



Internet Law (Law 793)
Final Exam Sample Answer
Prof. Eric Goldman • Fall 2014

Part 1 (Christine Jacko)

As usual, I based this question on a real-life incident. In 2013, Justine Sacco, a PR executive for IAC (InterActive Corp.), a major Internet company, made the tweet in question just as she boarded a flight from London to South Africa. The tweet, coming right before Christmas, became a viral sensation during a slow news cycle. It's a classic reminder of the principle we discussed with the Moreno case: post in haste, repent at leisure. See this story telling Justine's story a year after her tweet: <http://www.buzzfeed.com/jtes/justine-sacco-says-she-really-suffered-after-tweeting-aids-j#.epPbglROq>

By the way, did you find my exam Easter egg? <https://twitter.com/ChristineJacko9> Cat videos FTW!

Christine v. GoGeaux. [Note: the wi-fi service Gogo actually tweeted "Next time you plan to tweet something stupid before you take off, make sure you are getting on a @Gogo flight! CC: @JustineSacco." In response to criticism over that tweet, Gogo promptly removed it.]

Trademark Infringement. GoGeaux bought the equivalent of a keyword ad triggered by the name "Christine Jacko," and it used the hashtag #ChristineJacko in its ad copy. As another keyword advertising case, the Network Automation case can help here.

Protectable trademark rights. The name "Christine Jacko" has developed secondary meaning for speaking services, so she has protectable rights. Note: Some of you apparently confused the copyright registration prerequisite for suing with the lack of a registration requirement for trademarks. Federal law protects both registered and unregistered trademarks.

Priority. GoGeaux's use began after Christine Jacko's.

Use in Commerce. Displaying the name in ad copy constitutes trademark use by GoGeaux. This is expressly covered by the statutory definition of "use in commerce." Keyword triggering also constitutes a use in commerce per Network Automation.

It's less clear to me if GoGeaux further made a use in commerce by using the hashtag #HasChristineLandedYet. Although GoGeaux didn't use the full trademark, GoGeaux clearly was referring to her. However, the hashtags act more as a type of index term than as a designator of GoGeaux's products.

Likelihood of Consumer Confusion. I doubt consumers would be confused by GoGeaux's usage of Christine's trademark. First, many consumers probably don't know Christine's brand. Second,

GoGeaux isn't offering rival services. Third, the "something stupid" grammar strongly suggests that Christine didn't endorse the ad. Then again, celebrities—especially those who have done something stupid—sometimes engage in self-mockery or self-parody as part of their absolution. It's possible consumers might think this ad is actually a clever comeback by Christine (or at least authorized by her).

Nominative Use. GoGeaux can argue that it made a nominative use of Christine's trademark because its ad copy refers to her. Christine might argue that GoGeaux used more of her trademark than necessary. For example, it didn't need to use the #ChristineJacko hashtag in the ad copy; the keyword triggering and the #HasChristineLandedYet hashtag would have been sufficient to make the desired association. I personally think GoGeaux's nominative use case is strong.

Some of you were confused how to apply nominative use. The standard isn't whether GoGeaux is referring to its own stuff; it's whether Christine could be identified using a synonym.

[Just a reminder that the facts told you not to discuss trademark dilution. Some of you did anyway.]

Publicity Rights. Using someone's name in ad copy without their permission is a prototypical publicity rights violation. There may be First Amendment limits to the claim, but the publicity rights claim is a potentially potent one. Buying the name as a keyword trigger, without more, may not be a publicity rights violation (*Habush v. Cannon*).

Defamation. GoGeaux implicitly called Justine's tweet "stupid." This should be characterized as an "opinion" and isn't actionable as defamation or false light.

Christine v. Beth. [Note: the JustineSacco.com domain promoted an organization called "Aid for Africa."]

Trademark Infringement.

Ownership. Established above.

Priority. Beth's use began after Christine Jacko's.

Use in Commerce. Beth's use of the christinejacko.com domain name promoted an independent third party charity. Beth didn't offer any services of her own via Christine Jacko's brand; she just redirected interested folks to the charity. This has some parallels to the Lamparello case, where the use in commerce question for a gripe site vexed the court. If the use in commerce factor covers all activity governed by the Commerce Clause, then Beth made a use in commerce. The Lamparello court also indicated that commercial links could indicate a use in commerce, so linking to a non-profit might also contribute to a determination that Beth made a use in commerce. However, I would distinguish Beth's gratis link to a charity from a compensated Amazon affiliate link.

Separately, Beth posted a tweet promoting the website, and the tweet references Christine Jacko as part of the domain name. This tweet could separately constitute a use in commerce.

Likelihood of Consumer Confusion. Beth probably didn't create any initial interest confusion, even though she registered and used a domain name containing a third party trademark and then tweeted a promotion of it. As the Lamparello court indicated, we need to consider the domain name in conjunction with the website.

However, unlike the Lamparello case (at least, some of the screenshots we reviewed in class), Beth's website text didn't necessarily eliminate confusion. As discussed above, consumers might infer that Christine sought to correct her faux pas by directing charitable donations. On the other hand, consumers might realize that the site has nothing to do with Christine. Anyone who came to the website based on Beth's tweet probably will realize that the website is independent of Christine; but if those consumers don't know anything about Beth's (non-)relationship with Christine, they still might think the website was Christine's attempt at rehabilitation.

If we get past initial interest confusion, website visitors won't be confused about who they are transacting with. That is, they will understand they are donating to the AID(S)Africa charity. However, they might be confused about *why* they are transacting with the charity. If consumers give to the charitable organization believing that it was endorsed by Christine, that confusion might be actionable under trademark law.

Of the cases we discussed in class, the Lamparello case is pretty close to Beth's conduct. Thus, I was a little surprised how many of you reached to use other cases (in preference to Lamparello) for your analogizing/distinguishing.

Nominative Use. Unlike GoGeaux's reference, the domain name doesn't necessarily refer to Christine.

Publicity Rights. If Beth's tweet is an ad, then it might trigger a publicity rights violation. The website, using her name in the domain name, could also be a publicity rights violation if it's viewed as commercial activity (for purposes of publicity rights law, which might be different than trademark law's commerciality).

ACPA (Trademark). Beth registered and used a domain name that was identical to a distinctive trademark (the Christine Jacko mark that had achieved secondary meaning). Did Christine have a bad faith intent to profit? Her promotion of an independent charity probably doesn't count towards that. However, she responded equivocally to an offer to buy the domain name. Some courts might count her equivocal response as a bad faith intent to profit.

ACPA (Personal Name). 15 USC §8131 applies to anyone who registers another living person's name as a domain name "with the specific intent to profit...by selling the domain name." Beth can argue that even if she responded equivocally to the invitation to buy the domain name, she didn't initially register the name with that intent.

State Domain Name Laws. As I mentioned briefly in class, state domain name laws also may protect individual names.

UDRP. Christine might be able to procure the domain name from Beth via a UDRP. Beth registered a domain name identical to Christine's trademark. However, it's not clear if Beth had legitimate interests in the domain name. Her website made a statement about Christine's views on AIDS in Africa. Beth's domain name registration and website may not have the requisite "bad faith," even though the UDRP considers more activities as bad faith than the ACPA. As with the ACPA, UDRP panelists might count Beth's equivocation on a domain name resale against Beth. Otherwise, we don't have any evidence of bad faith by Beth.

Christine v. William.

Defamation. William called Christine a "racist for years." This might be capable of a defamatory meaning, or it might be characterized as an opinion. My guess is that we'd treat "racist" as rhetorical hyperbole. The article linked by William doesn't support the "racist for years" characterization. Supporting immigration restrictions doesn't necessarily mean someone is a racist. This link could then provide further support that William's position is an opinion because he overinterprets the article.

[Note: saying "in my opinion" is neither necessary nor sufficient to make a statement into an opinion.]

William might claim First Amendment protection. It's not clear if Christine qualifies as a public figure. She is a high-ranking executive for a major company and does public speaking enough to qualify for trademark protection, so she might be. The assertion that she has been a racist for years potentially would be a matter of public concern. Although the entire event has a gossipy feel to it, the virality of #HasChristineLandedYet might make the issue enough of a public concern to satisfy the standard. But even if the First Amendment protections apply, William can still commit defamation if he had "malice." If he simply made up that she's been a racist for years, he might have the requisite malice to lose the First Amendment protection. His link to the article, which he overclaimed, could help show that William knew his assertion was false.

Note: calling the selfie "stolen" probably isn't technically inaccurate given the likelihood that William exceeded any consent he had.

Copyright. "Selfie" photographs should qualify for copyright protection. Photographs usually qualify as original works of authorship. The taker of a selfie—in this case, Christine—owns the copyright. Uploading the photo to Twitter constitutes a reproduction, public display and distribution of the photo. Therefore, Christine easily should be able to establish a prima facie case of copyright infringement against William after she registers the work. (It's unlikely Christine registered the photo initially given its personal nature and her likely desire not to share the photo more widely).

William could try to argue that he had an express or implied license to post the photo publicly. To judge this, we'd need to know more about the discussions between William and Christine at

the time she texted the photo. Maybe she told him that he was free to do whatever he wanted with the photo; or perhaps she indicated that the photo was “for his eyes only.” If the parties were silent about the future disposition of the selfie, I think it’s unlikely that William could successfully argue that Christine impliedly consented to public distribution of the photo. I think most people would assume that sexually explicit photos shared in the context of an intimate relationship are not intended for larger audiences.

William could argue fair use covers the dissemination. I doubt a fair use defense will succeed:

- Nature of his use. It’s neither commercial use nor non-profit academic use. There’s nothing transformative about the photo. He didn’t add anything or create a new meaning (in fact, the photo is completely irrelevant to the #HasChristineLandedYet controversy). To the extent it’s characterized as “revenge porn,” I think the revenge motivation would weigh heavily against him.
- Nature of the work. We’d need to see if the photo was composed in some way, but it’s probably closer to fact. Nevertheless, the fact that the photo was unpublished will weigh significantly in Christine’s favor.
- Amount taken. William redistributed the entire photo.
- Market effect. I’m going to assume Christine never intended to commercialize the photo, so it will be hard for her to argue that the publication undermined her commercial expectations. Nevertheless, courts will likely respect her desire not to commercialize the photo under any circumstances and count this factor against William.

We haven’t seen too many copyright-based revenge porn lawsuits, but I expect courts will treat the defendants harshly in those cases.

If Christine hasn’t made a timely registration, then she won’t be able to get statutory damages or attorneys’ fees. However, she would be able to get actual damages (probably nominal) and an injunction.

Other Revenge Porn Claims. William may have made a public disclosure of private facts. The private fact is the photographic depiction of Christine. William made a public disclosure. Though there is significant interest in Christine, there may not be a sufficient social interest in the publicized fact (i.e., seeing her nude).

If California law applies, this might be a good claim for Civil Code 1708.85 when it becomes effective on July 1, 2015. The law applies to intentional distribution of “a photograph...of another, without the other’s consent, if (1) the person knew that the other person had a reasonable expectation that the material would remain private, [and] (2) the distributed material exposes an intimate body part of the other person...” There are various statutory defenses but I don’t think any apply. The law is also subject to First Amendment limits, but the statutory defenses probably cover most of the circumstances where the First Amendment might apply.

Depending on her other interactions with William, Christine might have an intentional infliction of emotional distress claim or can claim breach of contract.

Christine v. Twitter.

Section 230. Twitter is a typical user-generated content website. As a result, Section 230 generally preempts all of Christine’s claims based on third party content, which in this case would include content provided by William, Beth and GoGeaux. Thus, Section 230 should preempt Christine’s claims against William for defamation, privacy invasions or California’s revenge porn law.

Section 230 does not preempt intellectual property claims. Therefore, Christine can bring federal copyright or trademark claims against Twitter without running into Section 230. I’ll discuss those below. (I assume ACPA claims are also an IP claim for Section 230 purposes, but nevertheless Twitter can’t be liable for Christine’s ACPA claims because there is no contributory cybersquatting doctrine. See *Petroliam Nasional Berhad (Petronas) v. GoDaddy.com, Inc.*, 737 F.3d 546 (9th Cir. 2013)).

Christine’s publicity rights claims against GoGeaux or Beth are state IP claims. If the lawsuit is in the Ninth Circuit, it is also preempted. If the lawsuit isn’t in the Ninth Circuit, then Section 230 won’t apply.

Can Christine get around Section 230? Rebecca’s notice of problematic content is irrelevant to Section 230. Twitter’s filter failure is also irrelevant per both 230(c)(1) and 230(c)(2).

Twitter’s purported failure to enforce its contract terms is irrelevant. Typically, users are not third party beneficiaries of the service’s agreement with other users (see *Noah*), and I believe Section 230(c)(2) would preempt such claims anyway.

There’s no evidence Twitter requires the input of illegal content or encourages illegal content. It’s possible that Christine could find some marketing language that conflicts with Twitter’s handling of user content and thus establish a claim for Twitter’s false marketing, but the exam facts don’t give us any indication of that.

Twitter promised to investigate Rebecca’s complaint, but Christine probably can’t claim promissory estoppel. First, Twitter made the promise to Rebecca, not Christine. Second, there’s no evidence Christine detrimentally relied on Twitter’s promise. For example, if Christine would have deleted her account upon landing either way, Twitter’s promise didn’t make a difference to that decision.

Christine might argue that Twitter should have warned her of the risks of making ill-advised tweets, and such a claim may not be preempted by Section 230 per the Ninth Circuit’s *Internet Brands* case. Indeed, I imagine Twitter is well aware that edgy users have a risk of getting cybermobbed. We didn’t get into “failure to warn” doctrine too much in class, but I believe a “failure to warn” claim by Christine would fail for several reasons—most importantly, because Twitter doesn’t owe the requisite “special duty” to its users.

Christine’s “best” hope for getting around Section 230 is *Roommates.com*’s minority holding about service providers partially responsible for the development of the offending content.

However, the facts don't support this workaround. Christine might argue that Twitter's retweet function caused the revenge porn to become more high-profile than it would have otherwise. However, numerous cases have rejected that increased promotion of user content vitiates Section 230. *See, e.g., Asia Economic Institute v. Xcentric Ventures LLC*, 2:10-cv-01360-SVW -PJW (C.D. Cal. May 4, 2011). Christine could also argue that Twitter distributed the content to unsuspecting due to its auto-follow feature. However, syndicating content to third parties also doesn't trump Section 230. *See, e.g., Nasser v. WhitePages, Inc.*, 2012 WL 6858438 (W.D. Va. 2012).

As a result, I don't think Christine can work around Section 230, though she can take advantage of the IP exception for her IP claims.

I was extremely unimpressed if your answer didn't mention Section 230. After all, it's been a starring doctrine on my exams every year for the last 19 years.

Copyright. For this discussion, I assume that William directly infringed Christine's copyright.

Direct Infringement. Twitter just operates servers that users use to publish their content. Therefore, I believe that any direct infringement claim would lack the requisite volitional conduct on Twitter's part. See the recent ruling in *Perfect 10, Inc. v. Giganews, Inc.*, 2:11-cv-07098-AB-SH (C.D. Cal. 2014):

To hold a service provider liable in *strict liability* for the discrete acts of *third party* copyright infringers because the infringing material was stored on or passed through the service provider's facilities would be, in effect, to hold the entire internet liable for the bad acts of a few.

Contributory Infringement. Twitter hosted the infringing photo, and the failure to remove a known infringing item usually constitutes a substantial participation in the infringement. But did Twitter have sufficient scienter of infringement? Twitter's system "knew" that the photo was the top search result for the hashtag, but we don't know if any human at Twitter knew that fact, nor can we assume the human could determine if the photo was infringing without additional information.

Rebecca's complaint also gave "notice" to Twitter. However, the complaint was not a 512(c)(3) notice; for example, Rebecca wasn't authorized to act as Christine's enforcement agent. Also, Rebecca's complaint didn't mention copyright problems.

I don't think Twitter got any "notice" from William's characterization of the photo as "stolen," even if a Twitter employee saw that characterization. See the Ninth Circuit's *Perfect 10 v. ccBill* ruling.

All told, based on these facts, Twitter probably lacks the requisite scienter for contributory infringement.

Inducement. We don't have any evidence to suggest that Twitter promotes its service with the objective of being used to infringe.

Vicarious Infringement. Twitter has the technical capacity to remove posts, so in that sense it has the right and ability to supervise infringements. However, the Veoh court made it clear that level of technical control isn't enough. If the "right and ability to supervise" requirement only applies with respect to specific posts as Veoh implied, we don't have any evidence indicating that Twitter had reason to focus on supervising William's photo. The failure of Twitter's filter should be irrelevant (Veoh had a copyright filter too).

Twitter may also lack the direct financial benefit from the photo. I don't believe Twitter actually tries to monetize photos themselves (though it does insert ads into the stream of posts). Infringing content doesn't act as a draw to Twitter, nor did this photo necessarily draw in folks to use Twitter.

Fair Use. If Twitter infringes, it can assert its own fair use defense. The defense looks pretty similar to William's, except the first factor is even more likely to weigh against Twitter because Twitter is a commercial service, although it didn't commercialize the actual photo. I don't have any reason to believe that Twitter would win a fair use defense.

512(c) Safe Harbor. Twitter will likely qualify for a 512(c) safe harbor. We know Twitter qualifies as a "service provider," but we don't have all of the information we need to confirm that Twitter has satisfied the other prerequisites for the safe harbor. The facts don't mention if Twitter made the appropriate filing with the Copyright Office (in fact, it has—see http://www.copyright.gov/onlinesp/agents/t/twitter_inc.pdf) or if Twitter made the requisite onsite disclosures. The facts tell us that Twitter communicates that it will terminate repeat infringers, but we don't know if it has adopted a repeat infringer policy or followed its policy.

The meatier questions are whether Twitter had the requisite scienter to disqualify it from 512(c) and if it had the requisite lack of control. As for scienter, as discussed with contributory infringement, Twitter didn't get a 512(c)(3) notice. It did get a user complaint, which the Veoh case suggests could trigger a "red flag" of infringement. However, because Rebecca's complaint doesn't mention copyright, it's qualitatively different from the examples in Veoh. There's no evidence that Twitter was willfully blind, whatever that means. In the end, the evidence is strong that Twitter doesn't "know" about the infringement enough to take action.

As for the requisite control, the Veoh case's discussion about "substantial influence" is garbled. However, Veoh and Twitter are both pretty similar in their design to collect and republish user-generated content. If Veoh lacked a substantial influence, we don't have any facts to suggest a harsher treatment for Twitter.

I don't think it matters to the 512(c) defense that Twitter displays content to followers who never subscribed to the account. See the discussion in the *Viacom v. YouTube* cases about "syndicating" content.

Some of you confusingly analyzed Twitter's filter as a "standard technical measure." The statute defines the term as "technical measures that are used *by copyright owners* to identify or protect copyrighted works" (emphasis added). That doesn't apply to Twitter's filter.

As a practical matter, in a situation like this where the service provider didn't get a 512(c)(3) notice and there's only one infringing file at issue, service providers routinely win the 512(c) safe harbor.

Trademark.

Direct infringement for selling keyword ads. Google's liability for selling keyword ads based on trademarked keywords is unresolved, but its courtroom successes give us some reason to believe it's not trademark infringement.

Contributory infringement for GoGeaux's ad. Even if Twitter isn't liable for selling the keyword ads, it might be contributorily liable for GoGeaux buying and running an infringing ad. That issue also has not been resolved in the litigation.

As discussed above, it's not clear that GoGeaux's ad constituted trademark infringement. Twitter would have several additional defenses, including that it lacked the requisite knowledge (after all, it never got a trademark-based takedown notice regarding the ad) and possibly it qualifies as a 1114(2) innocent publisher.

Publicity Rights. Outside the 9th Circuit, the publicity rights claim based on GoGeaux's ad isn't preempted by Section 230. We didn't discuss what principles might to a secondary publicity rights claim. Under a publicity rights statute like California's, I believe Twitter would avoid liability. *See* Cal. Civil Code Sec. 3344(f), which says (emphasis added):

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.

I believe the statutorily required knowledge, at least in the online context, would require a publicity rights-based takedown notice, which Twitter didn't receive.

Christine v. Others.

Note: I don't think any of these were particularly important. I list some ideas just for sake of completeness, not because they deserved any word count allocation.

Christine v. Poodle. Christine may have employment law claims for her termination. Most of these claims are beyond the scope of Internet Law; but so long as Christine was an at-will

employee, she faces a tough road. If I were her attorney, I would investigate the social media password protection laws to see if they might apply to Poodle’s investigation of her tweeting. So long as her tweets were publicly viewable, I’d expect those laws provide her no recourse.

Christine v. Sarah. Sarah encouraged Poodle to fire Christine. A variety of torts might apply, such as interference with contract.

Cybermobbing. The entire group participating in #HasChristineLandedYet contributed to Christine’s job loss and emotional distress. However, even if the collective endeavor created a harm, it’s not clear if any single participant’s actions constitute a legally actionable tort.

Christine v. Photo Viewers. The people browsing her photo all possibly committed copyright infringement. Although I see the issue of browsing-as-infringement legally unsettled, I think its implications are so problematic that I hope it doesn’t succeed.

Does Christine have better claims against the retweeters of the photo? In practice, the retweeters simply linked to the photo, so at most they are liable for secondary copyright infringement for others viewing the photo. This kind of linking liability is at least as problematic to me as the browsing-as-infringement argument.

Twitter v. William.

Breach of Contract.

Formation. In order to post, William needed to create a Twitter account. The account creation page generally looks like a mandatory non-leaky clickthrough page:

- **Mandatory:** the facts stipulate that all registered users navigate through the page.
- **Non-leaky:** we might investigate if there are other ways that users created an account, such as through a mobile device or manually by a customer support representative. The facts don’t suggest any leaks, however.
- **Clickthrough.** The page has a “create my account” button, and below it the text “By clicking on ‘Create my account’ above, you confirm that you accept the Terms of Service.” This is a proper if/then statement.

Superficially, this looks like a solid clickthrough process. However, the account creation page is suboptimal. The font size for the “by clicking…” language is small, and it’s hard to see because it’s grey text on a blue background. Furthermore, by being a fair ways below the button, a user could see the button but not the “by clicking” language. This gap could be exacerbated by different browser interfaces, where it’s possible the “by clicking” language would appear “below the fold.”

Having said that, the odds of this contract formation process failing in court is close to zero. Indeed, Twitter’s contract has been upheld several times in court. See, e.g., *Wingo v. Twitter*, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1893&context=historical>.

The contract also could be attacked due to its amendment provision. Like the Blockbuster provision, the language says that Twitter can unilaterally amend the contract, and it further implies that such amendments are effective whenever Twitter deems it to be so. This language could create the same kind of failure-of-consideration problem in the Blockbuster case. (And see the recent Safeway ruling, http://scholar.google.com/scholar_case?case=5925834191658507423&hl=en&as_sdt=6&as_vis=1&oi=scholar). Unlike the Blockbuster language, Twitter does undertake to notify users of material changes. However, the language doesn't specify what users can do if they disagree with the material change, although we might infer that users can terminate their accounts now that they know. Will this notification provision help the amendment clause survive a Blockbuster challenge?

Although clearly the language and user interface could be improved, I'm reasonably confident that courts would uphold this contract formation.

Breach. William arguably breached several of the negative covenants in Twitter's Terms of Service, including the restrictions against:

- "illegal" behavior. Arguably this covers both civil and criminal wrongs. Thus, his torts (and possible crimes) against Christine for the revenge porn should qualify, as well as the possible defamation.
- "abuse." I'm not sure what this means, but a revenge porn campaign ought to qualify.
- "harass." I personally think harassment usually involves a series of interactions, not just one. Here, William made two posts close in time. Does this mean he "harassed" Christine?
- "intimidate." His actions contributed to Christine shutting down her account.

As you can see, these negative covenants are fairly ambiguous. If Twitter wants to terminate William's account for these breaches, I don't think it would face any liability for doing so (I've also argued Section 230(c)(2) would provide the necessary protection irrespective of the contract—see <http://ssrn.com/abstract=1934310>). Twitter's breach of contract claim probably would also support in an injunction and maybe damages.

Trespass to Chattels. If William breached the Twitter contract, then arguably he lacked authorization to access Twitter's servers. Even if the contract fails, the contract provisions nevertheless delimit William's right to access the servers. Twitter didn't directly give William notice that his conduct was unauthorized, unlike the correspondence between Intel and Hamidi or Register.com and Verio. Nevertheless, for purposes of server usage authorization, William might be charged with knowing the limits in the Terms of Service.

Common Law Trespass to Chattels. We don't have any evidence that William caused any measurable loss to Twitter's computer system resources, and given Twitter's size and scale, it would not be likely that any single tweet or photo would do so. Even if others copied William's misbehavior, it would take a lot of disobedience before Twitter noticed. (Note that if Twitter's filters work properly, then misuse of Twitter's servers for impermissible pornography would be even rarer).

CFAA. Similarly, it's hard to see how William caused any harm recognized by the CFAA. In theory, Twitter could stitch together its enforcement and remediation costs to try to clear the \$5k threshold, though much of Twitter's work wouldn't be in response to any harm to Twitter's computer system as such.

Penal Code 502. Twitter should be able to establish a good prima facie case given the trivial harm threshold. Some cases have held that 502 only applies to automated conduct, and that would provide William with a viable defense.

Copyright. If William lacks authorization to access Twitter, then arguably he is also browsing Twitter's pages—which presumably contain some copyrightable material—without authorization. As I mentioned in class, this would be a crazy outcome but for the Ticketmaster case.

Twitter v. Sarah.

Did Sarah “spam” Poodle? Twitter could argue that Sarah violated CAN-SPAM. As we discussed, CAN-SPAM normally doesn't provide private remedies, but it does allow limited claims by Internet access services. Even though a Twitter direct message lacks a clear “local part” and “domain part,” per *MySpace v. theglobe*, Twitter should qualify as an Internet access service because it enables email-like private messaging; and Sarah's direct message should qualify as an electronic mail message. As we discussed in class, emailing a resume could constitute the “commercial advertisement or promotion of a commercial product or service.” Per 15 U.S.C. §7706(g), Twitter would also have to show that it was “adversely affected” by “false or misleading transmission information” (or some other provisions that aren't relevant) or that Sarah engaged in a “pattern or practice” of violating some other parts of CAN-SPAM. We'd have to know more about Sarah's Twitter activities to know if she engaged in such a pattern/practice, but a single resume tweet is nothing like theglobe's messaging campaigns; and it's not clear how Sarah provided false or misleading transmission information. As a result, I doubt Twitter could bring a CAN-SPAM claim against Sarah unless we find more facts adverse to her.

In addition to the CAN-SPAM claim, Twitter could argue that the email constituted “spamming” as proscribed by the contract. To resolve the definition of “spamming,” we'd have to use our standard contract interpretation tools, but I would expect the term means more than just CAN-SPAM violations.

[Note: Twitter only allows a user to send a direct message to another user that has followed him/her, another fact that may weigh heavily against any spam claim.]

If Sarah “spammed” Poodle, then Sarah breached Twitter's contract if it was properly formed. She also may have committed browsing-by-infringement like William. She probably didn't violate the common law trespass to chattels or CFAA because of the insignificant server usage; and it's not even clear how her single direct message would cause cognizable harm per Penal Code 502.

Part 2 (Internet Law surprise)

This question was an experiment. I wasn't quite sure what you would say or how well the question would work. Overall, I was pleased with the experiment and will probably try a question like this again. For many of you, the question prompted the kind of self-reflection I was hoping for. Plus, it was a lot more interesting reading for me than the repetitive answers to a fact-pattern-driven question.

Many of you discussed Internet exceptionalism in various forms. Section 230 came up a lot, mostly unfavorably. The right to be forgotten also showed up repeatedly. Contracts and trespass to chattels were also mentioned a few times.

There was no single path to success on this question, but I can provide a few thoughts about what worked better and what worked less well.

What worked well: (1) discussions that demonstrated self-reflection. For example, some of you clearly explained your expectations before class and then how those expectations were challenged throughout the semester. (2) Discussing one general point and then illustrating it with disparate examples drawn from throughout the semester.

What didn't work as well: (1) discussing a picayune point we barely addressed during the semester. The question asked what surprised you *the most*. If what surprised you the most was something we spent only a minute or two in class, either I failed to expand your horizons very much or your self-reflection was incomplete. (2) a "travelogue" answer which looked nostalgically at a few stops we had during the semester but really tie the examples together. (3) Similarly, the answers which enumerated more than one surprise. The question what was surprised you *most*, so if your answer recounted several surprises, it didn't actually answer the question I asked.

One substantive point in response to your answers. A number of you discussed the challenges of regulating the Internet early in the technological adoption curve and expressed hope that Internet Law would improve as we move deeper into the curve. It's true that over time we'll progressively fix the errors we've made in regulating the Internet, but this optimistic assessment ignores that we are constantly resetting the technological adoption curve. The "Internet" is being eclipsed by new technologies, such as mobile devices, where we will probably make the same types of regulatory errors during its early adoption curve that we made with the Internet during its early adoption curve. Thus, the only real "solution" is to recognize the systematic regulatory errors we make with every new emerging technology, and I'm not optimistic we'll achieve that "solution" because we always seem to repeat our regulatory mistakes with each new technology.

To me, the brilliance of Section 230 is that it intentionally "broke the cycle" of misregulating technologies at their early stages—a shocking display of regulatory humility. We might debate if Section 230 has become less justified as we've gotten deeper into the Internet's technological adoption curve (I think it's as vital today as it was in 1996, but it's a debate worth having).

However, if we think it was a good idea to delay regulation early on, how can we replicate that insight with the next new technology?