S.C. § 512(a) – transitory communications, 17 U.S.C. § 512(b) – caching, 17 U.S.C. § 512(c) – storage providers, and 17 U.S.C. § 512(d) – search tools. Because GettaLife's potential infringement hinges on whether it is secondarily liable for storing a copyrighted work, the most appropriate safe harbor is 17 U.S.C. § 512(c). Under § 512(c), to avoid liability, the storage provider must not have knowledge of the infringement, the storage provider does not receive a financial benefit directly attributable to the infringement, and the storage provider must

expeditiously act upon notice of infringement. Because GettaLife receives a direct financial benefit from Cy's infringement, it is not entitled to the § 512(c) safe harbor.

For the foregoing reasons, GettaLife is probably vicariously liable for Cy's infringement of Christian's mark.

B. Contract

For the reasons stated in Problem 1, a valid contract was created between Christian and GettaLife. Assuming that a contract was created between Christian and GettaLife, GettaLife breached its agreement with Christian when it did not terminate Cy's account for violating Christian's copyright and potentially, his trademark. Christian incurred damages because his copyrighted work was available without authorization. Thus, Christian is entitled to bring a breach of contract action against GettaLife.

On the other hand, GettaLife might argue that it did not know about Cy's infringement and, hence, did not know it was in breach. However, GettaLife is not entitled to such a defense because it is vicariously liable for Cy's infringement. Vicarious liability imputed knowledge to the liable party, which prevents it from asserting a lack of knowledge defense in a breach of contract action. Therefore, GettaLife is liable for breach of contract to Christian.

III.

There various ways that Christian may prevent Cy from using “Christian Art” in his domain name are by bring action against Cy for (A) Trademark Infringement, (B) Violation of the Anti-Cybersquatting Consumer Protection Act, (C) Violation of ICANN’s Uniform Dispute Resolution Procedure, and (D) Trespass to Chattels.

A. Trademark

Trademark infringement exists when the plaintiff proves that the trademark is valid and legally enforceable, the mark is owned by the plaintiff, and that use of the mark results in consumer confusion. Playboy; Albert v. Spencer; Niton v. Radiation Monitoring. Here, Christian’s mark “Christian Art” is valid and legally enforceable. However, an argument could be made that the word combination of “Christian” and “Art” is generic because both of its components are generic. Furthermore, it is indicated that Christian owns the mark. However, it is not clear that Cy’s use of “Christian Art” in his domain name results in consumer confusion.

The degree of similarity between Christian’s mark and Cy’s domain name is identical except for the addition of “sucks” to the end of the domain name. Thus, this factor weighs in favor of Christian. The strength of Christian’s mark is not high because no evidence indicates how long he has held it and it is not fanciful or arbitrary. Thus, this factor weighs in favor of Cy. Artwork is typically expensive so customers typically use more care in their purchasing decisions and are not easily deceived. Thus, this factor also weighs in favor of Cy. Visitors on Cy’s website have purchased copies of the portrait by linking from Cy’s website, which is evidence that these customers might not realize that they purchased the portrait from Christian rather than Cy. Thus, this factor weighs in favor of Christian. Cy intended to use the mark to criticize Christian so this factor also weighs in favor of Christian. Cy also sales his own paintings on the website, so this factor weighs in favor of Christian. Both parties are attempting to sale paintings so this factor also weighs to Christian’s advantage. Because the preponderance of the factors weigh in Christian’s favor, it is probable that consumer confusion exists. Christian could also bring a cause of action against Cy for Initial Interest Confusion, but because Cy has sold his own paintings on the site, traditional confusion is more appropriate.

Christian also has claim for dilution. Dilution only requires proof of commercial use on the part of the infringer and dilution of the distinctive quality of the famous mark. Panavision. Here, Cy is using the website “christianartsucks.com” to sell his paintings, so commercial use exists. Furthermore, use of the amount of users on “christianartsucks” indicates that the website is tarnishing its quality. Thus, Christian has a cause of action for dilution against Cy as well. However, the cause of action only allows injunctive relief and not damages, unless the actions of the infringer are willful. Because Cy stated that he hates beautiful people and that Christian is a beautiful person, the evidence probably indicates willful conduct as well.

On the other hand, Cy might argue that he is entitled to a fair use defense. To qualify for a fair use defense, the defendant must prove that the mark was used in its descriptive sense, in good faith, and was used to describe the defendant’s goods in comparison to the

plaintiff's. Bihari. Here, an argument can be made that Cy is using the mark in its descriptive sense because he is criticizing Christian's abilities as an artist, but he is not necessarily comparing them to his own artwork. Furthermore, Cy is not using the mark in good faith because he is not attacking the product. Rather, Cy is attacking the artist. Finally, Cy is profiting substantially from the use. Thus, Cy is probably not entitled to a fair use defense.

Cy might also argue that he is entitled to a nominative use defense. To qualify for a nominative use defense, the defendant must prove that the product or service is not readily identifiable without using the mark, the use is limited to only so much as is reasonably necessary, and the use does not suggest sponsorship or endorsement by the markholder. While it is clear that there is no evidence of sponsorship, Cy could easily describe his goods without using Christian's mark, i.e. ugly people art, nor does he need to use the entire mark to describe his goods. Thus, Cy is not entitled to a nominative use defense.

Cy might claim a First Amendment defense, but because he is involved in commerce, the defense is probably not available.

B. ACPA

Under the ACPA, a defendant is liable to the markholder if there is evidence of a bad faith intent to profit. Because Cy did not qualify for a fair use defense, he knowingly used Christian's mark in bad faith, he intended to divert customers from Christian's site, there is evidence of a bad faith intent to profit. However, Cy did not register false registration information, Christian actually received sales from Cy's site, and Cy did not offer to sale the site to Christian the bad faith indicators are outweighed. Thus, Christian probably does not have a cause of action under the ACPA.

C. ICANN's UDRP

Under the ICANN's UDRP a plaintiff must prove that a domain name is identical or confusingly similar to its mark, the domain name owner has no rights in the mark, and the domain name has been registered and is being used in bad faith to bring a cause of action. Madonna. Here, Christian owns the mark, but Cy's domain name is not confusing similar because it includes "sucks" and there is no evidence of a bad faith intent to profit (discussed above). Therefore, Christian probably does not have a cause of action under the UDRP, but he might if he can convince the court that use of bad faith does not mean a bad faith intent to profit.

D. Trespass

To qualify for a trespass to chattels claim against a defendant, the plaintiff must prove intentional interference with his property that results in damage. CompuServe. Here, Christian owns a website that is receiving additional activity from Cy's site through Cy's in-line linking that could cause damage if allowed to persist. However, some of the activity is resulting in additional sales for Christian, so a court might not allow it.

IV.

Roxanne probably can win her defamation suit against GettaLife. Under 47 U.S.C. § 230, a publisher of online material is subject to liability for all posts if it edits or deletes one post, whereas a distributor of online content is only subject to liability for posts that it knows or has reason to know of being defamatory and does not remove from its site. Here, GettaLife is known as a dating site, not a publisher of information. Thus, GettaLife is probably considered a distributor under § 230. However, Roxanne notified GettaLife of the defamatory comments and GettaLife refused to remove them from its site. Because GettaLife did not remove the defamatory comments after receiving notice, it breached its duty and, hence, is liable under § 230.

V.

Christian probably cannot win a direct copyright infringement suit against Cy because the action fails the “server” test. Under the “server” test, a copy of a copyright is not in possession of alleged infringer unless it resides on the infringer’s server. Because Cy used in-line linking to cause the image to appear on his site, he is not in possession of the copy and, hence, does not violate Christian’s copyright.

VI.

§ 230 of the Communications Decency Act was created to protect providers from liability when restricting obscene or lewd behavior. Here, GettaLife is not only restricting potentially obscene or lewd material, but also material that could advance the proliferation of information throughout the internet. Because GettaLife's use of § 230 exceeds, and potentially contradicts the purpose of the legislation, it is not entitled to protection.