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47 USC 230-no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider, where the information is provided over the net. As in Zeran, FB fits under the broad definition of “interactive cpu service” and here, the information was provided by “another info content provider” (Cy), whose posting would allow a reasonable person to believe that the info creator provided it for publication on the internet, Batzel, because Cy was intentionally posting to reach out to Cy. The fact that a FB user attempted to notify FB is irrelevant under the statute – defamatory items need not be taken down, even if notice, Zeran–and the fact that FB sometimes independently takes down some defamatory things under its “Terms” but leaves others is also irrelevant. Finally, under Carafano/Roommates.com, FB’s providing of an “open ended” blank box for user posts could in no way be said to make it a developer of content, as it had no specific questions.

2

CR Infringement-1)valid CR, 2)material was copied, 3)violates §106 rights.

Edge will be able to show he does have an original work of authorship deserving of a CR – it is original (he took the photo himself/no copying); it is a “pictorial”/“graphic” work under §102(a); it was fixed by Edge in a tangible medium (his camera’s memory and later his iPad hard-disk), so that it could be perceived for more than a transitory duration; and it did contain the requisite minimum creativity (Edge chose angle, lighting).

Cy did copy and violate §106 right-reproduction right. First, when Cy logged onto Edge’s iPad, a copy of the photo was likely loaded into RAM for use in displaying the background; because Cy had no authority to turn on Edge’s iPad, he had no authority to make this copy in RAM. MAI. Second, Cy infringed Edge’s reproduction right when he uploaded the photo to WebSite’s server-copy fixed on hard-disk.

Cy will first want to insist that he did not infringe the CR at all. Because he “copied” Edge’s photo, his only argument may be that Edge didn’t really have a copyrightable work in the first place–photo was arbitrarily “snapped”–with a phone (un-ideal camera),– that when

compared with normal, copyrightable photos (e.g.-Playboy—who do extensive work in posing, airbrushing), Edge’s photo fails to have minimum creativity. But creativity is a low standard and Edge’s choice of angle should be enough.

Cy may argue Fair Use defense. Under **§107 factor 1**, Cy should argue that while his use was not for criticism/comment/teaching/scholarship– it DID have a good purpose, which was simply to return the iPad, not a commercial use. Edge will argue that it was not transformative– no new meaning or expression was added; and if anything, the photo was simply transmitted in a new medium (mp3.com/Napster), which is not transformative. Edge may also want to question why the photo was uploaded in the first place–was it really intended to aid the return of the iPad, or did Cy possibly think he could earn \$ or a kickback from WebSite for all the viewers of the photo/advertising. Under **§107 factor 2**, while Edge will argue that photos are exactly the type of creative work that is close to the core of CR protection, Cy should once again assert that there is very little creativity in a badly snapped phone picture. Under **§107 factor 3**, Edge will assert that the whole photo was used, but Cy should argue that to accomplish his goal of returning the iPad, he simply had to use the whole photo, as just a portion of the photo may not have been enough to sufficiently identify it as Edge’s. Under **§107 factor 4**, Cy will argue that he didn’t harm the market for the photo, because Edge didn’t intend there to be a market for his badly-snapped-phone-pic; Edge will point to the massive success of the site, largely created by the photo, and argue that he has lost the chance to capitalize on the popularity of the photo. As in Free Republic, Cy may respond that the photo was only popular due to his funny strip-club story and that if anything, he has enhanced the status of the photo. The courts in Free Republic/Napster rejected the “it helps the CR owner” argument–the CR owner should be able to control use of their photo. Balancing the factors is difficult here, but the 100% copying, photos being close to the core of CR may tip balance in Edge’s favor.

Cy will have no defenses under the 1st Am, which has been held to have been incorporated into the 107 factors.

Perhaps the court will hold that Cy is not liable for direct infringement–the loading of the background into RAM was non-volitional and for the simple purpose of helping Edge, and the copy to WebSite may be a FU. Cy may STILL be liable for secondary infringement, if his actions contributed to CR infringement by others. Google-v-P10 ID’d 3 potential direct infringers when an image is on a website–1) users who DL the image, 2) users who make copies

in RAM by standard browser-caching (G-v-P10-likely FU), 3) direct infringers/uploader (inapplicable here, as Cy is uplaoder). Assuming that yourappleipad.com visitors who make browser cache copies are simply making fair use of the photo, the only potential direct infringer are users who download the photo from the site. This is PROBABLY a stretch-it appears that most visitors liked the stripper/iPad story, not the photo-so people probably did not seek to save the photo.

If there are no direct infringers, then Cy can't be liable for secondary infringement. But if the court does find that there were direct infringers (evidence of people DL'ing?), a number of theories apply. First, Cy will not likely be held liable for inducement under Grokster-while it's not clear why he made the copy, it is certainly clear that he took no affirmative steps to help others infringe (ie-"Right-click/Save-As! to download"). Second, there are substantial non-infringing uses for this photo, likely, under Grokster/SonyVCR-plenty of people could come to the site and just view the image, which is arguably a fair use under P10-v-Google. Because Cy is not a service-provider for DMCA-§512, he cannot avail himself of any of safe-harbor. Cy is left to deal with the Common-law vicarious and contributory liability. Cy cannot be held vicariously liable-he had no ability to control the direct infringer's acts (the user) and did not appear to make any \$ off of it. Contributory infringement under Gerswhin/P10 is a little less clear-as to whether Cy had knowledge of the infringing activity, the court will likely note that Cy seems to be ignorant of copyright-related matters and regardless-with a plausible FU for caching and questionable evidence about whether anyone actually downloads, his knowledge of infringement would be equivocal at best.

Edge may even assert that Cy unwittingly infringed his derivative work by spilling the coffee that left a mark across the screen (and thus, altered the photo). This argument will fail under Game Genie/Duke Nukem-mainly because Cy didn't create a "work," but rather merely changed the display of Edge's own work-like a kaleidoscope/lens as analogized in GG. Moreover, while it is similar to the original and incorporates in parts of the original, when the coffee dries/moves to other parts of the iPad, the derivative work will fail to exist in any concrete/permanent form.

Finally, for direct infringement, because Cy was not authorized to access Edge's iPad OR Facebook page, any of Edge's own CR'ed works that may have been accessible only via his own FB account may have been impermissibly copied to the iPad's RAM when Cy accessed the

account. Of course, Cy could still assert FU. Regarding both the logging onto the computer and FB loading-of-info-into-RAM, while both are ostensibly situations of Cy not being authorized and thus impermissibly making copies (and CR infringement is a strict liability offense)—the court may be very sympathetic to the foolish Cy, who apparently had a good heart and arguably made innocent clicks to create these so-called “unauthorized copies.”

Trespass to chattels

Edge may wish to assert trespass-to-chattels claims against Cy for the harm caused to his iPad by spilling coffee in it, for deleting his iPad programs, and for deleting his FB posts. A Trespass-to-chattels claim requires an access 1)intentional, without authorization, 2)interference with possessory interest in the computer, 3)harm/damage to computer (BiddersEdge/Hamidi). As discussed in regard to copyright infringement, Cy may assert that he had no notice that his access to the computer was without authorization—there was no note on the iPad saying “don’t use” and Cy appeared to inexplicably stumble through the login with his pin-number. Edge will state that the password was a lock and that Cy was thus on notice that his access was not authorized. And certainly the access was intentional—he explicitly aimed to get in the computer and seek out Edge’s contact info. Physically using Edge’s iPad would seem to interfere with his possessory interest in it (though Cy should argue—Edge had no possession of it at the time). For prong #3—appropriating the “damages” definition from the CFAA=access-to-info is not damage, but damage must be to the system or data availability—the court may find that when the applications were removed, this unavailability of data caused sufficient harm for a trespass-to-chattels action. Cy should argue—the programs were restored—so at the end of the day, no actual harm. Edge should respond that under these cases, especially if he seeks an injunction—the likelihood of harm should be sufficient here and the loss of data was real (would be damages under CFAA). The coffee is another matter—similar to the other arguments, if it is able to be drained out and the computer works fine, then maybe there has been no actual harm. But Edge can already show the streak on the screen, which may harm enough. Cy should argue that the coffee harm was not related to his access.

CFAA

Edge may want to bring a CFAA action. The iPad will likely be seen as a “protected-computer”-though the statute has not likely been applied to the iPad-which is a “tablet device”-and not NECESSARILY a computer-because the iPad does so many computer-like things and does affect interstate commerce (connected-to-web), it should be within CFAA.

(a)(2)-access without authorization or exceeding authorized access and obtaining info from protected computer-Loading up the photo, the apps, copying credit-card info, and obtaining information from Edge’s FB page-were all pieces of information obtained when he did so without authorization. Requirement of password shows unauthorized.

(a)(4)-because this section requires an intent-to-defraud, it is unlikely that this C/A will be availing for Edge.

(a)(5)(C)-intentionally without authorization accesses protected computer and cause damage and loss. Damage requires an actual harm to computer/data-availability and not just use of information. Edge will again point to the harm of the coffee in the screen, removal of applications, deleting of Facebook posts. Cy should again argue that the unavailability of data was only temporary. However, just because a computer’s data may be restored via backups, etc, a CFAA action should still be able to be brought-the definition of “loss” includes costs of “restoring data,” it would not make sense for “loss” to include this if it was fine to remove data that could later be restored.

As a sidenote, (a)(5)(B) should be unavailing for Edge, because in light of Cy’s unintentional hurting of data, he probably did not have the “reckless” state of mind required.

(a)(5)(C) requires both damage and loss. Assuming the court finds the temporary unavailability of data to be damage, Cy can show loss, which is defined as any reasonable cost to the victim (ie-responding to offense, restoring data). Cy’s losses here should include the time spent to discover and fix deleted programs (1.25 hours) and likely the unauthorized charges to WebSite on his credit card caused by Cy’s access (4/2010 to 6/2010-26 months at \$100/month=\$2600). A CFAA civil action requires damage or loss of \$5000. This does not seem to be met here. Any damages/loss due to the hardship of his divorce (loss of consortium?) not usable to reach \$5K-damage refers to harm to computers and loss seems to only contemplate reasonable costs associated with fixing the offense.

He may encourage law enforcement to bring a criminal action under the CFAA. Cy should argue under Lori Drew that this is too HARSH-he was an empty-headed stranger trying to help-his actions should not yield criminal penalties.

Circumvention

17 USC 1201(a)(1)(A)-circumvention of a technological measure that effectively controls access to a copyrighted work. This statute is relevant in regards to Cy's "1234" login to the iPad; it will probably not be useful regarding his access to Edge's FB page, because when Edge used the "remember login" he effectively removed the lock that was previously there. A password is a normal example of a tech measure that controls access-it requires the application of information with the authority of the copyright owner; here, Cy had no authority to from Edge to use the password. Cy, however, will argue that it is not a technological measure because it does not "effectively control" access to the work, as required by the statute. This argument will likely be unavailing under Reimerdes, where the court said that the STRENGTH of the tech measure is irrelevant.

Cy's use likely does not come into any of the exceptions of the statute (reverse engineering, etc). While the lock may have protected some factual (non-copyright-able) information (credit card info), as discussed above, the lock was also on the photo, which was likely copyrightable. Cy may seek to argue under Skylink that his circumvention was not related to a protected 106 right. Edge should point to the fact that when Cy accessed, it caused the photo to be loaded into RAM, and thus caused unauthorized copy.

3

Direct infringement-WebSite may have made copies of the photo on backup servers; moreover, because the image is located on their server, they are infringing his display/distribution rights. WebSite will respond that they are a service provider, and under Netcom/§512, they cannot be held liable for direct infringement stemming from Cy's upload, because their service is automatic and general, and not geared towards infringement. Website will then want to argue that they cannot be held 2ndary liable, because there are likely no direct infringers. P10-visitors who make copies in browser-cache are making FU and there is no

evidence of people downloading the photo. Edge may be able to prove that there ARE downloaders of the photo and that WebSite is not eligible for 512 safe harbor because it does not have a reasonably implemented policy for dealing with infringement-he reported the infringement problem and they took from 5/2011-6/2012 to fix. If Website eligible for safe harbor, they should assert that 512(c) applies and shields them from liability. Edge will again point to the fact that he provided **notice** of the infringement and that they still took over a year to remove, so no safe-harbor. Edge should also assert that they are not within the 512(c) safe harbor because they were vicariously liable. Edge should point to the huge \$ benefit that they received from the advertising directly related to the infringement and the fact that they could have controlled the infringer's actions by screening the image/site before it went up. WebSite will assert that because the site is automatic, they couldn't control Cy's upload and even if they could, they would have no knowledge that the image was a copy, because it had no CR information attached and they assumed it was Cy's own image.

4

FB can assert that Cy breached their provision about posting material that "... violates the law," because of Cy's defamation. Under Specht, Cy can argue that there was no K because the site used browsewrap and his act of using did not unambiguously show assent, especially given his ignorance of the internet (no internet in his house). Cy will state that the terms were not even on the bottom of the page, as they were in Specht, but rather a link-click away. Moreover, Cy can point to the confusing list of links with the confusing dot in the middle (which looks like 2 big links only). All of this-show that he did not know there were terms and that he didn't assent to them by using the site. FB can assert that Specht was in 2002 and that things are different now; savvy net users now on inquiry notice. Cy should assert that if there was a K, it should be void as unconscionable. There is procedural unconscionability-it was a contract of adhesion where FB had all the bargaining power and there was surprise, because he wasn't even aware of where the particular terms were (buried). Cy can also assert that like in Linden, the termination term appears to be incredibly one-sided (substantive unconscionability) where FB cancel an account without notice and even for violating "the spirit" of the agreement. Finally, Cy should assert that the breach of K action fails because FB suffered no damages from his breach.

As a registrar, under Lockheed, WebSite's registration was not "use in connection with the sale or advertising of goods/services"-but rather a mechanical linking. HOWEVER, this case is different and may allow an action against WebSite. Here, beyond just registering, WebSite made further "use" in connection with advertising by placing the advertisements on the page. This presumably removes them from their registrar immunity. For most actions below, the defendant COULD be either Cy or Website.

A valid TM requires-1)distinctiveness, 2)use in commerce, 3)fixed/associated with goods/services, 4)signify source/origin of goods. **Distinctiveness**-Apple will want to assert that iPad is inherently distinctive as being suggestive. Apple will assert that the mark requires a JUMP/INFERENCE and some imagination to determine what the product really does. Apple will assert that the mark itself doesn't describe the product-there are many ways that a "pad" could be interactive-but rather would require a jump in logic for one to understand that it refers to a computer-like-device with a rich set of features. The defendant will assert that at most, the mark is descriptive-like iTunes (interactive/internet music), iPad is merely descriptive because it is an "interactive pad." Even if it is descriptive, Apple will be able to show that they have a valid TM, because the mark has acquired secondary meaning, already-with Apple's reputation for putting "i" in front of their product-names, people will automatically associate this interactive-pad with its source, Apple. The defendant should note products that have appropriated the "i"-prefix—not all of which are offered by Apple. The other "valid-TM-requirements" are also met.

Defendant must use the mark in commerce and use the mark in connection with the sale or advertising of goods and services. Here, the defendant will assert that the site has no competing product so TM infringement is not a viable C/A. However, Apple should be able to point to the advertisements would put the use of the mark in connection with the "... advertising of goods and services." Apple will point to keyword-advertising cases like Rescuecom, where the use of the TM in connection with advertising was "use."

Likelihood confusion-Defendant's use likely creates initial-interest-confusion (IIC), because people interested in IPads may stumble onto the site, and though they may realize that the site is not Apple-affiliated, choose to use the advertisements and buy advertisers' products (use in DN=come up in Google search). Relevant confusion factors are as follows: **degree of similarity** (used Apple's mark 100%, though added 'your'-prefix); **strength of owner's mark**

(maybe just descriptive, but Apple a huge company); **length of time without actual confusion** (popularity of the site, there was likely MUCH confusion in people trying to find an Apple-affiliated site); **intent in adopting the mark** (if Cy defendant- no bad intent; but WebSite-likely tried to lure people using the mark); **proximity of goods/targets of parties' sales efforts the same** (if ads tech-product-related, there was likely a close proximity of products/advertising efforts); **sophistication of buyers** (the defendant-tech savvy Apple fans know Apple only uses Apple.com).

TM-infringement defenses. The Δ will want to say that the use is a FU-like Bihari, the TM simply had to be used to describe the site, which dealt with one person's ("your"/Edge's) iPad and was used in good faith for the purpose of returning it to. If the defendant is WebSite, this defense may be less availing-seemed to be luring Apple customers(misappropriation).

The defendant may also want to assert a nominative use(NU) defense-though he used the mark, he did so in the smallest way possible, and only enough for the purpose of finding the iPad owner. The Δ will argue that he couldn't plausibly describe the product in any other way ("interactive Tablet-like device designed by Steve Jobs") and that he didn't use Apple fonts. Apple-Welles-the use was not nominative, as it was used not only in the domain name, but several times on the page.

The 1st Amendment defense will not likely be availing-largely because it will receive less 1st-Am protection because of its commerciality and also because it's questionable whether there is a communicative message here. Most 1st Am cases (Bally, Bosley,etc) are communicative by commenting/creating on the product.

Dilution action-1)famous mark,2)commercial use in commerce,3)after mark famous,4)blurring or tarnishing. The defendant-argue "not famous"-first, it is a new product/mark and probably not widely recognized by public. Apple can respond with information about their huge advertising campaign, buzz created prior to release, and the iPad's instant association with Apple itself and Apple's other famous "i"-products. The mark is being used commercially, because of the ads on the site. However, perhaps if the defendant is Cy, there is no commerciality-HE is not making any money from it. But assuming WebSite can be a defendant for his "use" in connection with advertising, there is commerciality.

Tarnishing/blurring-site's references to strip clubs and iPad are arguably the type of thing that harms the reputation of the mark. The defendant will want to assert the massive popularity

of the site that actually lead to MORE GOODWILL towards Apple. Blurring may also be viable, because any unauthorized use of the mark makes it lose distinctiveness-when people think of iPad, they now think of Apple's product but also the funny picture/strip-club story (more visitors than Panvaison-could be significant blurring here).

The defendant should again assert the FU, NU defenses, which apply in dilution.

For the actions above, Apple should likely seek an injunction-it shows they really care about stopping confusion/tarnishment, not looking for payday (also-Cy likely no \$). However, for dilution, 1125(c)(5) does create the possibility of the remedy of destruction, profits, damages/costs, and attorneys fees if the user willfully intended to trade on the recognition of the famous mark; this may be a good idea to use against WebSite, who arguably did this.

ACPA-1)famous/distinctive mark, 2)bad-faith intent to profit,3)register or use DN identical or confusingly similar. This could not be used against Cy (no bad-faith-intent and he also falls within the ACPA "pure-heart-empty-head" defense). Again, use against WebSite is questionable, as it limits liability for registrars; but as detailed in the analysis above, WebSite seemed to go beyond merely registering, so should be held liable. Moreover, while WebSite wasn't the registrant, WebSite did ostensibly "use" the DN (in connection with its advertising), even if it did not 'register' the DN. WebSite did likely have the bad-faith-intent-to-profit needed-in putting up the ads associated with the mark, they had no bona-fide/non-commercial use of the mark and likely did so just to divert customers away from Apple and towards their ads, likely by creating confusion as to source/sponsorship. WebSite will argue that the domain name is not confusingly similar-the "your"-prefix sufficiently distinguishes it. In the context of UDRP actions, the ICANN has noted that even a "sucks"-postfix does not conclusively indicate not confusingly-similar. Though this rationale has not been applied to ACPA, the actions are similar (both related to DN-mark-usage) and the rationale makes sense-attaching the non-derogatory "your" is arguably very close to the mark. As mentioned for Cy, WebSite itself will also be able to assert the "empty-head-pure-heart" defense-possibly assert thought it was FU. Apple can seek both an injunction under the ACPA and even profits/damages/costs/statutory damages if Website's use is found to be willful.

UDRP action-1)DN identical/confusingly similar,2)no legitimate interests in the DN,3)registered and used in bad faith. Much of the analysis for the ACPA action applies here-the first factor is the same and if "bad faith intent to profit" can be shown under the ACPA, then

that should satisfy bad faith here. Like the ACPA, the registrar is ostensibly freed from liability here; it should be noted that the language of the ACPA is “register OR use,” but the language of the UDRP is “register AND use”-thus, Website may assert that they are a registrar (excepted from liability), Cy registered, and Website only “used” the DN (Telstra). Otherwise, Website still has no legitimate interest in the use of the mark in the domain name and were likely doing so to capitalize on the use of the mark. Under the UDRP, Apple can only seek cancelation of the DN.