

1. Law could have several claims against Myplace and Yourplace. First I will address the claims against Myplace. Law can bring a breach of contract action against Myplace, as well as an action for secondary copyright infringement.

Law can bring a breach of contract action against Myplace, alleging that Myplace failed to live up to the terms agreed upon within Myplace's terms of use, specifically number 5 which states that "Myplace.com, Inc., will maintain the secrecy of a registered user's personal information and will not divulge such information to others, *nor will it allow others to discover such information.*" Law can allege that Myplace did allow others to discover such information by allowing Yourspace to access his picture of his home and use it to gather the other information posted on the Coolhouse42 Yourplace profile.

First, Law must establish that there exists a valid and enforceable contract between Law and Myplace. The agreement between Law and Myplace fits most squarely with the rubric of clickwrap agreements examined in *Davidson & Associates v. Internet Gateway*. The *Davidson* court found such an agreement enforceable. These agreements require a display of a website's or software's terms of use before installation software or initiation of an internet transaction. For the user to proceed with installation or the transaction, the user must click on an "I agree" or similar button. *Davidson* holds that such clicking constitutes express consent on the part of the user, binding the user and the website or software company. Before Law was able to put together his Myplace profile he had to register on the website, and in doing so he was required to, and did, click the "I agree" button on the window displaying the websites terms of use (TOU). Thus, Myplace and Law are bound by the terms of use.

Therefore, because Yourplace was able to use Law's Myplace profile to obtain so much personal information about Law, Myplace failed to live up to its obligation under term five of not allowing others to discover personal information. In this instance, Myplace is damned by the extremely broad language it has used in its terms of use. Myplace may attempt to argue that there was no contract formed, however, the Davidson holding will trump that argument. Myplace may also try to argue that the terms of the contract are unconscionable under *Bragg v. Linden Research*. It cannot claim procedural unconscionability because it designed the TOU, therefore it cannot claim adhesion or surprise. It's only hope is substantive unconscionability by proving that this term was unfair and or costly. It may end up that such broad language – not allowing others to discovery personal information – is unfairly burdensome to Myplace. However, because Myplace is the party who drafted the terms, a court is unlikely to be sympathetic to this argument.

The likely outcome here is that Law will win on breach of contract but will have a difficult time proving damages, so even though Myplace may have a judgment entered against it, the judgment may not have a significant impact on Myplace. It should also be noted that UCC article 2 will not apply in this instance because there is no sale of goods between Myplace and Law, therefore, Law's claims and Myplace's defenses will rest solely on common law grounds.

Law can also claim secondary copyright infringement against Myplace - assuming for the moment, arguendo, that Yourplace's display of Law's home photo is infringing on Law's copyright on the photo. Law could not succeed on a claim of contributory infringement because there is nothing in the facts to indicate that Myplace had knowledge of Yourplace's infringing activity. To establish a claim of contributory infringement, Law must show that Myplace, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing

conduct of [Yourplace]”. *Netcom*. It is not clear that Myplace even had any knowledge of Yourplace’s existence at the time Law discovered Yourplace’s transgressions, therefore, it would be difficult for Law to prove any substantial participation on Myplace’s account, and therefore it would be difficult to prove contributory liability.

Law may have better luck pursuing a claim of vicarious liability against Myplace. “A defendant is liable for vicarious liability for the actions of a primary infringer where the defendant (1) has the right and ability to control the infringer’s acts and (2) receives a direct financial benefit from the infringement.” *Netcom*. Under the first element of this test it seems that Law can make a case that Myplace has a responsibility to ensure that the photos he posts on his profile do not get linked elsewhere. Since the TOU indicate that Myplace has a license to display and reproduce Law’s photos within the Myplace website, it is implied that Myplace does not have a license to allow other websites to conduct in-line linking of the same images, therefore Myplace should be required to put measures in place to ensure that such activity does not occur. Not being familiar with the technology makes it difficult to know what kind of technology it would take to prevent Yourplace’s behavior. However, because of Myplace’s sensitivity to personal privacy, it seems that Myplace should be extra-cautious with the photos uploaded by users and therefore not only has the right and ability, but has the obligation to control Yourplace’s activity.

Law will have a difficult time convincing a court that Myplace gains a direct financial benefit from Yourplace’s infringing activity. Law can argue that by inadvertently permitting Yourplace to in-line link to Myplace photos that Myplace’s traffic is increased, and therefore its revenue from google is increased, however, this argument is weak at best because it is unclear

that its revenue from google increases with traffic. If it does, this would certainly bolster Law's argument.

Myplace's strongest defense springs from the § 512 (c) safe harbor provisions of the DMCA. To qualify for this safe harbor, Myplace must prove several factors. First it must prove it is a covered entity or a "service provider." Courts have broadly construed the meaning of service providers under 512 (k) such that ebay has qualified (*Hendrickson v. eBay*) and a peer to peer file trading network qualified. *In re Aimster Copyright Litigation*. Therefore, it is likely that Myplace would qualify as well because it is an interactive community website with 100k subscribers.

Next, Under 512 (c)(1)(A)(i) Myplace must prove that it does not have actual knowledge that infringing activity is taking place and the facts show no indication that Myplace had such knowledge. Under (c)(1)(A)(ii) it must show that it is not aware of facts or circumstances from which the infringing activity is apparent, which again can be proven because Myplace didn't even become aware of Yourplace until after the whole incident in question took place. Under (c)(1)(A)(iii) Myplace must prove that upon learning of the infringing activity it acted expeditiously to disable Yourplace's access to the photos, and again, it is not clear when and if Myplace ever took any such measures other than removing the single comment from Law's profile. If Myplace did act quickly then they would pass this prong, if not, then they would fail this prong and fail to qualify for safe harbor under the DMCA. Myplace would also have to prove no financial benefit under (c)(1)(B), and again, this prong is contingent on whether Google awards more revenues from increased traffic. If it does, then Myplace will have a more difficult time gaining safe harbor. If it doesn't Myplace still qualifies. (c)(1)(C) requires expeditious removal upon notice, with the notice requirements set forth in (c)(3). However, there are no facts

with respect to notice, therefore, further fact development will be necessary to analyze these two prongs of the safe harbor provision. Finally, once again it is unclear whether the requirement of designating an agent for receipt of notice under (c)(2) is fulfilled by Myplace, though somebody must have received Law's letter complaining about the comment on his profile. Once again, this fact must be developed going forward with any litigation. However, all things considered, it appears that Law will have a difficult time clearing all the hurdles necessary to win on his secondary liability claim.

In examining the claims against Yourplace, it appears that Law can bring a claim of defamation, a claim of direct copyright infringement, and a claim of tampering with copyright management information.

First, Law can likely win a claim of copyright infringement against Yourplace. Law must first establish ownership of a valid copyright. Under § 102 his photograph of his house is a copyrightable work because it's fixed in a tangible medium of expression (digital code), it's an original photo, it's creative, and it's a work of authorship. Law has notice of copyright affixed on the bottom corner of his photo. Since Law has a copyrighted photo he gets a set of exclusive rights under § 106 including the right to reproduce, the right to prepare derivative works, the right to distribute copies, the right to perform the work, and the right to display the work publicly (sound recording rights do not apply here).

Law will claim that Yourplace directly infringed his rights of copying and display. First, Law maintains ownership of the copyright to the photo, and has merely issued a license to Myplace to display and copy the picture on Myplace. Therefore, the license does not defeat the copyright ownership with respect to other parties and is not preempted under 17 USC 301 according to *ProCd v. Zeidenberg*. Because it is a copyrightable work and because there is the

extra element of a contract between Law and MYplace there is no limitation to Law's rights against Yourplace, just Myplace.

Law can prove that Yourplace infringed on his copying right when it put its profile through its technological process. According to the record, the system loaded Law's entire profile into Yourplace's RAM. According to *MAI v. Peak*, this copying of the profile, including the photo, onto Yourplace's RAM constitutes copying in violation of the Copyright Act. Even though it is only fixed on Yourplace's RAM for three hours, that should be long enough to be considered infringing activity. Law can also prove that Yourplace infringed on his display right by posting the photo on its Coolhouse42 profile. The simple posting and display on the site without Law's permission constitutes infringement in violation of 106. Law's only license is with Myplace, not Yourplace, so Yourplace has no permission.

Yourplace can defend these claims by claiming fair use under § 107. To establish a fair use defense, Yourplace will have to argue that the four pronged test of 107 weighs in its favor. Those prongs are 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) amount and substantiality of the portion used and 4) effect of the use upon the potential market. First, the purpose and the character of the use factor weighs heavily against Yourplace because Yourplace is using the photo commercially (selling the photo and other info as a package to customers) and has no transformative value because it's just a copy. Because its being used commercially with little transformative value this weighs heavily against Yourplace's fair use argument. *LA Times v. Free Republic*.

The nature of the copyrighted work is that it is an photograph, which Congress contemplated as fully deserving of copyright protection as evidenced in § 102 in which pictorial works is included. This weighs against Yourplace.

The amount and substantiality prong is a wash because they used the entire photograph. On one hand, it would be difficult for Yourplace to use anything less than the full photo for showing the home on its profile, however, the converse argument is that Yourplace's use of the photo isn't even necessary at all because customers still get the same pertinent info on the home (address, SSN, etc.) from the profile.

Finally, the effect of the use on the potential market is negligible because it is doubtful that there is any market for pictures of Law's home. Also, Yourplace provides a different service from Myplace, so Yourplace's use of the photo would be unlikely to drag customers away from Myplace. Therefore, this factor weighs for Yourplace. However, in weighing all of the factors together, it is unlikely that a court will rule that Yourplace engaged in a fair use of the photograph because of the commercial nature of its use and the fact that its use was not transformative at all.

Yourplace may also attempt to invoke the *TM v. Tickets.com* case in which the court found fair use for copyright infringement where the defendant pulled copyrighted material and then kept it for 15 seconds before discarding it after pulling facts from the material. However, this case is distinguishable because the defendant in *TM* didn't keep any copyrighted material around. Here, Yourplace kept the photo, so this case will not assist Yourplace.

Next, Law will bring a claim of tampering with copyright management information because in copying the photo from the Myplace profile to the Yourplace profile, Yourplace wiped the copyright indication from the bottom right corner of the photo. § 1202 (b) establishes prohibition against deliberately removing or altering CMI, and § 1203 creates a federal civil action for violating 1202 (b).

Yourplace will argue under *Kelly v. Arriba* that it should not be liable, however, the facts of that case are clearly distinguishable. In *Kelly*, the copyrighted work had CMI attached but not on its face so the court found that 1202(b) couldn't apply. Here, the copyright stamp was right on the photo originally, and was removed when it was placed on Yourplace.com. Therefore, Yourplace clearly tampered and will be likely to lose in defending its case.

Finally, Law can bring a defamation suit against Yourplace. However, Yourplace might be protected by section 230 if Yourplace can fit under the definition of "Interactive Computer Service" and if it can show that when it became aware that its assertion that Law was unemployed was false, it took it down expeditiously. With respect to Yourplace being an ICS, Yourplace can argue under 230 (f)(2) that it is an "information system . . . that enables computer access by multiple users to a computer server." because it allows multiple paying customers onto its servers to peruse the info it has collected. If the court buys this argument then Law's defamation suit would lose because Yourplace would be shielded by 230.

Law should be made aware of the Fair Credit Reporting Act of 1970, which regulates disclosure of information from a consumer's credit report because the Yourplace profile has credit info listed for Law.



2. Myplace can bring a number of claims against Yourplace. It's first claim should be that Yourplace violated Myplace's terms of use by using the material from coolhouse42's profile in a commercial manner. This violates section 4 of Myplace's terms of use. For Yourplace to have attained access to the Myplace profiles it had to have gone through the registration process which involves clicking the I agree button and assenting to the terms as discussed above. Therefore, as established above, Yourplace and Myplace have a legally binding clickwrap contract between them, and Myplace should have a winning claim against Yourplace for breach of contract. Because Yourplace expressly assented by clicking "I Agree" they cannot argue that there is no valid and enforceable contract between them.

Myplace can also bring a trespass to chattels claim similar to the one brought in *ebay v. Bidder's Edge*. To establish trespass to chattels under eBay, Myplace must establish that Yourplace's data acquisition was 1) intentional and without authorization and that it 2)interfered with Myplace's possessory interest in its computer system and 3) that there was proximate result in damage to plaintiff.

Myplace can easily establish the first prong because Yourplace's whole model is to take information from Myplace's profiles, and it does so for a commercial use (to sell the info), which contravenes the Myplace's TOU (no commercial use), so Myplace can clearly establish intent and lack of authorization. Second, it is certain that Yourplace's scraping of the Myplace profiles has some effect on Myplace's operations, however negligible. Myplace, at this point, has no evidence to support a contention that Yourplace's scraping has caused problems for Myplace's servers or data. There must be actual damage or the claim of trespass will fail (see *Intel v.Hamidi*). If Myplace can provide this evidence then they will satisfy the second prong. Otherwise their claim will fail.

With respect to the third prong – the proper inquiry is “what if everybody did it?” Again, Myplace has brought forth no evidence that Yourplace has damaged its servers or impeded its ability to operate so it can’t establish that there would be a major problem if everybody did it, but if it can provide some evidence of this nature it could have a successful claim.

Myplace should make a claim under the CFAA - 18 USC 1030 and make its local prosecutor aware of potential criminal liability under this statute. Because Myplace and Yourplace both engage in interstate commerce and both live in different states this will constitute interstate commerce for the purposes of 1030 (a)(2) criminal liability. Myplace can also file under 1030 if it can prove 5k worth of damages. Again, it is unclear from the record what kind of damages Myplace may have suffered from Yourplace’s use, so if it can’t come up with 5k in damages, its 1030 claim will fail.

Myplace may run into difficulty with its 1030 claim because much of the information used on Yourspace profiles is obtained from places other than Myplace. In fact, aside from the infringing photo noted above, the only info taken directly from Myplace is coolhouse42’s profile text. However, Yourplace is using the info commercially under 1030(a)(2) (and in violation of the TOU), a prosecutor could establish liability for just that small piece of info.

Finally, Myplace can bring a trademark infringement action against Yourplace for having a similar company name and domain name. First Myplace will try to establish that it has a valid and enforceable trademark under the Lanham Act. It will argue that Myplace is distinctive, it is used in commerce, it is affixed and associated with the service it provides, and it signifies the source or origin. Most likely a court will find that Myplace’s TM is “suggestive” like facebook, or descriptive like iTunes. Yourplace will likely argue that Myplace is a generic mark that cannot be protected because it was never distinctive.

However, assuming Myplace convinces a court it has a valid trademark, the court will examine likelihood of confusion. The confusion factors, under *Playboy v. Teletalk*, are numerous but the most relevant are degree of similarity and strength of the owners mark. It seems like the court would likely go against Myplace because Yourplace is a different name and even though it is similar it is not as if Yourplace barely altered the spelling or something devious like that. Therefore a court will likely rule against traditional infringement.

It does not appear likely that Myplace could succeed on initial interest confusion either, because Yourplace is seeking to run an entirely different kind of business than Myplace. While Myplace is seeking to create an interactive community Yourplace is seeking to create a data bank for commercial marketing. It does not appear that Yourplace is seeking to divert Myplace users to its site, rather it is seeking to pull from a completely different pool of customers. Therefore, it is not trading on Myplace's goodwill under *Brookfield*. Additionally, the names are sufficiently different that a reasonable consumer would immediately know that *Yourplace* is not *Myplace*.

3. Cy Law could potentially assert jurisdiction over Yourplace in California or Virginia. To establish jurisdiction, Cy Law needs to show that Yourplace has “minimum contacts” with either CA or VA under *International Shoe*. Law can do this by establishing specific or general jurisdiction.

First, Law can claim general jurisdiction over Yourplace in California. To establish general jurisdiction, Law must show that Yourplace’s contacts with CA are “continuous and systematic.” *Helicopteros*. Because Yourplace is incorporated in CA and its servers are also located in CA, any court would find that Yourplace’s contacts with CA are continuous and systematic and claim general jurisdiction over Yourplace.

Second, Law can possibly claim specific jurisdiction over Yourplace in Virginia even though Yourplace is not physically present in VA. To establish specific jurisdiction, Law must show 1) that Yourplace purposefully availed itself of the privileges of conducting activities in Virginia, 2) that Law’s cause of action arises out of Yourplace’s contacts with VA, and 3) that jurisdiction in VA would be reasonable. *Burger King*.

Law’s best option would be to pursue specific jurisdiction under the *Zippo* sliding scale analysis. This analysis examines whether a website is an active internet business, a passive information provider, or somewhere in between. The closer the site falls to the active internet business end of the scale, the easier it is for courts to establish purposeful availment in a state. Here, there are key facts missing under *Zippo*. The *Zippo* court found purposeful availment in the plaintiff’s state because the defendant website had 3,000 customers under contract in the plaintiff’s home state. It is unclear from the facts how many customers Yourplace has in Virginia. If it has any that might be enough for a VA court to establish jurisdiction. If not, Law may lose on the issue. However, a court may find jurisdiction simply because Yourplace is a

business website that is actively selling its information to paying customers. Therefore, if the court takes this view, jurisdiction would be established despite Yourplace's lack of VA customers.

Law can also try to prove purposeful availment under the "effects test" established in *Panavision v. Toepfen*. The effects test states that the defendant must have taken 1) intentional actions 2) expressly aimed at the forum 3) causing harm, the brunt of which is in the forum state. Passing the effects test would satisfy the purposeful availment prong of the *Burger King* test.

An argument can be made that Yourplace did take intentional actions expressly aimed at VA because it posted Law's VA address and sold this information to companies looking to market to people in VA. Additionally, Law can argue that the brunt of the harm occurred in VA, especially under a defamation suit, because he lives in VA and his reputation as a gainfully employed well-to-do guy was compromised because of false info posted on Yourplace. Law must be careful in pursuing the effects test in a defamation suit, however, because *Revell v. Lidov* suggests that in a defamation suit the effects test is not necessarily satisfied in the defendant's home state.

4. The court should use the test established in *Columbia Insurance Co. v. Seescandy.com*. Anonymity is a valuable asset to free speech on the internet. As the court in *Seescandy* notes, anonymity can allow people to freely speak their mind, and conversely the court worries that speech would be chilled if the veil of anonymity were easily pierced. Therefore, the court established a test for determining when anonymity can be lifted. First, a plaintiff must show that the person being sued is real and can be sued in federal court “to ensure that federal requirements of jurisdiction and justiciability can be satisfied.” Second, the plaintiff must show that they have taken steps prior to filing in court to determine the identity of the defendant. By fulfilling this requirement, the plaintiff shows that a good faith effort to comply with the requirements of service of process. Third, the plaintiff must establish that its suit against the unknown defendant could withstand a motion to dismiss. This requirement ensures that the anonymity of the person won’t be disrupted for trivial matter. Some argue that this standard should be even stronger, requiring the plaintiff to show that its case can withstand a motion for summary judgment to further avoid this problem. Finally, the plaintiff must file a request for discovery with the court establishing how many people or entities it wishes to serve and showing a reasonable likelihood that process can actually be served on these people.

5. Whether the anonymous poster is an employee or independent contractor of Yourplace will determine whether she can be shielded by 230. Under *Blumenthal v. Drudge* if an employee of Yourplace is doing the speaking then the employer (Yourplace) is the speaker. If that is the case then Yourplace and the poster would be shielded. If the poster is just a random person looking to buy a house who happened to be a Yourplace customer, then she will not be shielded.

6. At first glance no, because the privacy language is strong in the TOU and it must have been impossible for Myplace to foresee that Yourplace had the kind of technology to take one aerial picture and find the address of Law's house. Now knowing about this technology, Site may want to prohibit posting of exterior photos of homes. Perhaps Site could add a term to the TOU stating that no information attained on Myplace shall be utilized on any other website by any other website.