

Question 1.

GettaLife.com may pursue many different legal claims against Cy Law. Each claim its strengths and weaknesses will be discussed in turn below.

Breach of Contract

GettaLife may sue Cy for breach of contract. The terms of service for the GettaLife site list the rules that all users, including just visitors to the site must obey. These are available by clicking on the link at the bottom any page on the website. This qualifies as “browse wrap.” Also, before being able to register with GettaLife, users must click an “I Agree” button. The button is listed on the same page as the terms of service, indicating that the user understands and agrees to the terms of service for GettaLife before they register for the site and are then bound by the terms, this qualifies as “click wrap.”

Browse wrap agreements tend to not be binding on users of websites because there is no affirmative asset to the terms. To be upheld, a reasonably prudent internet user must have seen and understood to the terms of service. Under *Specht*, terms of use at bottoms of GettaLife are not binding on casual visitors to the site.

However, since Cy is not just a casual visitor but a registered fee paying member, the rules for him differ. Because he registered with the site, he had to click on the “I Agree” button. This click wrap agreement should be binding against him for any violation of the terms of service. Click wraps are valid and binding under *Davidson*. Here Cy, agreed to GettaLife’s terms before he registered and gained access to the site and its benefits. He could have not agreed to the terms and declined to register, being only able to view profiles, not enjoying the connectivity to other users in the virtual world.

Bound by the terms of service, Cy breached his contract with GettaLife. The first rule was not breached because Cy didn't register as Christian. He just hijacked Christian's account and impersonated him. The "register as someone else" ban shields Cy in this case. GettaLife could have written this term better to include Cy's behavior. The second rule was again not broken because Cy's profile had his own picture. He used Christian's profile with Christian's picture. He did not use his own profile with Christian's picture. So again, Cy is safe. However, he definitely breached the third rule, because we are to assume that Roxanne would win any defamation case brought against Cy. So in fact being a defamatory statement, it breaks the third rule. This might also qualify as harassment, but being that we don't know what else Cy did to Roxanne, if anything, this is undetermined. He could have sent her a hundred emails a day, or spray painted her virtual house, if she had one.

Finally, Cy has also violated the sixth rule. He violated Christian's exclusive copyright rights of reproduction, display, and distribution when he uploaded Christian's self-portrait to the website. GettaLife may not sue Cy for copyright infringement, that right is left to Christian. This term of the contract will not be preempted by the copyright laws because it has an "added element"—the agreement not to infringe. (*Bowers*). Very rarely will the copyright laws preempt a term such as this. It is valid to go beyond the protection of copyright law, but it is not ok to reduce the protection. Here the terms are trying to enhance the copyright owners rights through this agreement.

Cy will likely argue that the terms of service are not a valid, and if they are held to be valid, the terms are unconscionable and should thus he should not be bound by them. These arguments will not prevail. First, as noted above click wrap agreements are usually upheld because the parties have manifested assent to the terms by clicking the agree button. Cy was a

registered user and could have gone elsewhere if he didn't agree to the terms. After this finding of a valid click wrap, Cy could rely on *Bragg v. Linden* to argue that the terms were unconscionable. Although finding click wrap to not be binding on the parties after they agree is rare, Cy has a good argument. In *Bragg*, only Secondlife was offering users the ability to own virtual property. No other website was. Because there was no reasonable market alternative, on top of terms of adhesion, the scales tipped in favor of the user who agreed to Secondlife's terms of service. Here, like with *Bragg*, GettaLife is the only virtual world dating site. There is no mention of other sites, so we can assume this is the only site like this on the internet. This might shift into Cy's favor.

Mostly likely, Cy will be bound by the terms and be liable for breach of contract.

Copyright Infringement and the DCMA

By registering as a user to GettaLife, any written information and images posted on the site are still owned by the user. GettaLife is given a license by the owner of the images and text to reproduce and display such content on the website. So long as the profile information is not strictly factual, it is copyrightable because it is an original work of authorship that is fixed in a tangible medium of expression by being posted on the website for a significant period of time. The photo of Christian is copyrightable for the same reasons, and it has been copyrighted as evidenced by the copyright symbol on the picture and the fact that we are told Christian has registered the portrait. Because Christian did not post the portrait himself, he did not give GettaLife the license to use it. However, Christian himself filled out the questionnaire and his textual answers were licensed to the website to use.

User profiles are password protected. Under the Digital Millennium Copyright Act, GettaLife can Cy for circumventing their technological measure that effectively control access to a copyrighted work. (17 USC §1201(a)(1)). Here, Cy only accessed the information in Christian's profile. He did not tell other people how to gain entry to Christian's profile, or tell them how to hack anyone's password. There was no trafficking, only access to the copyrighted material (profile information).

Arguably, this was no an authorized access, Christian never told Cy that he could do this, otherwise, he would not have had to guess Christian's password. Cy circumvented the password protection without Christian's permission (*Reimerdes*). Password protection for social websites is the norm. There was no reason for GettaLife to think that this type of barrier to access would not have been adequate.

Cy will have a hard time arguing that he is not liable under the DCMA for unauthorized access. He can try to say that he did not act in bad faith when he used Christian's profile. But copyright infringement and the DCMA violations are strict liability and do not consider the defendant's state of mind. Cy could also not argue that this was a fair use, even if he could make up an excuse because fair use is specifically not a defense to the DCMA. And as he is not a service provider or website operator, he does not get immunity under the §512 safe harbors.

a. Secondary Liability

Because GettaLife does not hold the copyright on the Christian's image or text, it is not possible to raise any secondary liability concerns for other users having access to Christian's photo against Cy. Christian would have to be the one to allege copyright infringement through secondary liability against Cy and GettaLife.

Trespass to Chattels

GettaLife can argue that Cy's guessing of Christian's password, Cy trespassed into GettaLife's website. But because he did not impair the running capability of the GettaLife website or server (*Hamidi*) this will likely not be a valid claim. Even the potential for harm is low because if everyone impersonated someone on GettaLife, the usage would likely not be impaired or overburdened.

Computer Fraud and Abuse Act

GettaLife would not want to bring a CFAA claim (18 USC §1030 (a)(2)(c) or (a)(4) depending on whether this was an interstate act or not) against Cy because they would likely not be able to show all the elements needed for Cy to be liable. Although Cy did access Christian's profile without authorization, we do not know if he obtained any protected information. We don't know if the full profile is available to see when you aren't the person using the profile. And it is not likely that GettaLife has suffered \$5,000 in damages or losses due to Cy's actions. It appears that the only damage done is to the other users. GettaLife has not suffered as we know of through diminished network capacity, or decreased membership.

Question 2.

Christian may peruse many different legal claims against GettaLife. Each claim its strengths and weaknesses will be discussed in turn below.

Breach of Contract

Christian is a registered user of GettaLife. When he registered, he agreed to be bound by the terms of service for the site. In addition to being bound by them, he is should also be protected by them. It is not clear if after he stopped using the site, he stopped paying the monthly membership fee. If he continued to pay, he is still a member. I assume he is still a member, and Cy is not paying for Christian's profile.

As mentioned above in discussing the breach of the terms of service in relation to Cy, they are still a valid and enforceable contract for Christian's purposes. When Cy violates Christian's copyright rights, this is a breach of the terms of service. It is not known if Roxanne told GettaLife that Cy was impersonating Christian when she complained of the sign he put in front of his virtual house. And it is not known if Christian has asked them to take down his profile due to Cy's actions. But by not making sure that users comply with the terms of service, they breached their own contract.

GettaLife can argue that these terms are for the users to abide by, and GettaLife should not have to police its own website for breaches. While it is accurate that there is no requirement for sites to search out instances of defamation (47 USC §230) or other law violations it is encouraged. By having users pay a monthly fee, it would be unconscionable that users would have no protection of rights of the terms of service due to lax enforcement.

Copyright Infringement

Christian's text and portrait are copyrightable as noted above. And although GettaLife did not upload the portrait or access the information itself, its website aided Cy in posting these materials and allowed others to view and possibly do other things with it as well. When Cy uploaded the portrait he reproduced, displayed, and distributed it—directly infringing Christian's rights as the copyright owner.

GettaLife changed the shape of the portrait from square to oval. This is only changing the display of the image, and not making a derivative work, which is a right that is held by Christian. Altering the view is not an infringement because this different shaped image is not a new independent work. (*Galoob*). GettaLife is not directly liable for this act.

However, other users accessing Christian's profile copy his text and portrait to their RAM just by viewing them. (*MAI*). This is arguably an infringement on rights in the portrait because there is no license given to GettaLife---Christian didn't upload the image himself. He did fill out the questionnaire himself, letting GettaLife post it. GettaLife can be found secondarily liable for infringements of other users. (The server test from *Perfect 10* only applies to direct infringement as GettaLife facilitates in users possible infringement it does not matter if the material was stored and served on GettaLife's servers).

a. Contributory Infringement

To be liable for contributory infringement Christian will have to show that 1) GettaLife knew of infringing activity and 2) GettaLife induced, caused, or materially contributed to the infringing conduct of users. Here, we do not know if GettaLife knew that Christian's portrait and text was infringed by Cy; other users storing a copy on their computers when viewing it

(although this is a fair use under *Perfect 10*); other users storing a copy on their computer by downloading it; or if the material is displayed somewhere else like an art show. Assuming that GettaLife did not know of the infringement, it cannot be a contributory infringer.

b. Vicarious Liability

To be liable vicariously, GettaLife had to have the 1) right and ability to supervise the infringing activity and 2) gained a direct financial benefit from the infringing activity. While there is no necessity that GettaLife know about the infringing activity, it must have the ability to tell infringers to stop their actions when it knows they are infringing. Arguably under the terms of service, copyright infringement is grounds for termination of the account. *Netcom* addressed whether or not a server had the right and ability to control user posting, leaving the final decision to a jury.

As users pay a monthly fee, GettaLife benefits from users going to this site. However, *Netcom* also clarified that if the money gained is not derived or caused by the infringement, the second prong cannot be met. Here, it is not shown that there was an increase in registration because “hot stud Christian” had posted his picture for all users to see and new users to be attracted to. There is no way to tell if there was a financial benefit for GettaLife.

c. §512 Safe Harbors

Although there is might not be a case of secondary liability for GettaLife, if by chance a court does rule that it aided in direct infringement, GettaLife can raise the defense that it is protected by the DCMA safe harbors. These safe harbors were designed to shield service providers from secondary liability for the direct infringement of users. Here, GettaLife would

qualify for immunity under §512(c) as a system that stores information at the direction of users.

GettaLife has no knowledge of the infringing activity, does not get a direct financial benefit from the infringing activity, and since no notification of infringement has been made (will get notice when Christian files suit) it has not yet had a chance to respond and remove the infringing activity. Once given, the notification will be valid as substantially complying with (c)(3) because under RemarkQ, generally any notice qualifies. And because GettaLife is incorporated, it most likely has registered with the copyright office and has designated an agent to receive notification as required under (c)(2). GettaLife will definitely qualify for immunity from secondary liability under the §512 safe harbor.

Question 3.

Christian can pursue many different causes of action against Cy for the use of “ChristianArt” in his domain name. Because there is no information on use of keying, use in metatags, or html code the following discussion will be confined to the domain name issues.

Trademark Infringement

To bring a case against GettaLife for trademark infringement Christian must prove 1) he owns the ChristianArt and it is entitled to trademark protection; 2) Cy used ChristianArt; 3) Cy’s use occurred in commerce; 4) Cy used ChristianArt in connection with the sale of goods and services; and 5) Cy used ChristianArt in a way likely to cause confusion.

In the information provided Christian does own ChristianArt and it is given trademark protection as evidence by the “TM” symbol. As it is already trademarked, ChristianArt is distinctive, used in commerce, associated with goods, and signifies Christian as the source of the good it is associated with (his paintings). Cy used ChristianArt in the domain name of his ChristianArtSucks.com site. This use with “sucks” after it could show that this was a good faith use for when Cy raises his fair use defense, as he inevitably will. While the first page of Cy’s site is arguably a “gripe site” and allowable, the second page is selling Cy’s own paintings which is in connection with the sale of goods. And analyzing the *Sleekcraft/Polaroid* factors of confusion with the facts provided: there is no evidence that Cy intended to confuse people, or whether the customers for Cy’s art is the same for Christian’s art, or whether or not people actually thought they were buying Christian’s art. These second page could have notices that this was Cy’s work conspicuously placed all over. No actual confusion is needed because it is always hard to find, but these factors weigh in favor of consumer confusion.

If Cy had kept the gripe part of his site separate and still used “ChristianArtSucks.com” this would have been allowed because people have the right to express their opinions. (*Bally*). As long as the sucks site was not connected to the sale of paintings it would get First Amendment protection. (*Taubman*).

But since the second page of the site sells Cy’s paintings, this is a use in commerce connected to the sale of goods. Christian meets all the prongs needed to find trademark infringement against Cy.

Cy will likely raise fair use and First Amendment arguments. Fair use would allow Cy to use ChristianArt to describe his own paintings. To use this defense Cy would have to 1) use ChristianArt in its descriptive sense; and 2) use ChristianArt in good faith. It is unknown whether Cy is describing Christian’s paintings in comparison to his. If he was saying that Christian’s paintings were of a lesser quality than his paintings then that would be an allowable descriptive sense. It is also unknown whether Cy intended to capitalize on Christian’s reputation and good will. Those facts are not provided and knowing that Christian had trademarked ChristianArt is not evidence of a lack of good faith on Cy’s behalf. As the facts are unclear as to Cy’s advertising of his paintings and his intent in selling on his “sucks” site it is unknown whether Cy can get fair use protection. There are opportunities to make convincing arguments for protection.

And as mentioned earlier the gripe portion of the website is entitled to First Amendment protection. However, the second page selling ads would not get the same treatment. To have First Amendment protection the use of ChristianArt must be part of a communicative message and have no commercial use. Under Taubman, arguably because the sucks site is connected with the sale of goods in Cy’s paintings this should not get protection from liability.

Initial Interest Confusion

The argument that customers would go to Cy's site looking for Christian's paintings would likely fail. Customers looking for ChristianArt would not go to a site that at ChristianArtsucks.com. Because there is no metatagging or anything to indicate that customers might find the site through any other means but looking for Cy's site this argument is not strong. There is no confusion when customers buy Cy's paintings off his site, presuming that he does not pass them off as Christian's. And they might not be of the same style and would be apparent to art buyers that they are not looking at Christian's work.

Trademark Dilution

If Christian cannot prove trademark infringement, he might want to raise a trademark dilution argument. His best chance would be to argue that by using ChristianArtSucks.com, Cy is diluting his trademark through tarnishment by harming the reputation of ChristianArt. The trademark specifics for ChristianArt are unknown. But it is likely that the mark is not famous as required by 15 USC §1125(c)(2)(A). Being famous is the essential requirement to be protected from dilution. ChristianArt is probably not widely recognized by the general public just because the market for paintings is not huge, but fame can be niche (*Ty*) as long as ChristianArt is famous in the painting circles.

Anticybersquatting Consumer Protection Act

If Christian peruses action against Cy under the ACPA, he will have to prove that: 1) ChristianArt is distinctive and entitled to protection under the act; 2) the sucks site is identical or

confusingly similar to ChristianArt; and 3) Cy acted with a bad faith intent to profit from ChristianArt.

ChristianArt is registered and is presumptively distinctive. Gripe sites are not cybersquatting according to *TMI v. Maxwell* and they can use the exact name of the trademark as their domain name as long as the site isn't commercial. While Cy is selling his paintings on the second page which is a commercial use, the court in *Taubman* said that sucks sites have no possibility of confusion with the trademark, as required by statute. And there is no evidence that Cy acted with a bad faith intent. All that is known is that he got mad at Roxanne being shallow and now hates Christian and everything about him because he is a "beautiful person." There is no evidence that Cy wanted to capitalize on ChristianArt's name.

As there are court rulings that address different aspects of Cy's site, there is no way to be certain if a cause of action under the ACPA will succeed or fail. If successful, Christian could force Cy to stop using the site, forfeit the domain name, and get statutory damages.

Question 4.

Roxanne cannot win a defamation suit against GettaLife as the publisher of the text on the sign in front of Cy's/Christian's house. 47 USC §230 shields interactive computer service providers from liability for defamation on behalf of its users. In *Zeran v. AOL*, AOL was found not to be the publisher of the defamatory statements and was immune from liability. Here, like AOL GettaLife is not the publisher because the defamatory statement originated with a third party, Cy. GettaLife as a website is generally not liable for any action of its users.

Question 5.

Under *Perfect 10 v. Amazon/Google*, Cy would not be liable for direct copyright infringement.

The image of the self-portrait is stored and served on Christian's website, not Cy's. Cy would have to have stored and served the self-portrait on his own computer to be liable under the server test.

Question 6.

§230 of the Communications Decency Act does not immunize websites from liability under state laws. If the state in which GettaLife is incorporated or has its principal place of business in has a state law that prohibits discriminatory housing practices or discrimination in general, GettaLife could be liable under that law.