

- **Question 1**

Issue

To begin, the issue concerns what legal claims GettaLife.com may bring against Cyrano de Law and what claims may be brought against Cyrano by Federal or State Governments. Each argument will be laid out individually with a specific heading identifying the claim and the subject matter.

Breach of Contract

Cyrano breached the Privacy and Integrity clause of the contract by violating the trademark rights of another by using Christian's image, using the service for harassment but stating defamatory statements about Roxanne, and was not honest in the information he submitted. In order for a breach of contract to occur, a valid contract must have existed. For a valid contract in cyberspace, the normal rules of contract law apply. There must be an offer and an acceptance along with consideration and mutual assent. GettaLife.com created a valid contract when Cyrano de Law clicked the "I agree" box on the End User License Agreement after uploading the software. Clickwrap agreements are generally found to create mutual assent because clicking "I agree" is an affirmative action (Specht) and the terms of service are expressly agreed upon by the user. (see Davidson, Klocek, and Zeidenberg). A click-wrap agreement occurs when a consumer buys the product, brings the product home, and before using it, must click an "I agree" button before using the software. First, an offer occurred when GettaLife put the software in stores. Next, an acceptance occurred when Cyrano inspected the goods and the contract. By agreeing to such terms, Cyrano purchased a license to use the software and a valid contract existed. By breaching the terms, license protection no longer exists and the person who breached can be liable for copyright infringement.

Cyrano will argue that the clickwrap agreement is not enforceable because this issue is more comparable to *Bragg v. Linden Lab*. The clickwrap agreement in *Bragg v. Linden lab* did not create a binding contract because it was not a mutual contract because the contract was unconscionable. The court found the contract unconscionable because there was no mutual agreement and there were no other reasonable alternatives in the market. Cyrano will argue that the GettaLife is the only site of its kind and there are no reasonable alternatives.

However, the court will find that the *Bragg* decision was a rare decision and clickwrap is a valid form of contracting because it is an affirmative agreement. The issue at hand is unlike the

Bragg case because the contract and its remedies are not one-sided (as was the Bragg contract). There is not limiting arbitration provision and the terms are reasonable (Random House). (**Insert property interest argument**) Cyrano will also argue that all the terms weren't listed, but the court will likely follow the majority of the courts and hold that clickwrap agreements create binding contracts. By affirmatively clicking the "I agree button", along with a listing of terms of the agreement, there was mutual assent and a valid offer and acceptance. Thus a valid contract existed and Cyrano breached it.

Computer Fraud and Abuse Act

Next, a claim may be brought under the Computer Fraud and Abuse Act (18 U.S.C 1030). Specifically, the two sections of importance are 1030 (a)(2)(C) and 1030 (a)(5)(C). 1030 (a)(2)(C) allows an action to be brought if there was unauthorized or exceeded authorized access done intentionally and *information was obtained*. 1030(a)(5)(c) allows a claim as in 1030 (a)(2)(C) but *damage must be caused or could be caused* (Register.com). GettaLife can argue that Cyrano was not authorized to access the online community because he used another's name and by doing so obtained information from others and information about Christian, information he was not authorized to view. Under 1030(a)(2)(c), although a stretch, the court may find that Cyrano's actions could cause damage greater than \$5,000 in a year period due to a loss in sales as a result to Cyrano's abuses of the online community and the faith lost by other members.

A claim may also be brought under 1030 (a)(4). This act states that whoever knowingly and with intent to defraud, accesses a protected computer without authorization, furthers the fraud, and obtains anything of value shall be liable. But, this is limited because Cyrano likely did not obtain anything close to \$5,000, unless he obtained property in GettaLife close to this value.

To summarize, injunctive relief may be sought on any one of these claims and Cyrano may be banned from GettaLife forever, despite his property interests. To be brief, claims under this Act are a stretch, but still are viable, and better options will be discussed later in the brief.

Trespass to Chattels

GettaLife may also bring a claim of trespass to chattels against Cyrano. For a trespass to chattels claim:

1. Property must be accessed intentionally and without authorization
2. There must be an interference with plaintiff's possessory interest
3. Must result in some form of damage to plaintiff.

The trespasser is liable when the trespass diminishes the condition, quality, or value of the property. This can be shown without actual damage. First, Cyrano accessed the property intentionally and without authorization because he used another's name, despite the fact that he was authorized to use his own name. This use exceeded his authorization. Next, the possessory interest was interfered with because, regardless of the amount of interference, intermeddling with or use of another's property is sufficient under this cause of action (Ebay Inc.) Cyrano did just this by accessing GettaLife's private property and using it without permission. Finally, damage occurred because the trespass likely diminished the quality and condition of the service. Now, users will lose faith in finding their true love because Cyrano's actions will leave a shred of doubt as to the authenticity of the person they are potentially dating. Unlike the intrusive speech emails in *Intel v. Hamdi*, this damage will be sufficient for an injunction and for damages.

Damages

Cyrano will argue that the damages there is no physical damage occurred to the property. But, both *Verio* and *Ebay* hold that personal property can be diminished without actual damage. Thus, a trespass to chattels claim may be brought against Cyrano.

DMCA

Finally, GettaLife may bring an action against Cyrano for violation of the DMCA.. Cyrano's actions fall under DMCA Section 1201(a)(1)(A). The Act states that no person shall circumvent a technological measure that effectively controls access to a work protected under this title. To "circumvent" is to avoid, bypass, remove, deactivate or impair a technological measure. "Effectively controls" is defined as any means in the ordinary course of operation which prevents, restricts or limits the exercise of a copyright. Further, GettaLife must demonstrate a reasonable relationship between the circumvention at issue and a use relating to a property right for which the copyright acts permits the owner to withhold authorization (Chamberlain).

It is clear that by entering a password which was not given to him and without permission of GettaLife or Christian, Cyrano circumvented a technological measure which GettaLife used to protect its copyrighted work. GettaLife's work, or anything within the virtual world, is likely copyrightable even though the computer program contains an algorithm. The copyright likely protects the audio-visual reconstruction as the Nintendo game in the Game Genie case. Next, the password protection system of GettaLife will be found to effectively protect the GettaLife system. Cyrano will argue that it doesn't effectively control the system and he doesn't fall under the act because the system is not sufficient to protect users from circumventing it. However, this argument is flawed because it offers no protection to imperfect systems that are hacked, the ones that need it most, and full protection for perfect systems which do not need protection. Mr. Cyrano may also try to argue an interoperability exception of 1201 E, but this argument has no merit. He was not reverse engineering anything; he was only sneaking on to his friend's account. Thus, Cyrano's actions fall under the DMCA

Question 2

Issue – Actions Christian may bring against GettaLife.

Claim for Direct Infringement of the copyright.

Although this may be shown to be an invalid claim later in the argument, for now, Christian may bring a claim against GettaLife for direct infringement of his copyrighted image. To prove copyright liability,

1. Plaintiff must own a copyright
2. The material at issue is a copy
3. The copy violates an exclusive right.

To begin, Christian's work is copyrighted. Next, the image which was displayed everyone on Gettalife was a copy of Christian's work. Finally, the copy can be shown to violate an exclusive right of reproduction, public display, and distribution.

The material at issue is likely a copy because the image was uploaded onto GettaLife's server by Cyrano. This loading of the copyrighted work onto Gettalife's server created a copy as in MAI when information was loaded onto a computer and into the RAM. The information is

thus sufficiently fixed to constitute a copy, even if it was fixed only for a short period. It can be argued that this gives too much control to copyright owners, but copyright seeks to preserve the interest of the copyright holder over consumers.

Next, the image was reproduced and displayed when it was placed onto the server of GettaLife. Unlike the Google case, the image, although framed, was not fetched. It was stored. Although it can be argued that Cyrano was reproducing the image, not GettaLife. When Cyrano was parading around the virtual world this was a public display. Limited access to paying customers is still a public display (*Playboy v. Frena*). Finally, it can be argued that this was also a distribution of the copyrighted material if others had access to it over the server.

However, as in *Netcom*, a server can't be directly liable under direct infringement for copies made when no direct action or human intervention takes place. The mere fact that the server makes a copy does not extend direct infringement to the server. This would otherwise extend countless liability. But, if *MAI* and *Perfect 10* were followed, a fair use defense can be asserted:

Fair Use defense (just in case)

In response to the direct infringement action, GettaLife (we) can argue fair use. The four factors of fair use are:

1. Purpose and character of the use
2. nature of the copyrighted work
3. Amount of the portion used
4. Effect on the potential market.

First, the purpose and character of the will be examined to see if there was a commercial use for the work and if they work has been transformed with "new aesthetics." (*UMG Recordings*). The more transformative the use, the less significance the other factors will have. The character of the use, although used in a commercial setting, is not for commercial purposes, other than selling Cyrano's love. The image has also not been reproduced except when Cyrano roams the world. Next, the work is arguably transformative, as found in *perfect 10*, because the image is scaled and put into a circle. However, the transformation maintains the identity of the image and doesn't change the expression. Thus it is not very transformative, copies are minimal, and there is little commercial use. This factor weighs in favor of neither party.

Next, the nature of the copyrighted work is one in which copies “are close to the core of intended copyright protection”. (UMG). Because the work is highly creative, it deserves a higher protection. (La Times). This factor weighs in favor of Christian.

The amount of the portion used is the entirety of the work, aside from its borders. Further, this image was not needed to be used at all. This factor weighs in favor of Christian.

The effect on the potential market is minimal, if anything it would be an advertisement for Christian’s artwork, unless other users are able to copy the image. This weighs in favor of Gettalife.

To conclude, the factors weigh in favor of Christian and a fair use is not a valid argument.

Vicarious Liability

A claim likely won’t be held actionable under vicarious liability. Vicarious liability can be proven if the defendant:

1. has the right and ability to control the infringer’s actions
2. receives a direct financial benefit from the infringement.

Although GettaLife could control the infringer’s actions by terminating their account, (Privacy agreement 7), GettaLife does not profit from the copyrighted image because a fixed fee is charged per month, as in Netcom. This fee is not based on the infringement.

Contributory Infringement

Contributory infringement can be found if:

1. the defendant knew of the infringing activity
2. the defendant induces, causes, or materially contributes to the infringement.

A claim likely won’t be able to be brought under this theory because GettaLife was not aware of this activity nor did it materially contribute to the infringement by any of its actions or lack thereof.

Liability with respect to the Safe Harbor provisions of 17 USC 512

The relevant safe harbor provisions provide safety to a server from potential copyrighted information transferred through the server, stored on the server, or temporarily stored on the server. GettaLife may be safe under 512 (a) or (c) of the safe harbor provision.

Under 512(a) [Rule omitted to save words]

To be brief, liability can be imposed under 512(a) because the information is not stored temporarily.

Under 512(c)

GettaLife will likely fall under the safe harbor of 512(c) because it meets all the requirements of statute. The relevant part of the statute states that no liability shall be imputed to a server when information stored on the server infringes a protected right when:

1. The server does not have actual knowledge that the material is infringing. Is not aware of the facts or circumstances to which the infringement is apparent and after obtaining such knowledge, removes material expeditiously.
2. Does not receive a financial benefit from the infringing activity
3. upon notification, removes it expeditiously.

First, GettaLife is totally unaware of the infringement. It is not aware of any facts or circumstances that deal with the infringement. Next, it does not receive any direct financial benefit from the infringing activity. Finally, upon being notified, it will (or has already) removed the infringing material.

Under 512(c) (2), This immunity can only be established if the GettaLife has a designated agent to receive notifications of claimed infringement. Further, the notification must meet the requirements of 512(c) (3); a notification failing to comply with these requirements is not sufficient (ALS scan).

Finally, under 512(i), the Safe-Harbors only apply to a server who has adopted and reasonably implemented, and informed the subscribers of, a policy that provides for termination in certain circumstances (repeat infringers). Christian finds his best argument here. Because GettaLife performs no checking to ensure contents comply with the terms of service and laws, the court may find that it is not in compliance under 512(i), as was the case with AOL in Ellison because it did not have a valid e-mail address. GettaLife will argue that it is unreasonable to maintain watch over everything, considering the enormity of the virtual world. The court may

sway either way, but likely because there have been no complaints of the service, it will be found to be sufficient under 512(i) and the safe harbors will apply.

Question 3

Issue – Whether use of “ChristianArt” in a domain name is actionable under trademark dilution, infringement, or the ACPA.

Trademark Infringement when used for a website

To establish trademark infringement, under the Lanham Act:

1. the mark must be valid, legally protectable, and owned by plaintiff
2. the defendant’s use of the mark is likely to create confusion.

Factors to consider when looking for a likelihood of confusion:

Degree of similarity, strength of the owners mark, price of goods, length of time defendant used without actual confusion, evidence of actual confusion, intent of the defendant, same channels of trade, same targeted sales, relationship of goods in public mind, and public perception.

First, the mark is a valid mark because “ChristianArt” is a registered trademark. Next, the use of the mark must create confusion to a consumer who is somewhat familiar with the plaintiff’s mark. Then, the eight factor test is used to determine if a likelihood of confusion exists. Evidence of direct confusion is difficult to obtain, so the factors are used. (playboy v. Tel-a-talk). First, the degree of similarity is small because “sucks” is not in Christian’s trademark. Arguably, this could create initial interest confusion because the names are confusingly similar. But, likely there is no confusion because of the word “sucks”. The names themselves are not strikingly similar because ChristianArtsucks.com and ChristianArt are different. A balancing of the factors also shows the strength of the mark is inherently distinctive, the infringing mark is in the same channel of trade and targets the same sales group, and the name was not adopted in good faith because there is an underlying intent to profit (Albert v. Spencer).

Consumers would likely enter the website looking for descriptions of Christian’s art, but find a commercialized art site. Such gripe sites, which discourse and comment on the work of another, are protected under fair uses (Bally). Trademark owners may not quash expressive free

speech. Also, it is permissible for the use to be a nominative one or one used to describe someone's own goods. Further, the non-commercial use of a trademark in a domain name is not trademark infringement. (Bihari). However, it is arguable that Cyrano uses Christian's good name to obtain profits for his paintings and confusion exists at the point of sale. Cyrano will argue that ill motive is ok so long as there is no confusion, and none exists because of the word "sucks". But, Christian can argue it is not a use describing his Cyrano's own goods or a nominative use because he intends to mislead consumers and profit from their confusion. Cyrano may also argue that the domain name is registered to him, but such registration does not trump the trademark laws. He may also state that a disclaimer exists on the web page. But, even if so this will not be sufficient. If Cyrano's willful intent to profit from the infringement can be shown, monetary damages and all profits resulting from the infringement may also be recovered along with attorney fees. The issue will center on the commercial objectives vs. argument of no confusion at the point of sale. Because there is some confusion along with extensive commercial objectives, the court will find likely infringement.

Trademark Dilution

Trademark dilution is defined as the lessening of the capacity of a famous mark to identify goods or services. The relevant test for dilution is:

1. use of another's valid mark in a manner that is likely to associate the other's mark with the goods of the actor and:
 - a. owners mark is highly distinctive and association reduces distinctiveness
 - b. use is likely to disparage the goods associated with the mark.

The use must be commercial in order for a web-site using a domain name to dilute. This is irrelevant of competition between the mark and other parties and the likelihood of confusion.

First, the owners mark is highly distinctive because it reflects his name and his artwork. The name is suggestive, it describes what it does. ChristianArtSucks will disparage Christian's good name because it degrades the artwork of Christian. Further, using another's trademark to profit from and further your own work is disparaging. As stated in the previous issue, ChristianArtsucks also may create a likelihood of confusion and associate Cyrano's work with Christian's. Further, although domain names have a functionality and expression, and may be protected under free speech, the intentions of the registrant will lead the court to hold that the

domain name dilutes the good name of Christian Art because of underlying commercial objectives. Valid defenses such as: fair use, generic term, nominative, or descriptive are irrelevant because of the intent to profit. The right to criticize is not a fair use because commercial use underlies any criticism and invalidates it. To summarize, the issue will center on whether the use likely will associate the goods of the actor with the trademark. Because there is an underlying bad faith intent to profit from the association between the Cyrano's name and the trademark, there is dilution by tarnishment and because of the willful intent, damages, costs, fees, destruction of the website, and an injunction may be found by the court to be proper.

UDRP

The dispute can be solved under the UDRP in negotiations, but a court will give no deference to the dispute resolution and this must be agreed upon by parties in arbitration. This is not the best option.

ACPA

The Anti-Cybersquatting Act makes actionable the bad faith registration of a domain name identical or confusingly similar to another. Christian has a strong claim under the ACPA and the court will likely find a violation of the act. This action may be brought in rem if Christian is unable to get personal jurisdiction. The act states that a person shall be liable, without regard to goods or services, if:

1. A bad faith intent to profit exists
2. A person registers, traffics, or uses that name
 - a. In the case of a distinctive mark – a mark that is identical or confusingly similar
 - b. In the case of a famous mark – one which the mark is identical or confusingly similar.

This action may work if other courts do not find that dilution and infringement are occurring within the same goods and services. First, the court will likely find bad faith intent to profit because Cyrano attracts customers using Christian's copyright and trademark to profit from customers. Cyrano will argue that criticizing artwork is not bad faith and the commercial objectives are unrelated. A court won't find bad faith if the person had reasonable grounds to

believe that the use of the domain name was a fair and lawful use. However, this is not the case. Cyrano willfully used Christian's good name and used it in connection with goods or services. Cyrano will argue that the names are not confusingly similar. But, this is undermined by the intent to profit from bad faith. Next, the court will likely find that the mark was used as a domain name and the mark is distinctive and not famous because it describes the goods and services; although a mark can be famous on a local scale. The issue will center on whether the mark is confusingly similar. But, because the mark is distinctive and used with bad faith intent to profit, the requirements of the ACPA will likely be met and liability imposed.

Finally, where willful intent to profit is shown, the plaintiff can recover actual damages, dilutor's profits, and costs. Otherwise, a court may award statutory damages from \$1,000 up to \$100,000 per infringement in order to deter wrongful conduct and provide adequate remedies (Zucharini). The court may also cancel the domain name. Although a court is not likely to award damages as large as the Zucharini case, because this is Cyrano's first and only infringement claim against him, the court still will find that the bad faith and the distinctive name are sufficient to award damages to deter Cyrano from doing this again. Thus, Christian should elect to receive statutory damages.

Question 3

3. Roxanne will not likely succeed on a claim against GettaLife as a publisher. 47 USC 30 prevents liability for Internet Service Providers. The act says that no ISP shall be treated as a publisher and they cannot be held liable for information on their server, even if they had an aggressive role in making the content available. To find such liability would have a drastic effect on internet speech and communications because every time notice is given, an ISP would have to remove the language, defamatory or not, in order to prevent liability. Congress chose to limit such liability under the act, and because GettaLife is a service provider on which the information was published, it cannot be held liable

Question 4

4. Whether Christian will be able to bring a copyright infringement will depend upon an analysis of the four factors of fair use in concern with the criticism of an artwork. If there is a commercial use then Christian can definitely succeed on his claim. The right of public display and reproduction will be juggled along with the nominative critique of the artwork, and because of the lack of transformation, I believe that it will be found to be an infringement.

Question 5

5. The best theory of liability under the Section 230 would be to show that GettaLife.com is not immune because it provides the information itself, and is a publisher. The information must be provided by someone other than the content provider, and by showing that the GettaLife.com created this invisibility feature in order to allow people to discriminate on the basis of sex or race will show that GettaLife.com is not a service provider, but is a publisher. Another theory would be to show that the information was not provided to the ISP for publishing under the “reasonable person in the position of the service provider” theory.