



## Internet Law Answer Outline

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Fall 2011

This case was based on *Ground Zero Museum Workshop v. Wilson*, 2011 WL 3758582 (D. Md. Aug. 24, 2011). See my blog post at [http://blog.ericgoldman.org/archives/2011/09/web\\_vendor\\_disp.htm](http://blog.ericgoldman.org/archives/2011/09/web_vendor_disp.htm)

My apologies, but I've run out of time to do a more thorough sample answer. Instead, I'm providing this answer outline as a substitute. If you're in a subsequent Internet Law class and you hope to mine this outline to quote it back to me or make points we didn't discuss in class, do so at your own risk. I didn't polish this enough to make it reliable for those purposes.

### James v. Sophie

- Common Law TTC
  - Sophie accessed the Sequoia website's servers, run by a third party host. Did James have a possessory interest in that chattel? This is an underdeveloped legal issue. As a chattel lessee, I believe James' chattel interest is protected. If not, then only the web host would have standing (but this doesn't make much sense, because the web host doesn't care what happens to James' website).
  - In contrast, James probably lacks any possessory interest in FaceSpace's chattels, so he probably can't claim trespass to chattels for Sophie's access of FaceSpace's servers. If it's like Facebook, which gives users no real control over their accounts, I believe only FaceSpace would have standing to enforce against misuse of its chattels.
  - Sophie caused harm by deleting data from the Sequoia website (some temporarily, some permanently). I believe lost data—especially deliberate data deletion—satisfies even the stricter Hamidi majority requirement for harm to the chattel. Recall how we worked through the different TTC hypothetical harms. However, the Hamidi case didn't explicitly address data loss, and data loss arguably doesn't degrade the server itself. I don't find that argument very persuasive.
  - James told Sophie to stop accessing the website's administrative interface (see below about the notice problem). He didn't take any obvious self-help steps, like changing the administrative password. Not all courts would require him to do so, but his failure to take simple technical steps would undercut a court's sympathy.
- CFAA
  - Even if James lacks a possessory interest in the host's chattel, the CFAA applies to impairment of his "data, program, system or information."
  - Problem: was Sophie's access of the Sequoia website "unauthorized"? James initially gave her authorization, but arguably she lost that authorization when James told her to stop. The caselaw is split on whether having authorization and then losing it satisfies the CFAA requirement. But, did he clearly communicate his rules in advance (see below), and did he effectively communicate his desire

that she stop? If Sophie didn't get James' instructions to stop, then she retained authorization to access the administrative interface. Even so, James could argue that she never had authorization to make major changes like reversion.

- Problem: did James meet the statutory harm requirement? He lost data, both permanently and temporarily, and he took time to remediate Sophie's actions. If this were a large business, those two facts should support \$5,000 of losses. But the Sequoia website was only a small hobby website.
- State computer crime (I'll focus on Cal. Penal Code 502)
  - As with CFAA, 502 applies to networks, not just chattel, so James qualifies even if he doesn't have a possessory interest in his host's chattel.
  - 502(c)(7) looks most relevant: Sophie accessed a computer system/network without authorization and caused damage/loss. Because 502 doesn't have the same financial threshold as CFAA, the 502 claim seems even stronger.
- Breach of contract
  - James didn't use a mandatory non-leaky clickthrough agreement or otherwise require Sophie to take an unambiguous action indicating assent to his terms (as indicated by Specht). As a result, we're not sure he formed a proper contract.
  - He could argue *Register.com v. Verio* = Sophie continued to take the benefits (website editing rights) knowing the terms. But did Sophie know the terms? We'd need to see the email to see how clearly the terms were presented. Further, unlike the *Register.com* case, James presented the terms once, not over and over again.
  - If the parties had a contract, Sophie breached.
- Defamation for Sophie's post
  - As discussed below, the post's content isn't defamatory; it's an opinion, not an assertion of fact.
  - However, Sophie put those opinions into James' mouth—her false assertion of fact was that James wrote the words when he didn't. This is similar to Moreno's potential claim against the *Hanford Sentinel* for implying that Moreno had submitted the letter to the editor. None of the privileges apply, but did her defamation cause cognizable harm?
  - Sophie might also be liable for intentional infliction of emotional distress for putting words in James' mouth. My take: what she did wasn't nice, but it may not be sufficiently outrageous.
  - Sophie isn't liable for any defamatory comments posted by third parties per 47 USC 230. James could argue, per *Roommates.com*, she lost the 230 immunity because she encouraged posts riffing on bugs and KFC sandwiches. However, her specific request invited readers' opinions, not illegal content.
- E-personation/identity theft?
  - Like *In re Rolando S*, she pretended to be James and hijacked his account. She retained James' password and used it in an unauthorized setting (to access his FaceSpace account).
- Possible ECPA claim if she accessed any private information in James' FaceSpace account.
- Copyright infringement by browsing (see *Ticketmaster v. RMG*) the Sequoia website's administrative interface after James ended her authorization.

- 512(f) claim for sending an unwarranted copyright takedown notice to James' website if she had actually provided copyright authorization to James (see below).

### **James v. BaconateRulz**

- As in the Moreno case, where people shot at her family's house and killed the family dog, BaconateRulz is the real bad actor.
- BaconateRulz's disclosure of James' home address and SSN probably constitutes a public disclosure of private facts. But James may have an Article III standing problem if he sues in federal court. The disclosure alone may not a cognizable harm. It was online only for a few days. Did anyone take the SSN? Did anyone misuse it?
- BaconateRulz attempted to inflict physical injury by sending the poisonous insect (assault/battery among other claims as well as possibly intentional infliction of emotional distress—this is clearly outrageous).
- PS: in case you aren't familiar with the Baconator, see <http://www.wendys.com/food/Product.jsp?family=1&product=4>

### **James v. FaceSpace**

- I believe all claims against FaceSpace based on user comments or actions, including BaconateRulz's mailing of a poisonous insect, are preempted by 47 USC 230. See Doe v. MySpace. If you don't think that 230 immunizes the poisonous insect, there are still causation problems with holding FaceSpace liable for the completely offline activity.

### **KFC v. Sophie/FaceSpace**

- Defamation claim
  - Vs. Sophie
    - Did Sophie make any false statements of fact about KFC? Sophie expressed her opinion about the taste of Double Down sandwiches. To the extent her post raises health and safety issues, it may get enhanced First Amendment protection too.
    - Many of you questioned how Sophie would know what bugs taste like. Maybe she has eaten bugs, which are popular in other countries. See <http://en.wikipedia.org/wiki/Entomophagy> Perhaps she extrapolated what bugs would taste like based on their smell. Or perhaps she was being hyperbolic.
    - As discussed above, Sophie isn't liable for any readers' defamatory comments per 47 USC 230.
  - Vs. FaceSpace: 47 USC 230 precludes KFC's defamation claim against FaceSpace for posts by either Sophie or the commenters.
- Trademark claim
  - Vs. Sophie
    - Infringement: the account username, standing alone, is ambiguous about its relationship with KFC. See the court's discussion about Lamparello's use of Fallwell.com. The relationship between KFC and bugs isn't

immediately derogatory; it might be a goofy marketing concept like Burger King's Subservient Chicken promotion for TenderCrisp. [http://www.subservientchicken.com/pre\\_bk\\_skinned.swf](http://www.subservientchicken.com/pre_bk_skinned.swf). Displaying KFC's product shot might increase the odds that people think it's an official account. Per Lamparello, this may be enough to say that Sophie made a use in commerce of KFC's marks, even though there is nothing remotely commercial about her activities. She also used the name Double Down in her text, which should be either not a use in commerce at all or a nominative use, although judges might stretch trademark law to cover that as well.

- Even if Sophie made a use in commerce, there is no likelihood of consumer confusion here (Lamparello). Any reader will be immediately clear that Sophie is critiquing KFC. KFC could claim initial interest confusion based on the username, but most plaintiffs have been losing IIC claims.
- Even if there's potential confusion, Sophie should qualify for a nominative use defense, although her use of the photo may be more than was reasonably necessary to communicate her points.
- Dilution: she may have tarnished KFC's brand. I didn't see much blurring by creating the name KFCBugSandwiches because I see that as nominative use. Sophie should also qualify for the defenses of non-commercial activity, trademark "fair use" (including nominative use) and commentary.
- Vs. FaceSpace: 47 USC 230 doesn't protect FaceSpace for federal trademark claims. Also, FaceSpace is making money from site ads, so there's a better argument that they are making a use in commerce.
  - However, because FaceSpace didn't create the account, at best they could be contributorily liable.
  - Let's assume Sophie infringes. If the secondary trademark liability rule is notice-and-takedown, FaceSpace may have satisfied the requirement with the prompt removal.
  - FaceSpace could also try to claim that it's an innocent printer/publisher.
- Copyright infringement for the photo.
  - Vs. Sophie. Assume KFC owns the copyright in the photo. If so, Sophie's republication is a prima facie case of copyright infringement. By posting to its site, did KFC grant an explicit or implicit license to reuse? If not, what about fair use? Hard to see how Sophie harmed the market for KFC's copyrighted work.
  - Vs. FaceSpace. Assume Sophie infringes. Did FaceSpace qualify for 512(c)? (i.e., did they satisfy all of the formalities). If so, they promptly responded to KFC's takedown notice. If FaceSpace didn't qualify for 512(c), we go back to the standard contributory and vicarious infringement tests. The fact FaceSpace promptly took down the site will undoubtedly weigh in their favor even if 512 doesn't apply.

### **Sophie's Copyright Claims.**

- What were the terms of her initial permission to James to publish the photos?

- Did she grant an irrevocable license?
- The parties probably never agreed on a license at all, in which case the court would imply a license.
- If she retained the power to revoke her license, she seemed to do so by reverting the website, although she didn't communicate her revocation very clearly to James.
- If Sophie revoked the license, James presumptively infringed by continuing to publish the photos. Even if the users are making a copy (per Cablevision), James has a volitional role in distributing and displaying her photos.
  - Fair use? His use is commercial due to the ads, although it's hard to believe it's commercial when it's losing money. Photos are typically closer to fact than fiction, but he took 100% of the photos. Did the photos have any commercial value? If they were vacation photos, Sophie may not be in a position to claim they had economic value.
- Can Sophie get statutory damages? If not, the case is probably not worth bringing. Plus James may be judgment proof.
- Secondary claim against James' web host
  - 512? Didn't remove after takedown notice, but did Sophie send a proper 512(c)(3) takedown notice.
  - Contributory infringement: continued hosting after takedown notice.
  - Vicarious infringement: hard to tell.

### **Which claims do you recommend?**

This part of the question invited you to discuss more than legal doctrine. I was hoping you would spend more time discussing this; generally, this was an easy way to earn "extra" points.

My position is that potentially none of the claims are worth pursuing:

- James vs. Sophie: his harms weren't that great. He lost some data, spent some time remediating, and in theory her post may have hurt his reputation. But Sophie may be judgment-proof, and he could spend years of his life litigating against her with no tangible payoff at the end of the lawsuit. Plus, because he's running a small hobby website, it's possible that any financial harms he suffered were de minimis.
- James vs. BaconateRulz: can he even identify BaconateRulz? It can be tricky to unmask pseudonymous posters. BaconateRulz is probably judgment-proof.
- James vs. FaceSpace: preempted by 230.
- KFC vs. Sophie or the other commenters: the trademark claim is not frivolous but pretty sketchy. The copyright claim may work technically, but what *copyright* damages did KFC suffer? Plus, Sophie may be judgment-proof. Although this doesn't change the legal doctrine, any court would note that the account was online only for a short period of time, which limited its exposure. Meanwhile, the last thing KFC wants to do is trigger the Streisand Effect and call more attention to discussions about whether it has a bug problem with its food. As the facts indicate, if their attention is called to the post, users are ready to pile on with their own horrific stories. Do a search on KFC and bugs or insects and see what I mean.

- KFC vs. FaceSpace: KFC’s claims are weak, and FaceSpace already resolved the problem.
- Sophie vs. James and James’ web host: even if Sophie has a technical claim for infringement, she has unclean hands. As a result, even if she can get statutory damages, a judge might award the minimum. Also, James may be judgment-proof.

Sophie and BaconateRulz both made poor choices, but unless James or KFC can show real harms, it seems like their problems are minor at best. The court system isn’t well set up to help for small-scale problems.

## General Information

Number of students submitting their exam on specific dates:

Nov. 30: 1  
 Dec. 1: 8  
 Dec. 2: 14  
 Dec. 6: 9  
 Dec. 7: 5  
 Dec. 8: 8  
 Dec. 9: 24

Comments about student answers:

- although porn is the paradigmatic example of tarnishment, anything that “harms the reputation” of the mark qualifies.
- only the government can enforce criminal copyright infringement (17 USC 506). Ditto for the identity theft claim at issue in the Rolando case.
- 512(c) is a safe harbor, not a cause of action.
- 230 doesn’t preempt government prosecutions of federal crimes, but it does preempt civil claims based on those same federal crimes.
- Even if an ICS provider makes a promise in its user agreement, 47 USC 230 may still immunize contract claims based on those promises. See, e.g., the Noah case and <http://ssrn.com/abstract=1934310>
- 512(a) probably only applies to providing Internet access. It does not apply to web hosts.
- Reminder: most courts have rejected contributory dilution.
- The fourth fair use factor looks at the harm to the market *for the work*.
- A number of you noted that fast food product shot photos are notoriously misleading. For a great example of this, see <http://www.alphaila.com/articles/failure/fast-food-false-advertising-vs-reality/>
- Some of you misunderstood claims for harmful or inaccurate information. They apply when someone suffers harm because they relied on published information, such as a guidebook misidentifying poisonous mushrooms or a price misquote that leads to a stock trade.

- A few of you said that 47 USC 230 applies *unless* the website gets notice of the defamation. What class did you take??? If you made this error, please let me know what more I could have done to make this point of law clearer to you.
- Common malaprops: it's nominative use, not normative use; Pharmatrak, not Pharmatrek; Specht, not Sprecht; and 47 USC 230, not 17 USC 230.