

Question 1: Cy Law's Claims
MyPlace.com

Cy Law could attempt to sue MyPlace.com for secondary liability for the defamatory comments posted to his profile on MyPlace.com. However, this most likely would not succeed because MyPlace.com could claim provider immunity under 42 U.S.C. § 230(c)(1), which states that “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. MyPlace.com could argue that it is an interactive computer service and thus not liable for the defamatory comment that another information content provider posted. Under Zeran v. AOL, the Fourth Circuit held that a distributor is a subsection of a publisher, and thus would fall under the statute. In that case, the Court held that AOL was not liable for horrible defamatory posts made to an AOL Bulletin by an “unknown” user. Based on that case, MyPlace.com could argue that it is like AOL and only a distributor and thus not liable. Cy Law could attempt to argue that MyPlace.com is not an interactive content provider, because it is a website that unlike AOL does not provide e-mail services and does not offer a connection the Internet as a whole. Based on the statute this argument would most likely fail because it does provide or enable computer access of multiple users to a computer server. Further, based on the Zeran case the notice given to MyPlace.com in the form of the letter of the defamatory posting is not relevant to whether MyPlace.com is immune under 42 U.S.C. § 230.

Next, Cy Law could have a K breach claim against MyPlace.com under its Terms of Service agreement. Since Cy Law as a registered user of the MyPlace.com website, is most likely would be bound to the Terms of Service, because to even be allowed to register he had to click an “I Agree” button that is on the same page as the Terms of Service. Thus, assuming that that list included the rules 1-5, it is likely that Cy Law manifested his assent to them by clicking

“I Agree” and thus the Terms of Service should be considered part of the K between Cy Law and MyPlace.com. Based on those terms being part of the K, Cy Law could have a claim against MyPlace.com for breaching the term that stated it will not allow others to discover a registered user’s personal information. Assuming based on the facts that Cy Law did in fact comply with the other terms and did not post any identifying information anywhere on the MyPlace.com website, then MyPlace.com could be in breach for allowing YourPlace.com to “discover such information,” by using his photograph posted to discover his personal information. First, based on the Terms of Service agreement and the way YourPlace.com was able to access Cy Law’s profile without registering, MyPlace.com allows anyone to view and post comments on user’s profile pages. Also, MyPlace.com takes no measures to ensure that no violations of the Terms of Service are occurring. However, under In re Jetblue Airways Corp. Privacy Litigation (E.D. N.Y. 2005), Cy Law’s K breach claim might be dismissed for lack of evidence of economic damages. In that case the court stated that “loss of privacy is not cognizable as economic loss flowing from the alleged breach.”

Also, Cy Law (through the FTC) likely has a privacy-policy violation claim against MyPlace.com. It would be relevant to know if MyPlace.com has a specific privacy policy in place. If not the term in the TOS which states that MyPlace.com will not allow others to discover a registered user’s personal information, may suffice. Under the FTCA, unfair or deceptive acts or practices in or affecting commerce are forbidden. In many cases the FTC has theorized that the inadvertent release of private information, when online websites represented that information was protected, showed a falsity in the company’s representation of its privacy policy

Additionally, Cy Law might have a copyright infringement claim against MyPlace.com for vicarious liability of copyright infringement of Cy Law's picture of his house. (For discussion of copyright infringement by YourPlace.com see below). To be vicariously liable for copyright infringement a person must have the right and ability to control infringer's act and receive direct financial benefit from the infringer's act. It is important to note that knowledge is not an element. In the present set of facts, MyPlace.com as the owner and operator of the website had the right and ability to protect the photograph as well as the entire profile page from being copied by YourPlace.com. But the extent of this control was only over the protection of information on its own webpage, not over YourPlace.com directly, and thus might not be satisfied. The next, prong direct financial benefit might be somewhat more difficult to prove since MyPlace.com is a free "community" website. However, it does have links to advertisements provided by Google, which generates some revenue. Thus, an argument could be made that by declining to stop the YourPlace.com activity, more people visited their website (to make posts on individual's profile pages), and thus more ads placed, and more revenue generated. However, this argument is a weak one and will most likely fail.

NOTE: MyPlace.com is likely not liable for direct copyright infringement of the photo based on one of the terms of the terms of service that stated, users continue to own anything they post to website, but that MyPlace.com has a license to reproduce and display such content, but only for the purpose of displaying such content on their website. However, it would be relevant to know where this other term was located on the website, and when and where a registered user was able to access it. If it was before registering and included in the "I Agree" terms then Cy Law is likely bound by the license. However, if after then could argue that no assent to give

MyPlace.com a reproduction and display license, and thus by storing the photo on its server, it copied the photo and directly infringed.

YourPlace.com

The main claim that Cy Law has against YourPlace.com is for copyright infringement of the exclusive right of reproduction and display of his photograph of his house. The photo of Cy Law's house posted on MyPlace.com contained copyright material on the photo itself, thus it is assumed that Law did in fact file copyright registration in order to sue. The photo itself is copyrightable because it an original work by Cy Law fixed in a tangible medium of expression that can be perceived, reproduced, or otherwise communicated. (See 17 U.S.C. § 102(b)). The material at issue here is the photograph on the MyPlace.com website, which since Cy Law posted it himself, MyPlace.com had an implied license to reproduce and display on its website. However, there is no implicit license to YourPlace.com to reproduce or display Cy Law's photograph.

Under MAI Systems Corp. v. Peak Computer, Inc., if a person copies a copyrighted material into RAM it is an infringement of the exclusive right of reproduction. Here the YourPlace.com system loads the entire MyPlace.com profile page into RAM of the computer, where it stays for approximately 3-4 hours per profile page house picture. Under MAI v. Peak, three to four hours in RAM would be sufficiently fixed to be perceived or reproduced, and in this case the photograph of Cy's house was actually perceived by the system in order for it match it up to the aerial photo database. Thus, it is likely that YourPlace.com's copying of the photo of Cy Law's house from his MyPlace.com profile page constituted infringement of his exclusive right to reproduction of his photo.

YourPlace.com could argue Fair Use as a defense to the copying onto RAM because it deleted the picture from the RAM, along with other profile information after it was done matching it to an aerial photograph. However, it also posted the picture of the house on its own website, on a profile page for Cy Law created by YourPlace.com. It is likely that YourPlace.com would not be successful in arguing fair use. First, the purpose of it using the photograph is to make money and thus is commercial. Users must pay to access YourPlace.com and it is password protected to prevent others from accessing without paying. Second, the character of YourPlace.com's use of Cy Law's photograph is not transformative at all; YourPlace.com uses the identical photograph that Cy Law posted on MyPlace.com (minus copyright information—discussed below). Next, a photograph of a house may not be as creative other photographs of well thought out scenes, etc., but it still is creative and entitled to some protection. Further, YourPlace.com used the entire photograph and thus the amount and substantiality are great. The last factor is the effect of the use on the market. When the use is commercial there is a presumption of market substitution. However, it is difficult to image that Cy Law's photograph of his house has high market value. Even still, the fact that it was so valuable to YourPlace.com that it spent all the time, effort, and money to copy it, in order to match to aerial photographs, pushes this factor in Cy Law's favor.

Another claim that Cy Law potentially has against YourPlace.com is under the Anti-Tampering provision of the Digital Millennium Copyright Act, which states that no person without authorization may intentionally remove or alter copyright information. (DMCA § 1202(b)). In the profile page on MyPlace.com, the photograph of the house contains copyright information directly on the photograph, thus any copy of it should contain the same information, unless it is has intentionally be removed. On the YourPlace.com profile page the photograph of

the house is missing the copyright information at the bottom right corner. Thus, it is likely that YourPlace.com violated the anti-tampering provision of the DMCA.

YourPlace.com could argue that the photograph posted by Cy Law was within the public domain of information, since it was posted to a “free community” website, in which anyone had access. Further, YourPlace.com did not by-pass any protection measures used in order to obtain the information, because there were none. So, YourPlace.com did not circumvent any technological protection in place by either MyPlace.com or Cy Law, it just accessed information already in the freely in the public domain.

Defamation

Cy Law most likely has a cause of action against YourPlace.com for defamation. Assuming that the information regarding Cy Law’s employment status and credit status are in fact false, then YourPlace.com not only created a profile of Cy Law without his permission but also actively posted false information about him. YourPlace.com would not be able to claim server provider immunity (see answer above for MyPlace.com), because it is not “information provided by another content provider,” but was in fact provided by them. However, Cy Law did not even become aware of the defamatory information that was posted on YourPlace.com, until a user of YourPlace.com posted defamatory comments based on the YourPlace.com page, on Law’s profile on MyPlace.com. Even still, YourPlace.com posted false information on its website about Cy Law which led to his defamation in his town and cannot claim immunity from such posts, because they are the ones that did the posting.

Question 2: MyPlace.com claims against YourPlace.com

The first claim that MyPlace.com could have against YourPlace.com is that it violated the Terms of Service by using information gathered from the MyPlace.com website for commercial purposes or in a manner that violated copyright and privacy rights. However, as a non-registered user the only way YourPlace.com would have seen these terms were if it scrolled down to the bottom of the page and clicked on a hyperlink. Thus, it would be relevant to know if there were any cues to direct users to scroll down to terms of service. If not then maybe YourPlace.com could argue that by entering a non-password, unprotected, free “community” website, it did not assent to any terms of service. However, it is unlikely they could argue the reasonable internet user argument in Specht v. Netscape, since they were themselves a company that operated a website.

Second, it would be relevant to know whether MyPlace.com was trademarked or whether any of their programs implemented on their website were copyrighted. This is relevant because YourPlace.com loaded or cached the entire profile page for a user onto its computer in RAM, thus violating a reproduction right if one existed, and because YourPlace.com used the term MyPlace.com on its profile pages, as well as direct quotes and photographs from MyPlace.com.

As far as trademark goes “MyPlace” is at the most suggestive and thus inherently distinctive. Thus “MyPlace.com” was associated with the service of a website for those wishing to discuss things about their homes and post classified ads. For MyPlace.com to succeed on a trademark infringement and unfair competition claim, it must show 1) that it possesses the mark; 2) that YourPlace.com used the mark without their consent; 3) that YourPlace.com use of the mark occurred “in commerce”; and 4) that YourPlace.com used the mark in a manner likely to confuse customers. MyPlace.com has a good chance of satisfying all of these requirements.

First, if in fact MyPlace.com trademarked My Place then they can show they possess it. Second, there is no question that YourPlace.com used the mark on its webpage without MyPlace's consent, as they had no idea of any of the actions by YourPlace until notified by Cy Law about the defamatory post. Third, YourPlace used the mark on its commercial website which users must pay to access, and thus satisfying the "in commerce" element. Fourth, YourPlace's use of the mark was in connection with them selling their location service. Last, the use of the mark may be likely to cause customer confusion, in that customers might think that YourPlace.com is somehow sponsored by MyPlace.com or that YourPlace.com bought MyPlace.com. This last factor could also cause dilution by tarnishment to MyPlace's mark by customers associating it with another business that divulges highly personal information about its users on the Internet.

In order to show trademark dilution under the Lanham Act, MyPlace.com will have to show that YourPlace's use is commercial in commerce and that it causes dilution of the distinctive quality of the mark. In order to prove that YourPlace violated the Federal Trademark Dilution Act, MyPlace will have show that the mark is famous; that YourPlace is making commercial use of the mark in commerce; that the use began after the mark became famous; and that YourPlace's use dilutes the quality of the mark by diminishing capacity of mark to identify services. Again, the issue will be whether "MyPlace" is distinctive and famous.

One defense that YourPlace.com could have for trademark infringement is that it is not posting anything that is not public information and thus is protected speech under the First Amendment. However, any First Amendment defense in this case is going to fail because the "speech" it is posting is for a commercial purpose—i.e. they make money off of people wanting to sign up to see the information. Further, their use of the MyPlace.com name on their webpage is for competitive purposes only. Another defense by YourPlace is that using MyPlace.com to

indicate that Cy Law is MyPlace.com user is only describing the product or service by MyPlace and thus a fair use.

MyPlace could have a claim against for violating the exclusive right to produce derivative works under the Copyright Act. However, this would assume that the format or the service offered by MyPlace is copyrightable. Thus, MyPlace could argue the YourPlace.com is just a derivative work of their website or service offered. However, YourPlace.com changed the original work or website so much, by adding aerial photos, obtaining personal information, etc., that they have a good argument that theirs in fact a new work and not derivative. Even still, when YourPlace loaded the entire MyPlace.com profile page into RAM they infringed on the reproduction rights of MyPlace.com. MyPlace.com could argue that they had an exclusive license to reproduce and display the photographs posted on their website, and thus when YourPlace loaded them onto RAM then that violated the exclusive license.

MyPlace might also have a claim under the Computer Fraud and Abuse Act, since YourPlace intentionally accessed MyPlace's computer without authorization. The strongest argument for MyPlace is under Registrar.com v. Verio, Inc.. In that case the defendant, as YourPlace would here, tried to argue that he or she was entitled to obtain the information because it was not password protected and thus available to everyone. The Court rejected this argument and stated that it is not just obtaining information but also use of it in a way the party does not like. However, the statute does not say anything about for what purpose the information is used. Even still, MyPlace would have to show \$5000k in damages based on YourPlace's activities to proceed civilly under this act. Furthermore, it is up in the air whether Terms of Use/Service are enough for the defendant's access to be considered unauthorized. This is important here, because as stated above the non-registered user never clicks "I Agree", but just

proceeds through the MyPlace.com website with the terms hyperlinked on the bottom of every page. So, MyPlace would want to argue that the Terms of Service are in fact enough to find unauthorized use, otherwise they might fail to prove that all of the access prior to them knowing of YourPlace's actions was unauthorized.

Lastly, MyPlace could argue a trespass to chattels theory. Trespass to chattels is impairment to quality, condition, or value of property, but the plaintiff must show actual damages. Here, MyPlace.com could argue that because of YourPlace's lengthy extraction of information from its servers that it suffered a decrease in the quality of its website. It could also argue, under eBay v. Bidder's Edge, that YourPlace was interfering with its possessory interest in its computer system, and that while extracting information from MyPlace.com, YourPlace was using "valuable bandwidth and capacity." Again, MyPlace must be able to show actual damages under a trespass to chattels theory of liability, which in this case might be difficult. However, the Court in eBay in lieu of actual damages suffered by eBay, applied the what if everyone did it test to find eBay *could* suffer irreparable harm, which might be the best way for MyPlace to show damages under a trespass to chattels theory of liability.

Question 3: Personal Jurisdiction against YourPlace.com

The first state that Cy Law could potentially assert personal jurisdiction in a case against YourPlace.com, Inc. is California. YourPlace.com, Inc. is incorporated in California and thus has sufficient contacts with California for it impose personal jurisdiction. Furthermore, by incorporating in California, YourPlace.com has purposefully availed itself to the laws of California. Also, regarding the defamation claim, the state in which the defamation took place would be a proper jurisdiction. So, wherever Cy Law lives and his friends saw the defamatory information on YourPlace.com would likely be proper, because that is where the cause of action occurred. No physical presence in the state is required to have personal jurisdiction in the state (Burger King case). All that is required that the defendant has sufficient minimum contacts within the forum state to make jurisdiction reasonable. (Zippo case). However, it is the quality and nature of the contacts, not the quantity that makes a difference. In Zippo the Court implemented the jurisdictional sliding scale for websites. At one end are passive, informational websites and at the other end are active websites that solicit customers for profit. The more active the website the more likely jurisdiction is proper. Here YourPlace.com was a completely for profit website. However, it might be relevant to know if it sent out any advertisements to consumers in Cy Law's home state via e-mail, with the intent of selling their service. If so that would be stronger argument that it actively solicited business in Law's state.

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Question 4: Identity of Anonymous Poster

The court should consider the burden on MyPlace to disclose the user's name and weight of protection that a person posting the comments should be given, compared to the rights of Cy Law to seek damages against that person.

Question 5: Anonymous Poster Immunity under 47 U.S.C. § 230

The anonymous may be able to claim immunity to the defamation claim under 47 U.S.C. § 230, because he/she was a user of an interactive computer service that posted information “provided by another information content provider,” in this case, YourPlace.com. The poster could argue that they should not be considered the publisher of the defamatory comments, since it was actually YourPlace.com that originally posted/provided the defamatory information and all they did was repeat it on a different website. Also, under Zeran v. AOL, a distributor of information provided by another information content provider is also considered a publisher under the statute. However, §230 does not preclude joint liability for the joint development of content. Thus, an argument could be made that the poster added to the defamatory comments, and is jointly liable.

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Question 6:

The most obviously thing that Web Site could have done to protect privacy interests of its users was to use a password protected website and actually monitor its site to see who is gaining access to it. This would have better protected the information on the site. Furthermore, it could have as part of its Terms of Use, which apply to non-registered users as well as anonymous users, as a clickwrap agreement, thus making it more difficult for a company like YourPlace.com to state did not know or did not assent to the terms.