



Internet Law (Law 793) Final Exam Sample Answer
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This question is an amalgam of issues from the rough-and-tumble world of online dating. Some facts are based on the Ashley Madison website, which advertises itself as a dating website for people already in relationships (its slogan: “Life is short. Have an affair.”). Among other things, Ashley Madison clearly discloses that it uses automated bots (called “Ashley Angels”) to flirt with new members. See, e.g., <http://www.businessinsider.com/are-ashley-madisons-fake-profiles-legal-2013-11>. Continuing to publish terminated user account profiles is a time-honored tradition in the online dating world. See, e.g., http://blog.ericgoldman.org/archives/2006/03/yahoo_loses_230.htm And recently a well-publicized IP lawsuit by model Yuliana Avalos claimed that hundreds of Match.com users are using her photos, so Match.com should deploy facial recognition technology. See the complaint at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1585&context=historical>.

This semester, I made two changes to the course that made this exam a little different from prior years: (1) the optional midterm, which gave many of you very specific feedback about how to take one of my exams, and (2) the increased time window of 73 hours to take the exam. To accommodate these changes, this year’s exam was wide-ranging and packed with issues. You could maximize points by both spotting lots of issues and doing deep dives on thorny facts, but the word count cap generally forced you to emphasize one strategy over the other. The point system was scored so that neither strategy was clearly superior to the other.

Normally, when I write a sample answer, I try to remain within the wordcount limit applicable to students. Because this is such a rich and interesting set of facts, my sample answer exceeds the wordcount students faced. Thus, there’s no way any student could come close to the combination of breadth and depth in this answer. For completeness, I’ve also added a few details that we didn’t cover in class (such as secondary liability for publicity rights). I didn’t expect students to address those topics.

34 of 65 (52%) of you took the midterm; 3/4 of the students earning A and A- grades on the final exam took the midterm. Now, the obvious question: did the feedback from the midterm help improve the scores, or a student who is likely to get an A/A- the kind of personality that will not skip an optional midterm?

1. Smiley’s claims against Jessica.

Trademark Infringement.

Ownership of a valid trademark. The trademark registration provides prima facie evidence of this.

Priority. Always satisfied in cases where the defendant is referring to the plaintiff.

Defendant's use in commerce. Jessica uses the fake profile and the follow-up email to advertise her service. This satisfies both the more permissive definition of use in commerce as anything regulable under the Commerce Clause as well as the more restrictive “use in commerce” test of using the trademark in ad copy or product packaging.

Consumer confusion about product source. There are several ways to gauge consumer confusion:

a) Consumer confusion using the standard multi-factor test.

- Mark strength. Smiley is a well-known singer. Pro-plaintiff. A number of you said that the mark is strong because it achieved secondary meaning. This is an over-interpretation. Secondary meaning is required for trademark protection for a descriptive mark like Smiley's, so it's double-counting to treat it as evidence of strength. Strength depends on consumer recognition, which is imperfectly measured by secondary meaning. Same goes for secondary meaning as evidence of fame in the dilution test.
- Similarity of services. Both Jessica and Smiley offer online services, though they are not directly competitive because they may cater to entirely different market segments. Neutral or may slightly favor defendant.
- Mark similarity. Jessica uses Smiley's name in her advertising. Pro-plaintiff.
- Evidence of actual confusion. None mentioned in facts. I'd like to see how many private messages Jessica actually got, and what they said, to see what other Heartsick members thought of the profile.
- Defendant's intent. Creating a fake profile to advertise an unrelated service seems pretty bad faith to me. Pro-plaintiff.
- Marketing channels. Both use the Internet for marketing. Pro-plaintiff.
- Purchaser care. Jessica is marketing a highly specialized dating service, and I expect many consumers give a fair amount of thought before selecting an online dating service—especially one as niche-y as GhouLove. Probably pro-defendant.
- Product line expansion. It's unlikely the litigants will develop directly competing services. Probably pro-defendant.

Most judges will twist the factors so they all support one conclusion. If we resist that temptation, the multi-factor analysis is a close call. The fame of Smiley's mark and Jessica's bad faith should lead to a Smiley victory, but the purchaser care and difference in services might support a ruling for GhouLove.

b) Endorsement/sponsorship confusion. Even if Jessica wins the multi-factor test, there is probably still actionable confusion because users receiving Jessica's follow-up message are likely to believe that Smiley endorses GhouLove (she “prefers to hang out” there).

c) Initial interest confusion. Alternatively, a judge could find that Jessica caused initial interest confusion. As Brookfield described it: “use of another's trademark in a manner reasonably calculated to capture initial consumer attention.” Isn't that exactly what Jessica did? Jessica used Smiley's trademark to call attention to her service. This, in particular, might rebut the factors in the multi-factor test about purchaser sophistication and differences in service. Even though

consumers transacting with GhouLove may understand that Smiley has nothing to do with the service, their interest in the service was piqued by the perceived relationship to Smiley.

Jessica can note that Heartsick ran its own fake profiles on the site, so consumers would not be any more confused by the fake Smiley profile than they are about other profiles on the site generally. I don't think a court will be inclined to bail out Jessica, but the presence of Heartsick-operated fake profiles on the site could raise the "baseline" level of consumer confusion about profile legitimacy on the site.

Jessica may try a nominative use defense because the fake profile refers to Smiley. A court would probably question if she took the minimum amount necessary to make the reference (she used Smiley's image and other identifying information); and the nominative use defense would almost certainly fail due to Smiley's implied endorsement. A number of you incorrectly rejected nominative use because Jessica didn't need to reference Smiley to pitch her GhouLove website. A nominative use refers to the trademark owner, and there is no other way Jessica can refer to Smiley without using her name.

Some of you discussed false designation of origin but we didn't cover it in class.

Trademark Dilution.

Fame. We don't have enough facts to definitively resolve her fame, but we know Smiley is a "well-known" entertainer, and many such celebrities often would have the requisite nationwide consumer recognition.

Defendant Use in Commerce. Same as trademark infringement analysis.

Use Began After Fame. We can assume.

Dilution. It's unlikely that Jessica caused blurring because her efforts refer to Smiley instead of adding a new meaning to the trademark. However, there is a serious risk of tarnishment, an "association that harms the trademark's reputation." Consumers might think it's strange that Smiley has a fetish for the undead, and consumers may shun a person with an STD. Either perception may degrade consumers' willingness to transact with Smiley's services...although the perception of having an undead fetish might boost Smiley's popularity in certain circles (for example, if it helps consumers forget that foam finger incident).

Jessica could assert a nominative use or parody defense to the dilution claim. Given her bad faith, I doubt she could qualify for "fair" use.

Publicity Rights. Jessica used Smiley's name and image in advertising for, and as an endorsement of, GhouLove. This is a pretty straightforward publicity rights violation.

Defamation. Jessica made several factual assertions about Smiley, including that Smiley is interested in a dating relationship and uses Heartsick. I'll focus on just two of Jessica's factual assertions: (1) Smiley has HPV, and (2) Smiley is romantically interested in the undead. The

facts specify #1 is untrue; I'll assume #2 is untrue as well. The HPV assertion is per se defamatory (a "loathsome disease"), so she doesn't need to show it injured her reputation. In contrast, Smiley might need to show that her asserted undead fetish injured her reputation to establish prima facie defamation for that claim. [Grading note: although it wasn't a perfect proxy, the A exams frequently discussed two or more defamatory facts while other exams discussed only the HPV claim.]

But do people really believe what they read in online dating profiles? Would anyone have taken either claim seriously? Even though Jessica's assertions are "fact-like," their context in the online dating world might make us question if anyone actually believed them. On a related note, assume for a moment that the only readers of Heartsick profiles themselves have an STD. Would the defamatory import of an STD accusation adjust to reflect the readers' conditions?

In terms of First Amendment limits on the defamation claims, Smiley's fame likely makes her a public figure, but were the assertions a matter of public concern? I doubt Smiley's undead fetish was—if a celebrity is entitled to any privacy, romantic interests in the occult are probably a private concern. Having an STD could be a matter of public concern if, for example, it affected her ability to perform on TV or at concerts. If so, Jessica would be liable only if she was reckless about the assertion's veracity. If Jessica simply made up the factoid to create a Heartsick account so she could conduct her guerrilla marketing plan, a First Amendment defense won't help her.

A number of you misunderstood the meaning of "malice" in the First Amendment defense. Malice doesn't refer to mean-spirited; it refers to the mental state (at least recklessness) about an assertion's veracity.

Overall, a defamation claim, at least for the STD claim, seems strong.

Identity Theft/E-Personation. Jessica's activities might satisfy the requirements of California's identity theft crime, Penal Code 530.5, which was at issue in the *In re Rolando S* case. However, I don't believe there's a civil enforcement right for 530.5 (other than possibly a B&P17200 claim), so Smiley can't sue under that statute. Smiley may have other anti-identity theft civil claims that were outside the scope of the course.

Smiley may have a claim under California's "e-personation" statute, Penal Code 528.5. Unlike 530.5, 528.5 expressly provides a civil cause of action (528.5(e)) for anyone who suffers damage or loss. 528.5 prohibits "knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person." I see two issues with the application of this statutory language in this context. First, was the impersonation "credible"? As discussed with the defamation claim, in context, did anyone really believe Smiley maintained a Heartsick profile? The odds of a popular celebrity using an online dating site in their own name seems really low. Second, did Jessica have requisite intent to harm, intimidate, threaten or defraud another person? I could see how that language might stretch to cover Jessica's impositions on Smiley, but I think saying Jessica "defrauded" anyone is aggressive.

2. Smiley's claims against Heartsick.

I assume that all of Smiley's claims against Jessica discussed above are successful.

47 USC 230. Heartsick can assert a 47 USC 230 immunity for Jessica's content. A successful Section 230 immunity has 3 elements:

- Provider or user of an interactive computer service. Websites qualify as providers (and users).
- Publisher or speaker claims. This covers everything other than IP claims (discussed below), federal criminal prosecutions (N/A) and ECPA.
- Provided by another information content provider. Content submitted by Jessica presumptively qualifies as being provided by another information provider.

I believe that Section 230 will preempt Smiley's defamation and e-personation claims against Heartsick. Let's take a look at some exceptions to Section 230's coverage:

Intellectual Property Claims. Section 230 would not apply to Smiley's federal trademark claims. In the Ninth Circuit, per *Perfect 10 v. ccBill*, Section 230 would preempt state IP claims, such as Smiley's publicity rights and any state trademark claims. Outside the Ninth Circuit, state IP claims would not be affected by Section 230. [A few of you got this reversed and said publicity rights claims were preempted outside the Ninth Circuit and OK inside the Ninth Circuit.]

Roommates.com Narrow Holding. The narrow *Roommates.com* holding applies when a service provider encourages illegal content, or designs its website to require users to input illegal content." Heartsick requires users to enter an STD to complete their profiles. Is this "illegal" content? It's not intrinsically illegal compared to a question requiring users to input discriminatory views about housing. Furthermore, the question only elicits facts about the member, and Heartsick doesn't have any reason to suspect that an answer is defamatory or contributes to e-personation. I think that Heartsick qualifies for Section 230 under *Roommates.com*'s narrow holding.

Roommates.com Broad Holding. The broad *Roommates.com* holding applies when a provider is responsible, in part, for the development of content. Heartsick arguably contributes to the development of content through its profile wizard and the pull-down menus for the STD question. Profile wizards and pull-down menus don't inherently disqualify a Section 230 immunity (see Carafano, discussed in the *Roommates.com* opinion). Still, Smiley could point out the wizard contains the actual defamatory answer (HPV), plus the other things that Heartsick does to shape the content database, including:

- prescreening photos
- running automated chatbots
- maintaining user profiles even when the users are no longer members

The problem is that other than pre-populating the pull-down menus, the other efforts don't directly contribute to the defamation. The entire wizard process contributes to the e-personation,

but there's no evidence that the wizard steers people towards committing e-personation. So even with the broad Roommates.com holding, I think Heartsick might qualify for Section 230.

Untrue Marketing/Promissory Estoppel. Smiley could argue that the member agreement provisions constitute a promise that no one will commit defamation or e-personation. This is a misreading of the agreement; it's a set of negative behavioral covenants, not guarantees against such activity occurring on the site. A promissory estoppel claim based on the member agreement is even more tenuous because there's no evidence Smiley detrimentally relied upon any Heartsick promise.

On balance, I think Heartsick qualifies for Section 230 immunity for Jessica's defamation and e-personation/identity theft; and in the Ninth Circuit, for the publicity rights claim.

Publicity Rights. Outside the Ninth Circuit, Section 230 would not preclude Smiley from bringing a publicity rights claim against Heartsick for Jessica's conduct. We didn't discuss in class what legal rules would apply to this claim. Arguably, because Heartsick "published" Jessica's fake profile, it should have strict liability for the content it published. If that isn't the rule (and it may not be under the First Amendment), then perhaps the rule would follow the de facto notice-and-takedown provisions that have developed around secondary trademark infringement online.

For what it's worth, California's publicity rights statute (obviously not applicable, because ccBill moots the question in California) addresses the issue in Civil Code § 3344(f):

Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section

Smiley could argue that Heartsick "knew" of the publicity rights violation because it prescreened the photo. I don't think that level of knowledge would suffice. Heartsick's screening the photo would not reveal the extent of Jessica's scheme. Plus, most publishers covered by 3344(f) pre-screen their advertisers' ad copy before publishing, so if pre-screening foreclosed the statutory immunity, then the provision is effectively a nullity. This statutory "knowledge" requirement probably turns into the equivalent of notice-and-takedown.

Trademark Infringement. Contributory and vicarious dilution doctrines probably aren't viable claims, and vicarious trademark infringement narrowly applies to agency relationships, so I'll focus just on contributory trademark infringement.

I don't see any evidence that Heartsick attempted to induce Jessica to infringe Smiley's trademark. As a result, the applicable Supreme Court standard (Inwood) would hold Heartsick liable when it continues to supply its product with actual or constructive knowledge that the

product is being used to infringe. In the online context, the Ninth Circuit (Lockheed and others) has interpreted that to apply when the defendant directly controls and monitors the instrumentality used to infringe.

Heartsick has the technical ability to control and monitor its website, including its database of user profiles. However, we don't have evidence that it knows of Jessica's misdeeds. As a result, Heartsick probably isn't contributorily liable until learns of her misdeeds or gets Smiley's notice.

Heartsick also can argue that it qualifies for the 1114(2) safe harbor for "innocent" printers and publishers. Because that statute hasn't been tested often in court, we don't know how successful that safe harbor defense would be.

I was exasperated by how many of you recycled language from copyright law for your secondary trademark discussion without explaining why you were doing so. For example, the elements of the vicarious copyright infringement test (right and ability to supervise/direct financial interest) don't provide any insight into the vicarious trademark infringement analysis. As we discussed, the vicarious copyright infringement standards have morphed substantially from their agency roots, so it's wrong to equate the two. Also, a number of you talked about "red flags of infringement" in your contributory trademark infringement analysis, even though there's no such doctrine ("red flags" are important to the 512(c) copyright safe harbor). The eBay case indicated that willful blindness, similar to the discussion in Veoh and YouTube, could support a contributory trademark infringement finding, but "red flags" isn't the right approach to address the willful blindness issue.

3. Krista's copyright claims against Heartsick.

Krista owns the copyright in her photo. We don't know if she's registered the photo's copyright. She'll need to do so before suing. In addition, if she didn't register within 3 months of first publication, she will be limited to actual damages. It's hard to gauge actual damages here; but if there is a licensing market for her photos, it might help quantify damages.

Direct Infringement. Heartsick's members upload and download Krista's photo. Per Cablevision, that would make them the direct infringers who take the "volitional" steps, even though Heartsick's servers mechanically process the copies.

Does Heartsick take any volitional actions because it pre-screens photos for pornography? I don't think so. For example, in Cablevision, the cable company selected which channels were eligible for DVR treatment. That's not a direct analogy, but it suggests that some pre-publication editorial discretion might not automatically create volition. I could see a court reaching the opposite conclusion, though because Heartsick's employee/contractor is the last step in the causal chain.

Can the members qualify for fair use?

- Nature of the use? Using a fake profile photo clearly isn't a non-profit education use, but it's not also clearly commercial. It's a little like the "personal" use at issue in P2P downloading, which Napster said was not fair use. I don't see it as transformative either.

There's no parody or commentary about the photo or modification of it. Given the deceptiveness inherent in members' usage, I'm going to weigh this factor against fair use.

- Nature of the work? Photos, especially "headshots," are more factual (i.e., try to make an accurate depiction of reality) than fictional, so I'll weigh this factor in favor of fair use.
- Amount and substantiality of the photo taken. This would depend on the specific usage, but most times headshots are taken verbatim, so this would weigh against fair use.
- Market effect. There's no licensing market for fake profile photos, nor is one likely to develop. Indeed, if such a market existed, the photos would become worthless because it would be easy to verify their inauthenticity. So Krista isn't losing out on photo sales to the members. On the other hand, to the extent Krista is trying to license the photo for other purposes, such as a stock photo, widespread usage on online dating websites, and any taint due to its association with an STD, could degrade its commercial value—especially if the photo becomes a viral "joke." If Krista can provide any evidence of this harm, I'll weigh this factor against fair use. [Note: harm to Krista's career prospects isn't harm to the copyrighted *work*.]

Overall, I think it's unlikely that members can claim fair use. Courts generally do not look favorably on inauthentic content.

While Krista may grant an implied license to download her photo from her website, that implied permission would not allow republication. We could check her website to see if she expressly permitted republication, such as by using an applicable Creative Commons license. Even if Heartsick members normally would have implied permission to download other members' photos, they won't have any permission if the uploader never had permission to upload.

For the rest of the question, I'll assume that Heartsick members uploading and downloading Krista's photo are direct infringers. Otherwise, without direct infringers, Heartsick can't be secondarily liable.

Contributory Infringement. Continuing to host the member-supplied photos knowing they are infringing will qualify as material contribution. But does Heartsick know they are infringing? Heartsick's pre-screening doesn't check for copyright infringement, and often a photo's infringing status won't be apparent on its face. On the other hand, if a Heartsick customer support representative (CSR) saw the same photo twice during pre-screening, the CSR could be charged with "knowing" that the same photo couldn't be legitimately used for two different members. But if CSRs review hundreds or thousands of photos a week, and are only looking for pornography, even prior exposure to a photo may not adequately confer "knowledge" of copyright infringement.

The more complicated question is what happens when Krista sends a takedown notice. Naturally, Heartsick will need to remove the copies identified as infringing, but will it have knowledge of future uploads of the same photo? I believe the answer is no, but plaintiffs continue to insist otherwise.

We don't have any evidence yet that Heartsick sought to induce members' infringement, although we'd expect Krista to allege inducement and to troll through Heartsick's website and employee emails looking for adverse evidence.

Vicarious Infringement. Due to its method of charging to view profile photos, Heartsick has a direct financial interest in its members' infringements. As more of Krista's photos are uploaded and viewed, Heartsick makes more money—perhaps not directly (because people pay to see a photo before they know it's infringing) but indirectly because users will be more willing to pay to send direct messages to a person they find more attractive. In any case, “direct financial interest” isn't a high bar; Napster had it even though it had no revenues at all.

With respect to the “right and ability to supervise” the infringement, it's tempting to say that Heartsick's pre-screening confirms its right and ability to supervise infringements, but I don't think so. After all, Veoh requires that service providers exercise “substantial influence” over their users' submissions, and post-hoc removal of users' uploads doesn't automatically satisfy this element, i.e., removing allegedly infringing photos in response to takedown notices doesn't confer the right and ability to supervise the infringements. Does pre-screening constitute the requisite supervisory power even though post-hoc control doesn't? I vote no.

Heartsick's Fair Use Defense. Heartsick can assert its own fair use defense in addition to its members' fair use defense, but Heartsick's fair use defense is likely going nowhere. Because Heartsick effectively sells access to the photos, its use (for the first factor) will be commercial. With respect to the fourth factor, I expect a court's rationale would be that between Krista and Heartsick, Krista is the more deserving recipient of the money generated from Heartsick's commercial activity. The other two factors are as discussed above.

512(c) Safe Harbor. In general, Heartsick looks well-positioned to qualify for the 512(c) safe harbor for the member-uploaded photos. Heartsick has satisfied most of the formalities, and we can find out if they have met the other formalities. We don't know if Heartsick accommodates standard technical measures, but my current hypothesis is that nothing qualifies as a standard technical measure. I assume that Heartsick expeditiously responds to 512(c)(3) takedown notices. I don't know what “willful blindness” means, but we don't seem to have any evidence of Heartsick's willful blindness.

I have three reservations about the 512(c) safe harbor:

First, does Heartsick's pre-screening mean that Heartsick has red flags of infringement? As discussed above, a CSR might see the same photo twice. And Heartsick probably has gotten complaints from members that other members aren't accurately depicting themselves in their profile photos. Even though those complaints wouldn't constitute 512(c)(3) notices, they might indicate that some members are using photos of other people—perhaps without copyright permission to republish the photo.

[Side note: unless it's a selfie, members probably didn't take the photos of themselves—meaning that an uploading member often won't own the copyright to their uploaded photo, though they may have sufficient permission to republish. So the copyright problems with member photos run

deep, but 512(c) should still be available even though Heartsick has generalized awareness of this problem.]

Second, Krista could argue that the photos weren't stored "at the direction of a user" because Heartsick pre-screened the photos. For example, if the uploaded photos go into a holding bin until they've been pre-screened, at which point the CSR moves the digital bits into a different location to publish them, Krista could argue that the CSR "breaks the chain" between the member's uploading and the actual publication. I don't think such an argument is likely to succeed. It reminds me of the arguments about transcoding and syndication in the Veoh and YouTube cases. Transcoding was clearly covered by 512(c) even though it was a change to the digital bits; and syndication was still potentially covered by 512(c).

Third, Krista could argue that continued publication of member profiles after the member has terminated his/her account is no longer "at the direction of a user." Personally, I think this would depend on the member's license to Heartsick. Heartsick discloses its post-termination publication in its member agreement, and if the agreement says it's OK, then the publication is still technically at the user's direction. Still, when continued publication doesn't benefit the former member, I could see a court question if the user is still in charge of the photo.

The availability of facial recognition software doesn't affect the 512 safe harbor inquiry. See 17 USC 512(m) ("Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on...a service provider monitoring its service or affirmatively seeking facts indicating infringing activity").

4. Heartsick's claims against Jessica.

Breach of Contract. The facts specify that Heartsick's member agreement was properly formed (as a mandatory non-leaky clickthrough agreement). The facts also pretty clearly indicate that Jessica breached numerous provisions of the member agreement. I'd argue that she clearly breached all five of the restrictions listed in the exam facts.

Heartsick's contract amendment provision allows it to unilaterally amend the contract without notifying the user. [Note: this provision is a lightly edited version of Ashley Madison's actual clause.] Like the Blockbuster clause, Heartsick's clause puts the onus on members to keep checking back and says members are automatically bound if they keep using the site after a change. Unlike the Blockbuster clause, Heartsick's clause gives a way for members to do version control—it says they can note the "last update date of the revision" and, if that's changed, the member has been put on notice that the terms have been amended. So the revision date acts as a form of notice to members, but it's an incredibly passive notice. Members must seek it out and remember the prior modification date, and Heartsick doesn't make it easy to determine what has changed, such as by providing a redline or an archive of past versions.

Does the presence of this unilateral amendment clause undermine the entire member agreement? The Blockbuster and theglobe cases reach opposite results on this issue. I think Blockbuster is the better statement of current law, so the clause puts Heartsick's entire contract at risk. I don't think Heartsick's minor efforts to provide greater notice to members about changes makes a

material difference to the analysis. Consistent with the Ninth Circuit's Douglas opinion, at minimum Heartsick would need to affirmatively "push" notice to its members of any changes. The fact that Heartsick hasn't amended the contract yet is immaterial; the mere presence of the unilateral amendment clause weakens the contract, whether or not it's been used yet.

Even if a court doesn't render the entire member agreement illusory, Jessica can still argue that the unilateral amendment clause is unconscionable.

Trespass to Chattels. Jessica "used" Heartsick's servers as other ordinary members would. The member agreement makes it clear that Jessica's ways of using the servers was unwelcome, unlike "ordinary" members' usage. I already discussed that Heartsick's member agreement might be defective due to the unilateral amendment clause, but restrictions on chattel use can be effective even if not communicated via a binding contract. So even if the contract fails, Jessica may be trespassing on Heartsick's servers by using them in ways that contravene the member agreement's restrictions. Jessica's conduct checks off the "chattel interference" box for all three trespass to chattel doctrines.

It's less clear if Jessica has caused the requisite harm:

Common law trespass to chattels. If Jessica's usage resembles that of an ordinary member, it won't be very credible for Heartsick to argue that Jessica caused a measurable loss to its system resources. Perhaps Heartsick would have a better argument if it could show that Jessica engaged in a high volume of unsolicited private messages, but that seems unlikely given that Jessica only responds to private messages sent to the fake Smiley account.

Due to Heartsick's business model, which charges senders to send private messages, the odds of follow-on spammers overwhelming Heartsick's resources is substantially lower than was the case in eBay and Register.com.

CFAA. Heartsick could try to marshal evidence that it incurred \$5,000 of losses due to Jessica's conduct, but if remediation is as simple as deleting her account, that may not be very persuasive. A more promising angle would be to explore how Heartsick's other members responded to Jessica. Recall those members had to pay to send a private message to the fake Smiley. I would want to explore if they requested refunds or outright canceled their accounts due to the fakery. The costs of investigating these issues, processing the refunds and possibly the lost revenues from canceled accounts might be counted against the \$5,000 threshold.

State Computer Crime. California Penal Code 502 merely requires some damage or loss, including verification expenses. Read literally, the trivial costs to terminate Jessica's account, plus the costs of researching if Heartsick had to issue refunds to misled members, ought to easily satisfy the standard.

Thus, as usual, the state computer crime claim is the most likely to succeed, the CFAA claim is the next most likely to succeed, and the common law claim is the least likely to succeed.

Anti-Spam. This situation resembles the MySpace v. theglobe situation pretty closely. Heartsick should be able to claim that it provides email services because of its private messaging system, and it will argue that Jessica violated CAN-SPAM. Her violations may be less clear than theglobe's because Jessica's operations appear to be manual, not automated (and given the price of credits, Jessica probably couldn't afford to automate the process of sending private messages). We might also question Heartsick's damages because Jessica paid to send her private messages, but Heartsick could still try to get CAN-SPAM's statutory damages. I think the overall falsity of Smiley's fake profile should trigger a CAN-SPAM violation enforceable by an "Internet access service." Similarly, Heartsick could have a state anti-spam claim; pretending to be Smiley in Jessica's private message response should provide enough falsity to allow a state anti-spam law to survive federal preemption.

Copyright Infringement. If browsing is infringement, then Jessica may have infringed Heartsick's copyrights in its web pages. Any implied license to browse would be defeated by Heartsick's express terms in its member agreement, and Jessica's deceit and commercial intent would undermine a fair use defense.

5. Recommendations for Heartsick.

Heartsick's business model of charging members to publish and consume content creates some difficult legal problems, such as the "direct financial interest" prong of vicarious copyright infringement. However, it's not easy to restructure a company's business model, nor is it clear that a different business model would moot the legal issues. For example, a flat monthly subscription fee would reduce Heartsick's direct financial interest in infringing photos, but a court might nevertheless find that infringing photos acted as a "draw" (see the old Napster ruling) to get new members or extract more money from existing members, in which case the business model change doesn't solve the legal problem anyway.

Similarly, it's easy to say that Heartsick should stop pre-screening members' submissions, but is that a good business decision? Heartsick may not want to be the kind of environment where members pay to unexpectedly see pornographic photos (think Chatroulette). Heartsick would benefit from investigating if there are anti-pornography automated filters. It could also investigate automated copyright detection filters.

Heartsick might benefit from doing more to authenticate its users' identities. This would prevent e-personations like Jessica's fake Smiley profile. I don't know that authenticating members is legally required, however. Authenticating members could be coupled with screening out convicted sex offenders or convicted criminals, which is also advisable even if not legally required. If facial recognition software were cost-effective, that would be a good investment to strengthen the likelihood that people are who they say they are (i.e., the same face can't appear twice on the site).

Heartsick should stop publishing old member profiles, even if members agree to it in the member agreement. The practice seems inherently deceptive and offers no benefit to either existing or former members.

Heartsick should end its chatbots. Even if they have the salutary benefits of engaging new members, they drain those members' accounts for little return value. Alternatively, it may be less problematic to use chatbots if Heartsick doesn't charge for interacting with them.

Heartsick should change its unilateral amendment clause in the member agreement. At minimum, it should push notice of changes to its members. Preferably it would require members to affirmatively consent to new terms.

6. A Few More Thoughts.

More than in previous years, some students bypassed the "black letter" common law rules I provided in my PowerPoint slides and used alternative rulesets. For example, some students used different prima facie elements for defamation than I provided; a surprising number of you used the Grokster definitions of contributory and vicarious copyright infringement even though I provided you what I think is a more accurate distillation of the common laws tests in my slides—TWICE; and one student used the Restatements test for contributory trademark infringement even though I can't recall the last time a court looked to the Restatements in that case. I'm not sure why so many of you decided to go off-roading. Maybe because I encouraged students to look at the statutes; and students took this as an invitation to find different common law rules too? I didn't downgrade students who go off-roading so long as their alternative black-letter rules are generally good law, but I'm still baffled. Students always say they want black-letter rules, so I try to provide simple distillations of various common law tests in my slides—yet that doesn't seem to be enough for some of you. Why? If you were one of the students who went off-roading to find a different common law test than the one we discussed in class, I'd be grateful for your feedback about why you thought you needed to find something better.

Given the questions I actually asked, I didn't give any credit for claims where the government would be the plaintiff, such as 530.5 identity theft and the FTC Act. Please make sure you're clear on who is the plaintiff and the defendant in the call of the question; if you've got the right defendant but the wrong plaintiff, it's still irrelevant to the question asked.

A peeve: it's troubling when I see incorrect statutory references or defined statutory terms: things like citations to 27 USC 230, the "DCMA," references to "ISP" when discussing CAN-SPAM's "Internet access services," or references to "IAP" when discussing Section 230's "interactive computer services." (Please, if we could all just stop using the term ISP altogether, the world would be a better place). Sometimes this is obviously a typo, but it's still confidence-rattling. I didn't downgrade for these errors, even though they hurt me more than a toothache, but minor errors like this will count against you A LOT when you are a practicing lawyer. Imprecisions about statutory terms or statutory citations, however minor, instantly undermine your credibility.

Another peeve: A number of exams had apparent typos with substantive import. For example (and I had dozens of examples to choose from), imagine a statement that "Section 230 will preempt a trademark claim because it is an IP claim." I assume, based on the surrounding discussion, that the author meant "Section 230 will **NOT** preempt a trademark claim because it is an IP claim." However, the omission of "not" makes the statement simply incorrect. If I grade based on what the student said, instead of what the student meant, this typo will hurt the

student's score. To avoid the risk you get downgraded for small typographical errors, I *strongly* recommend you to proof your answer one final time before submission.