

WORD COUNT: 4154

Question 1:

Using the immunity provisions of 47 U.S.C. § 230(c)(1), Facebook will undoubtedly win the defamation lawsuit. Under § 230, “[n]o 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.” *Id.* The term “interactive computer service” includes Facebook, which is an “information service, system, or access software provider” that allows “multiple users” access to a “computer server,” *Id.* at §230(f)(2), Batzel v. Smith, and defamation is a quintessential tort dealing with a “publisher or speaker” of information. Zeran v. America Online. Here, the defamatory statement at issue was posted by Cy, “another information content provider,” and Facebook did not create or develop his post; as such, Facebook is eligible for § 230 immunity. Batzel.

Question 2:

Edge can bring several causes of actions against Cy: (1) direct copyright infringement, (2) potentially secondary copyright infringement, (3) 18 USC § 1030 claims, (5) 17 U.S.C. § 1201 claims, and (6) trespass to chattels claims.

1. Direct Copyright Infringement

a. Prima facie case

In order to pursue a claim of direct copyright infringement against Cy, Edge must show (1) that he owns of a valid copyright in the photograph, and (2) that Cy infringed on at least one of his exclusive rights. The Copyright Act gives owners a set of exclusive rights in their original creations, including the right to reproduce, prepare a derivative work, distribute, publicly display, and perform by digital audio transmission. 17 U.S.C § 106. These exclusive rights are tempered by the “fair use” doctrine and other statutory immunities. 17 USC § 512.

Edge is likely the owner of a valid copyright in the picture uploaded by Cy. The photograph, an original work because Edge took the photo himself, was fixed in a tangible medium and perceivable/reproducible/communicable because it was both uploaded into the camera’s memory and then uploaded onto the hard drive of the iPad. 17 USC § 101; MAI. Moreover, a photograph is one of the specific examples of copyrightable material. 17 USC § 102(a).

Edge has three potentially applicable “exclusive rights” that were infringed here; the display right, the distribution right, and the right to create derivative works.

i. Public Display Right

First, Edge will likely be able to prove that Cy infringed on his exclusive right to publicly display his work. To “display a work means to show a copy of it, either directly or by means of . . . any other device or process. . . .” 17 USC § 101. To “display” a work includes “the transmission of an image by electronic or other means.” Frena. A computer operator shows a copy “by means of a device or process” under this definition when they communicate that stored image to another’s computer. Perfect10 v. Google.

Here, Cy displayed a “copy” of the work to the virtual public by communicating the image stored in Edge’s computer to innumerable people on the Internet. Indeed, as the website has been making considerable money in advertising revenue, it is clear that many people have been viewing Cy’s display of Edge’s copyrighted work.

Cy could attempt to argue that under the “server test,” he did not infringe on Edge’s right because he did not himself store the copy that was displayed on the iPADS hard drive, and as such was merely doing the equivalent of “linking” to a copy already made, akin to Google’s exonerated “framing” practice in Perfect10. However, the fact remains that Cy uploaded a copy saved in the hard drive of a computer under his control to a website where it could be viewed by the public, and a court will not likely find this argument persuasive.

ii. Distribution Right

Edge could argue under Frena that Cy violated his exclusive right to distribute copies of his photograph. A copyright owner has the exclusive right to distribute copies of its work to the public. 17 USC § 106. In Frena, the defendant was held to have “distributed” the plaintiff’s photographs when it allowed them to be posted them on a bulletin board. While the liability of the Frena defendant has been legislative overruled by § 512, its conception of “distribution” by

posting pictures online is still viable. By posting the photograph on the website, Cy made it available for download by countless users.

iii. Derivative Work Right

Third, Edge could argue that Cy infringed on his derivative work right in the photograph. A “derivative work” does not have to be “fixed,” but it has to incorporate the protected work in some concrete or permanent “form.” Here, Cy added “annotations” and “elaborations” to the bottom of his photograph – this could arguable be seen as an “original work,” as it involves some modicum of creativity. Here, the website substantially incorporates the protected work (the whole photo) into the website, which is in a permanent form. Lewis Galoob.

b. Fair Use

Cy is likely to argue that his use of the photograph constituted a “fair use” and thus he did not infringe on Edge’s copyright. When evaluating a fair use defense, a court considers (1) the purpose and character of the use and the extent to which it is transformative or commercial in nature, (2) the nature of the copyrighted work and whether it is at the core of copyright protection, (3) and amount/substantiality of the portion of the copyrighted work used, and (4) the effect of the use on the market or value of the copyrighted work. 17 USC § 107; Free Republic.

Here, the purpose and character of Cy’s use is arguable transformative. Under Perfect 10 v. Google, even making an exact copy of the work may be transformative so long as the copy serves a different function than the original work. Here, Cy had a different purpose than the artistic/amusement purpose presumably held by Edge when he took the photograph; Cy was using it so that Edge could identify and find his missing iPad. However, potentially weighing against this transformative use in the first factor is the commercial nature of Cy’s website, as it included advertisements that Web Site makes significant revenue from. However, Cy himself is

not getting the benefit of this commercial use; moreover, users of the website are not getting something for free that they would normally pay for, Free Republic, because Cy's picture is likely more for personal use than valuable. As such, this commerciality will not likely weigh heavily against Cy. In sum, as his website is using the copyrighted material for the transformative and public interest use of identifying a missing iPad, this factor weighs in favor of Cy.

Second, the nature of the copyrighted work is a photograph, a creative work that is considered more at the core of copyright protection. Moreover, Edge was never given the opportunity to "first publish" his photograph, which is entitled to enhanced copyright protection, and as such this factor likely weighs strongly against Cy.

Third, Cy used the entire photo, which would weigh against him, Free Republic, but as the purpose of Cy's use was to locate Edge, use of the whole picture is reasonable and this factor is neutral. Perfect10 v. Google.

Fourth, there is negligible effect on the market for Edge's photograph here because it was likely taken for personal use and is not intrinsically valuable as there is no evidence Edge has a market for selling his photos. As there is not a market to supersede, this factor weighs in favor of Cy.

Therefore, Cy is likely to prove fair use.

2. Secondary Copyright Infringement

If Edge could establish that other users had copied, distributed, or publicly displayed his photograph in violation of copyright laws, then he would have a potential case against Cy for secondary liability that he knew and materially contributed to the direct infringements of the others.

3. 17 U.S.C. § 1201(a)(1)

17 U.S.C. § 1201(a)(1) provides that no person shall circumvent a technological measure that effectively controls access to a copyrighted work. A password is a technological measure that effectively controls access to a copyrighted work. IMS. Here, Edge could argue that Cy “effectively circumvented” Edge’s password when he logged onto his iPad without authorization by guessing his password and accessed his copyrighted pictures and the software program running the iPad, which is also subject to copyright.

However, Cy could argue that there is no “circumvention” without the authority of the copyright owner, Lexmark International, and as to the software program, the iPad gives an implied license to all users to access its software. Moreover, courts have noted that correctly guessing a password, as opposed to fraudulently hacking, etc., is bypassing permissions, not necessarily “circumventing” access for the purposes of the statute. IMS.

Therefore, unless Edge can prove that Cy “circumvented” his technological measures by guessing his password, he will not likely prevail.

4. Computer Fraud Abuse Act 18 U.S.C. § 1030

Edge could attempt to ensure that charges are filed against Cy for violations of 18 U.S.C. a(2)(A), and (a)(5)(b) and (c). The first two elements are the same for all three above: (1) knowingly access a computer to obtain info, (2) without authorization or exceeding authorized access. Here, Cy clearly accessed Edge’s computer, the iPad, without Edge’s authorization.

Under (a)(2)(A), Cy arguably obtained credit card information which could be considered “information contained in . . . a card issuer.”

Under (a)(5)(b), Edge could argue that Cy “recklessly caused damage” by posting the status update that ended his marriage; however, as she didn’t leave him for that reason, he may have difficulty proving this.

Under (a)(5)(c), Edge will have to show 5,000 in damage or loss in a year or less. Damage means impairment to data and loss means reasonable cost to the victim. Here, while the only instant damage to Edge’s files was the deletion of one of his status updates, and his only loss was some time spent getting his free applications back, he also incurred damage and loss because Cy signed up for the Web Site at 100 dollars a month. However, this still does not add up to 5,000, so it seems unlikely that this claim will prevail unless Edge incurs more damages related to the website.

5. Trespass to Chattels

In order to establish a cause of action for trespass to chattels, the plaintiff must establish that the defendant intentionally and without authorization interfered with a possessory interest of the plaintiff and this unauthorized use proximate resulted in damage to the plaintiff.

Compuserve; RST of Torts § 218(b). Cy has two potential trespass actions here, in the physical iPad itself and for trespassing on his possessory interest in his computer/facebook account

Here, Cy intentionally meddled with Edge’s chattel, the iPad, which was Edge had a clear possessory interest in. Id. He impaired the iPad as to its condition, quality, or value by spilling coffee on it, a direct form of damages. This prong of the trespass action is likely to succeed.

Edge could also argue that Cy intentionally meddled with the possessory interest that he had in his computer and/or Facebook account (assuming arguendo he has a possessory interest in his facebook, which is doubtful). Electronic signals are sufficient to support a tangible ToC action. Compuserve. First, Cy caused an intentional interference when it went on Edge’s

computer/facebook account and deleted his posts and made a new post without authorization from Edge as well as when he deleted applications from the iPad interface. Edge could argue that this meddling, posting, and deletion of his applications diminished the value of his Facebook account and his iPad. However, there is an element of *actual* damage required here. As such, unless Cy can establish a possessory interest in his facebook account and argue that the loss of his reputation and goodwill is an actual damage (viable under Compuserve, but many courts have rejected this argument and note that it has to be damage to the system itself), he will not likely succeed in his trespass action as he has no actual damages.

Question 3:

Edge could argue that Web Site is directly liable because it would have automatically stored a copy of his photograph in its servers when Cy uploaded the photograph and it continues to display and distribute the infringing photograph by virtue of the fact that it hasn't removed it. MAI; Frena. Edge could also argue that Web Site is liable for vicarious copyright infringement because it (1) was profiting from Cy's direct infringement by virtue of the fact that it was drawing profits from users clicking on advertisements on the site and (2) it had the right and ability to stop Cy's direct infringement and declined to do so. Perfect10v. Google. Edge could also argue that Web Site is liable for contributory copyright infringement because it (1) knew that the infringing photograph was available, (2) could have taken simple measures to take it down, and (3) continued to provide its users with access to the infringing works. Id.

Web Site would respond that is protected from a claim of direct copyright infringement under the statutory immunities of § 512(c), which protects both secondary and direct infringers, Perfect10 v. Google, because it is a "provider of online service or network access," a term which has been construed very broadly and held to include website providers. Web Site would argue that it was merely storing material as a passive automatic act at the behest of its users, and Edge's did not provide the proper notice that would take it out of the purview of the safe harbor.

While perfect notice isn't required, ALS Scan, it does not appear from these facts that Edge even informed Web Site that there was an infringing photograph and on its servers.

Therefore, it appears that any claims of copyright infringement against Web Site would fail.

Edge could also argue that Web Site's 512 immunity should be revoked because it did reasonably implement a policy to terminate infringing users, AOL, but as this provision only

applies to “repeat offenders” and there is no indication that Cy is a repeat offender, this argument will not likely succeed.

Question 4:

Facebook can potentially bring a suit against Cy for breach of their browsewrap contract to “not post content or take any action on Facebook that infringes or violates someone else’s rights,” as Cy posted a defamatory statement about Edge on Edge’s status update. An action for a breach of contract occurs when (1) a valid contract exists, (2) one of the parties breaches the contract, and (3) one of the parties suffers damages.

First, Facebook could argue that its browsewrap contract is valid because it was clearly visible at the bottom of the page and Cy impliedly assented to it through conduct when he continued to browse the website, updated a status, looked at others’ information, etc. However, Cy is likely to cite Ticketmaster and Specht for the proposition that merely putting terms on conditions on a webpage does not necessarily create a contract with all users of the website. Although it is true that Cy could have learned about the terms if he had merely scrolled down the page, in the absence of proof of actual knowledge of the terms, the question is what a reasonably prudent internet user in those circumstances would have known or learned before continuing to browse the website. Given that Cy was not even a member of facebook and there is no indication that he actually viewed the browsewrap contract or was even aware of its existence, both (1) and (2) of the contract test fail.

Moreover, under (3), no damages have accrued here for the involved parties; Facebook only states that it can terminate an account upon breach of contract, but Cy doesn’t have an account and therefore won’t likely care about this remedy; and Facebook was not damaged by the “breach” of the alleged contract when Cy posted the defamatory statement, particularly since Facebook has millions of users and its service would not have been impaired by one posting.

Question 5:

Apple may bring several claims (1) trademark infringement against Cy, (2) trademark dilution against Cy (2) contributory trademark infringement against Web Site, (3) violations of the ACPA (4) an action under the ICANN UDRP.

1. Trademark Infringement

In order to have actionable claim of trademark infringement, Apple must be able to show (1) that its mark is valid and legally enforceable, (2) it owns its mark, and (3) the defendant used the mark “in connection with the sale, offering for sale, distribution, or advertising” of goods and services, and (4) defendant’s use of the marks to is likely to create consumer confusion. Playboy v. Netscape; Albert; Bosley. In a typical trademark infringement lawsuit, the senior user (Apple) sues the junior user (Cy) of the mark.

Here, Apple has an exceedingly strong trademark because it is a senior user of both “Apple” and “iPad” and (I’m assuming) “Apple” has been registered as a trademark for a number of years and “iPad” is also likely registered. As such, it will easily fulfill the first two prongs of the infringement test.

Next, the court would consider whether Cy was using the marks “in commerce.” Here, the web page contains advertisements that provide Web Site with revenue. Apple could argue that, although Cy’s website is primarily noncommercial, the fact that the website has links to commercial businesses should be enough to render it “in connection with . . . advertising.” Nissan; Bosley. Cy could respond with the fact that his website is like Bosley in the sense that it is primarily noncommercial in nature and he didn’t intend to sale or advertise any products when he registered the website. However, it has been held that even if a website owner doesn’t *intend*

their website to be commercial, this is irrelevant if consumers are confused. Taubman Co. Additionally, at least one court has held that the bare registration of a trademark as a domain name can be considered a commercial use. Green Products. While “something more” than simply registering a domain name is required to satisfy the “in commerce” requirement in the majority of courts, Lockheed Martin, the fact that there are commercial links on Cy’s website leads to a fairly strong argument that the use of his website is appropriately considered “in connection with the advertising of the goods sold by the advertisers. Taubman.

Next, the court will consider the likelihood of consumer confusion using the 8-factor test. Here, there is potentially a likelihood for initial interest confusion – consumers looking for Apple’s iPad could either type in the domain name or run a search and get on Cy’s website. Brookfield. In terms of the confusion factors, there is a high degree of similarity between “yourappleipad” and “Apple iPad,” although the inclusion of “your” renders them not identical. Given the fact that several courts have even held that the addition of “sucks” to the end of the website is sufficiently similar, this aspect likely weighs in favor of Apple. Apple’s mark is inherently distinctive and very strong, which weighs in favor of Apple. Without knowing the goods the advertisers are selling on Cy’s site, it is difficult to determine whether there has been actual confusion/same channels of trade/ same targets of sales efforts/ relationship of goods in the public mind, etc. However, given the fact that users will likely realize immediately upon entering the site that it is not sponsored by Apple, and the site is largely for personal use with a few ads, it seems likely that the court will balance the confusion factors against a finding of traditional confusion here. Moreover, Cy has several affirmative defenses that will likely be successful (see below).

2. Trademark Dilution

Apple could also bring an action for an injunction against Cy for trademark dilution. A trademark owner of a famous, distinctive mark has an action for trademark dilution if another's use of the trademark lessens the capacity of the trademark owner to identify and distinguish his goods and services, even if there is no consumer confusion. Here, Apple's trademarks in Apple (arbitrary) and iPad (at least suggestive) are inherently distinctive and internationally famous and thus they are eligible for a dilution claim.

The "in commerce" requirement is still applicable in a dilution action (see the analysis above in "trademark infringement").

First, Apple could argue that yourappleipad.com blurs its trademark under 15 USC § 1125(c)(2), as there is a high degree of similarity b/w the trademark "Apple iPad" and "Your Apple iPad," Apple iPad, as described above, is an inherently distinctive mark that Apple has been using exclusively, it is highly recognizable. The last two factors weigh slightly against this however, as Cy himself is not trying to sell any products and was merely attempting to return an iPad.

Second, Apple could argue that yourappleipad.com tarnishes its reputation as it causes an association of its mark with strip clubs. This action has the highest likelihood of success, but see Cy's affirmative defenses below.

Cy's Defenses to Trademark Infringement/Dilution

Fair use, nominative use, and the first amendment are all potential defenses that Cy could bring up against the trademark claims. Of these, nominative use and first amendment are the most pertinent, because Cy was clearly describing Apple's product in the domain name, not any products of his own (which would have raised the defense of fair use). Here, Cy likely qualifies

for the nominative use defense to both dilution and infringement because (1) the lost iPad could not be identified without the use of the trademark, (2) the use of the entire mark was likely necessary to identify the iPad, and (3) Cy didn't do anything that would have suggested sponsorship or endorsement. Playboy v. Welles.

Cy's use of Apple's trademark is entitled to first amendment protection when his use of that mark is part of a communicative message and not when it is used to identify the source of a product. Planned Parenthood. Although some courts have held that domain names are more akin to source identifiers than communicative messages, at least one court has held that there can be no per se rule that domain names can never be a communicative message. Name.Space. Here, this appears to be a quintessential instance when a domain name is used as a communicative message – the domain name is a message from Cy to Edge that he has “your apple ipad.” However, as described above, courts may consider that the domain name is used in commerce and is therefore commercial speech entitled to less protection.

CONCLUSIONS: Apple will not likely win any trademark infringement or dilution claims against Cy.

Contributory Trademark

An action against Web Site for an injunction against the domain name for contributory trademark infringement would not likely be successful because registration itself does not likely infringe the trademark. Lockheed Martin.

AntiCyberSquatting Consumer Protection Act 15 USC § 1125

Apple could bring an action against Cy under this Act for injunctive relief or statutory damages, but the Act requires that the Registrant have a “bad faith intent to profit” when it registered the domain name, and here it appears that Cy never attempted to get a profit from his

website and instead was engaging in a bona fide noncommercial use of the domain name in an attempt to return Edge's iPad. Plus it seems likely that Cy would also qualify for the "pure heart empty head defense" even if liability under the Act could initially be found.

Apple could also bring an action for injunctive or monetary relief against Web Site under this Act if it believes that it is acting in bad faith in keeping up the domain name. There may be an argument here because Web Site was informed that the domain name and website were set up fraudulently in May 2011, but is refusing to take the website down until June 2012. This may show that it just wishes to profit from its advertisements in the interim despite knowing that the website is fraudulent. Therefore, it may be acting in bad faith under the Act.

ICANN's UDRP

Apple could also file an action for an injunction against Cy and Web Site to transfer the domain name to it yourappleipad.com under ICANN's Uniform Dispute Resolution Policy. Under this policy, a trademark owner can challenge domain names that are confusingly similar to their trademarks (but not for dilutive domain names). These proceedings are limited to domain name disputes in which the disputed domain name has been registered and is being used in bad faith and the registrant has no rights to the domain name. However, although the domain names are similar here, as described above, Cy has no bad faith intent to profit. Therefore, unless Apple can convince the court that "bad faith" under the UDRP is different from "bad faith intent to profit," then it will not likely succeed in this action.

END