

Q1. Facebook has immunity under §230 of the Communications Decency Act. §230(c)(1) says that no provider of an “interactive computer service,” shall be treated as publisher or speaker of material provided by another “information content provider.” §230(f)(2) maintains that an “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a given server, and §230(f)(3) defines “information content provider” as any person responsible or partially responsible for the creation or development of information on the internet. Cy qualifies as an “information content provider” and Facebook as an “interactive computer service,” so Facebook is not liable even though it received notice of the defamation *Zeran*.

Q2. Memo.

Date: May 1, 2010

To: Bleeding Edge

From: Counsel

Dear Edge:

You have several claims that you can bring against Cyber Law, namely, copyright infringement, secondary infringement (discussed with copyright), liability under §1030 of the Computer Fraud and Abuse Act and §1201 of the Digital Millennium Copyright Act, and trespass to chattels.

A. Copyright Infringement. You have a copyright in the “No Butts in the Mulch” picture (“Picture”) that you took, as same meets the requisite definition of “original work of authorship fixed in a tangible medium of expression §102(a), and arguably in your Facebook page itself. As such, we must explore whether Cy engaged in the copying of a protectable expression beyond the scope of any licensure *MAI*. Even though Cy did not intend to infringe your copyright, intent is irrelevant to liability in this regard, as copyright infringement is strict liability.

a) Picture. It appears that Cy violated at least two of your exclusive rights as a copyright owner, namely, your rights to reproduce and distribute your work. Cy may also be liable for either the direct or secondary infringement of your display right. First, reproduction requires “fixation,” which the Act defines as “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” §101. Here, you merely imported the Picture to your iPad via a special cable, which means that it was stored on the machine itself. Cy proceeded to upload the Picture to his newly-created website, which created a further fixed copy in the iPad’s RAM *MAI*. Therefore, he infringed your exclusive right to reproduce your work.

Next, Cy infringed your right to distribute copies of the Picture to the public. By uploading the Picture, Cy put it out there for the world to see and even afforded patrons the opportunity to copy and print it for their own use. Although Cy did not directly offer the Picture for sale or lease, at least one court has held that making a work available to be distributed is analogous to the act of actually distributing same *Napster*. As such, it appears that Cy infringed your right to distribute the Picture as you please.

Finally, Cy may have infringed your right to display the Picture publicly. To display “publicly” means to do so in a public area or where a substantial number of persons other than one’s family or close friends are gathered *Frena*. However, *Perfect 10 v. Google* has instructed that the infringement of a copyright owner’s display right is contingent upon whose server houses the copy of the work. This “Server Test” says that if the copy of the work is on “your” computer, you are liable, if it is on someone else’s server, you are not *Id*. Here, Cy definitely caused the Picture to be displayed publicly, as arguably nothing is more “public” than a website accessible by anyone who frequents the web. However, the Picture appears to be on Weber Site’s (“Web”) server, which is the subject matter web site’s host, so Cy cannot be liable for direct infringement of your display right.

Even though there is no direct liability in this context, Cy may be secondarily liable under either a contributory infringement theory or a vicarious infringement theory. To be liable for secondary infringement, there must be direct infringement. As stated above, the infringing picture is stored on Web’s server, so Web is strictly liable under the Server Test. This provides the necessary infringement that precedes a possible finding of secondary liability. Accordingly, for Cy to be liable for contributory infringement, he must have knowledge of the infringing activity, and he must induce, cause, or materially contribute to such infringing activity *Gershwin*.

Although being technically inept could not save Cy under a direct infringement theory, the knowledge requirement for contributory infringement makes this theory an unlikely source of liability. Cy had no way of knowing that the copy of the Picture was even on Web's server, let alone that such activity infringed your copyright.

Cy might be liable under a vicarious infringement theory, but he has to have the right and ability to control the infringing act, and he must receive a direct financial benefit from the infringement *Id.* Cy probably satisfies the first requirement of the test because he personally uploaded the Picture to Web's server, so he could have prevented the infringing act that Web is unfortunately responsible for. However, Cy does not seem to receive any financial benefit from the display of the Picture, unless the strange fame that resulted from his development of the web site somehow translated into other financial opportunities that would not have arisen otherwise.

Considering the above analysis, it is likely that Cy will be liable for copyright infringement based on his reproduction and distribution of the Picture. Secondary liability for the infringement of your display right is a stretch, but further facts might reveal that he is liable under a vicarious infringement theory.

Cy may have a fair use defense to such copyright infringement. §107 of the Act gives the court four factors to consider: 1) purpose and character of the use; 2) nature of the work; 3) amount and substantiality of the portion used; and 4) the effect of the use on the potential market for or value of the original. Here, although Cy used an exact copy of the Picture and failed to transform it in any way, his purpose for the infringing use was merely to locate the owner of the iPad. Cy sought to gain no financial benefit from his use of the Picture, for he would not even know how to profit off of someone else's work in this regard. The Picture, although comical and somewhat creative, does not seem to command the protection that other works boast, but this is a

question of fact. However, it is unclear whether you planned to engage the market to disseminate the Picture, but Cy's infringement has the potential to diminish any chance you may have had to sell such work since all one has to do is save the Picture to their computer or flash drive and print it.

Because Cy's use of the work is in no way transformative, it was comprised of the Picture in its entirety, and has the possibility of devastating any market you would have had for it, Cy probably will not prevail on a fair use defense. The only plausible way he would have a chance to prevail is if a jury sympathizes with his ignorance and finds that his satisfaction of one prong out of the four, the purpose of the use, is sufficient to allow a disregard for the other factors that weigh heavily in your favor.

b) Facebook Page. Cy may have infringed your exclusive rights in your Facebook page to prepare derivative works based on such page, and also to display the page, if it is in fact copyrightable. The page seems to be a "work of authorship," and it is arguably "fixed" to the point that it is "sufficiently permanent or stable to permit it to be perceived" for more than a transitory duration. First, derivative works must be sufficiently permanent and concrete, which means that the work must be capable of producing an independent visual display, but it does not have to be "fixed" in the same way every time *Galoob*. Here, Cy deleted your posting respecting American Idol and he added a status post as if he were you. This activity "permanently" changed your page, even though you can delete Cy's posting and possibly retype your Idol blurb.

As discussed above, Cy probably cannot be found liable for direct infringement of your display right since he personally has no server to house your Facebook page *Perfect 10*, but he may be liable for secondary infringement if it can be shown that he either had knowledge of his infringing acts or if he financially benefited from same. Because Cy is no techie, he obviously

did not realize that he was infringing your display right by opening your page, and it does not appear that any financial benefit is coming his way as a result of utilizing Facebook on your behalf.

Cy might have a fair use argument if he can show that his new creation-your page-is highly transformative. It is true that Cy added something new to your page that altered it with added expression, for he wrote about you frequenting strip clubs in the early morning hours. He also deleted a posting, but these profound activities probably took a matter of minutes so the notion that the “work” is highly transformative seems to be a stretch. However, one court found that thumbnail pictures, even though exact replicas of the larger versions, were in fact “highly” transformative *Id.*, so there is at least a chance that Cy can persuade a jury here.

B. §1030 of the CFAA. Cy may be liable under §1030 of the CFAA, which applies to “protected computers.” §1030(e)(2) defines “protected computer” as one used in or affecting commerce, and §1030(a)(2) creates liability where 1) the defendant intentionally accessed a computer without authorization or by exceeding it, and 2) thereby obtains information from any protected computer. Further, §1030(a)(5) explains that a defendant is liable if he 1) intentionally accessed a protected computer without authorization, and 2) thereby caused damage and loss. Damage occurs when something is tangibly impaired, and loss deals with the prevention or remedying of some harm. §1030(a)(4) seeks to prevent fraud, and because Cy did nothing with the requisite scienter, this is probably not a viable claim.

Here, your computer probably meets the definition of “protected” because you utilized several of the iPad’s applications when you purchased same, but Cy could make an argument that because you had to shut the computer down prior to connecting to the internet, the requisite “use in commerce” is not satisfied. Assuming it is in fact protected, Cy intentionally accessed the

iPad without authorization by simply turning it on. He knew the computer belonged to someone else, and a reasonable person would not immediately power it on upon finding it in the street. As further evidence, Cy had to enter a password to enable him to view the computer's content, so this should have put him on notice that he was not authorized to use it. Cy's unauthorized access to the iPad lead to his obtention of information from it, as he was able to view the Picture, look at your Facebook page, on which he viewed countless personal messages, and even discover your name. In addition, he found and utilized your credit card number, to which he helped himself. This conduct seems to satisfy §1030(a)(2) of the Act.

Cy also seems to have caused damage and loss to the iPad and to you as a result of his unauthorized access. Cy deleted several of the computer's applications, spilled coffee on it, which resulted in a streak under the iPad's screen, and even deleted your Idol status posting on Facebook. Cy also caused you loss as a result of his perusal through your system; he posted something on your Facebook home page as if he were in fact you, which caused your family and friends to think poorly of you. At least one court explains that "loss" can mean lost good will *Registrar.com*, so an argument can be made that lost reputation is analogous to this notion. However, the court seems to emphasize that the lost good will must stem from the impairment caused to the computer or system, so this might be a stretch *Id.*

In sum, you probably have a valid claim under §1030(a)(2) of the CFAA.

C) §1201 of the DMCA. §1201(a)(1)(A) of the DMCA says that no person shall circumvent a technological measure that effectively controls access to a work protected by copyright. §1201(a)(3)(A) explains that to "circumvent a technological measure" basically means to get around what has been put there. §1201(a)(3)(B) instructs that a technological

measure “effectively controls access” to some work if it requires the application of information to gain such access.

Here, Cy breached the “technological measure” you put in place, the security code, which gave him unauthorized access to and facilitated the unauthorized use of the Picture and your Facebook page §§1201(a)(2), (5). Even though you entered an easily-guessed password, “1234,” the plain language of the statute merely requires the prerequisite of the application of information to gain access. In other words, Cy had to enter information to have the ability to utilize the iPad, so it appears that a good argument can be made that the security code “effectively controls access.” Further, you never shared your password with anyone, let alone with a stranger, so it is apparent that Cy’s conduct amounts to unauthorized access which lead to the resulting unauthorized use of both the Picture and your Facebook page.

D. Trespass to Chattels. Cy may also be liable under a trespass to chattels theory. To prove trespass to chattels, you must show that Cy: 1) intentionally used or intermeddled with your personal property without authorization; 2) such use or intermeddling interfered with your possessory interest in the property; and 3) you sustained damage which proximately resulted from his conduct *Bidder’s Edge*. Here, it is apparent that Cy used your iPad absent authorization, for he breached the security measures in place to gain such access. The fact that he correctly guessed the weak code you put in place seems to be irrelevant, for he should have been put on notice upon seeing such requirement to enter data that he needed authorization to use the computer. Cy’s use at least interfered with and possibly converted your possessory interest in the iPad, for he was able to utilize an expensive device for no cost and to your exclusion. Further, his intermeddling with the iPad resulted in deleted applications, ambiguous postings on Facebook, and a destroyed marriage, not to mention the wasted two hours of Wi-Fi use and \$100 per month



fee payable to Web, courtesy of your credit card, for Cy's hit web site. Even though potential harm may be enough to satisfy the requirement that you sustain damages as a result of Cy's unauthorized use *Id.*, it is readily apparent that you are able to show actual damage as required by some courts *CompuServ*.

Cy might be able to assert that he had an implied license to access the iPad because such conduct was required, in his mind, to ascertain the owner of the computer. Cy can argue that because he "guessed" the security code on the first try, it would have accepted any password that he entered, and all of the other charges, postings, and deletions were merely in an attempt to do the right thing and return the iPad to its owner.

Q3. Because Cy uploaded the infringing picture to Web's server, Web has possibly infringed Edge's display right *Perfect 10*, and because a copy of the Picture is stored on its server, Web may have also infringed Edge's reproduction right *Frena*. Web may be liable for secondary infringement under either a contributory or vicarious theory; Web might have had knowledge of the infringement in May 2011, and its refusal to take the site down upon Edge's request could satisfy the "causes infringement of another" prong of the test for contributory infringement; further it appears that Web had the requisite ability to supervise the site since it proved that it could take it down, and a strong argument can be made that Web received a direct financial benefit from the infringement since the site was so popular and many patrons clicked on advertisements on the page, which produced substantial revenue for Web.

In defense, Web can invoke the §512 safe harbors available to "service providers." It is unclear whether Web had a termination policy for infringing users' accounts, which is a prerequisite for immunity under the Act §512(i)(1)(A),(B). Web may have immunity under §512(a) if it meets the stringent definition of "service provider," which is defined in that section as an entity that offers the transmission, routing, or providing connections for online communications, without the modification of user content §512(k). As such, it appears that information is in fact routed through Web's system, and coupled with the fact that Cy was responsible for uploading the Picture which Web did not modify, it may qualify for this desirable safe harbor. Even though Edge gave Web notice in May 2011, §512(a) does not have a notice provision so Web would be off the hook.

Web can readily meet the definition of "service provider" for §512(c), as it is definitely a provider or operator of online services. Under §512(c), Web is not liable for storing material at the user's direction, but once it received adequate notice, the infringement must be cured;

accordingly, Web can make a valid argument that it did not receive sufficient notice in May 2011 because all Edge said was the Picture “is embarrassing.” This may not be enough to put Web on inquiry notice to investigate whether something on one of its sites was infringing *RemarQ*.

Q4. Memo.

Date: May 1, 2010

To: Facebook

From: Bleeding Edge

Dear Facebook:

You have a claim against Cyber Law for breach of contract because he violated your “Terms” and specifically Paragraph 5 by posting content on your site that infringed or violated someone else’s rights. You expressly state that “by using or accessing Facebook, you agree,” which is enough to create a valid contract with Cy. Further, even if Article 2 of the UCC is applicable in this context, which is unlikely since there is no sale of goods involved, the contract was effectively modified through conduct when Cy continued to frequent your site. Accordingly, Cy’s use of Edge’s Facebook page constituted copyright infringement, which in turn violated Paragraph 5, Sentence 1 of the Terms.

Please be aware that Cy will probably argue that such browsewrap contract is not enforceable because he never unambiguously manifested consent to such Terms *Specht*, and a reasonable user would not think to scroll to the bottom of the page to locate prescriptions as to permissible conduct. He will further try to argue that the UCC is applicable and §2-207 maintains that additional terms such as these are merely proposals to the contract in consumer transactions. Just because Cy accepted the “goods” at issue does not mean he accepted the contract that included such additional terms §2-606. Finally, Cy might try to argue that the state cause of action for breach of contract is preempted by the Copyright Act, as same proscribes limiting subject matter not within the subject matter of copyright. In other words, the contract restricts one’s ability to transfer or license a copyrighted work, which is grounds for a finding of preemption.

Q5. Apple should bring the following claims: 1) trademark infringement; 2) trademark dilution; 3) violation of the ACPA; and 4) a UDRP claim.

A. Trademark Infringement. First, Apple should sue Cy for trademark infringement. §43(a) of the Lanham Act asks whether: 1) the marks are valid and legally protectable; 2) they are owned by Apple; and 3) Cy's use of the marks to identify goods or services is likely to create confusion. To be sure, Cy must have used the marks in commerce to be liable for trademark infringement. The marks at issue are "Apple" and "iPad," so the first task is to determine whether same are valid. "Apple" seems to be an arbitrary mark that is used in commerce and affixed to goods, the source of which is readily apparent; as such, this mark is valid. "iPad" on the other hand is arguably descriptive because it was released merely two months ago, but consumers probably knew of the product long before it hit the market. Further, because both marks are registered, there exists prima facie evidence that they are valid.

Because both marks are probably valid and owned by Apple, the determination is whether Cy's use of the marks in his domain name "yourappleipad.com" is likely to cause confusion. The *Polaroid* confusion factors assist here, as Cy used the exact name of both marks in his domain name, Apple's marks seem to be very strong, Apple's products are very sophisticated and expensive, Apple advertises and sells its products online, and consumers might think Cy's web site actually sells Apple products. Although a few factors favor Cy, such as his intent in adopting the marks-to attempt to find the owner of the computer, it seems clear that consumers would likely be misled as to the origin of the goods.

Even if no source confusion exists, Apple might be able to prevail on the theory of initial interest confusion, which is defined as the using of another's trademark to capture initial consumer attention *Brookfield*. Because Cy's domain name exactly embodies Apple's marks, it

would be reasonable for consumers to mistakenly believe that they were visiting a site owned by Apple at which they could buy its products. If Apple can show infringement, it is entitled to damages and injunctive relief.

B. Dilution. Apple might also have a dilution claim against Cy, if it can show: 1) the marks are “famous,” meaning widely recognized by the consuming public; 2) Cy is using same in commerce; 3) the use began after the mark became famous; and 4) the use dilutes by blurring and/or tarnishment §1125(c), *et seq.* Here, “Apple” is definitely famous and “iPad” seems to be as well because of the media hype that preceded its arrival. Cy’s use of the marks arguably tarnish same due to his reference to the iPad being found at a strip club, which harms the marks’ reputations. If Apple can prove dilution, it is entitled to injunctive relief.

Defenses. First, Cy can argue that he is not liable for infringement because he did not use the marks in commerce like the Lanham Act envisioned. Second, Cy might be able to allege fair use and/or nominative use of the marks. For fair use, §1114(b)(4) of the Lanham act requires the use to be in the descriptive sense and in good faith. Cy’s use of the marks was probably in good faith because he did not intend to capitalize on Apple’s good will since he was not selling anything *Brookfield*, and he can argue that he was merely trying to identify goods that belonged to someone other than he. To show nominative use, the product must not be readily identifiable absent use of the marks, only so much of the marks may be used as is reasonably necessary, and nothing in the use can suggest sponsorship *Welles*. Cy used “yourappleipad.com” because that was the only way he knew to locate the owner of the product, which was not identifiable absent the use of the marks, but as said prior, such use can have the effect of suggesting sponsorship. Cy can invoke the First Amendment because his use was part of the communicative message *Bucci*, as he was attempting to communicate with the owner.

D. ACPA. Apple can sue Cy or yourappleipad.com for damages under §1125(d)(1)(A) of the ACPA. Apple must show that: 1) its marks are distinctive or famous; 2) Cy's domain name is identical or confusingly similar to its marks; and 3) he acted with a bad faith intent to profit. The ACPA does not require that the marks be affixed to goods and/or services or that they be used in commerce. Although the marks are probably famous and at least distinctive and Cy's domain name is at least confusingly similar to the marks ("your" arguably makes it slightly different), he did not have the requisite bad faith intent to profit which the Act seeks to disable. Again, Cy's only purpose in registering the domain name was to locate the iPad's owner, and he sought no financial gain as a result of his endeavors.

E. UDRP. Finally, Apple can sue Cy and yourappleipad.com under the Uniform Domain Name Dispute Resolution Policy to seek a transfer of the name. The UDRP process considers whether: 1) the domain name is identical or confusingly similar; 2) Cy has any legit interests in such name; and 3) the domain name is registered and used in bad faith. Although the name is at least confusingly similar to Apple's marks, Cy can argue that his interest in the mark was to find the iPad's owner, which dismisses any notion of bad faith.