

Cyberlaw 2005 Sample Answer
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Overview

I tried to make this exam a little more straightforward than the past 2 years' exams. I think many of you noticed. Indeed, in my opinion, this is a fairly easy exam. As a result, more of you wrote good answers, which meant that I made finer grading distinctions than I have the past couple of years. There were 5 As, 4 ABs, 21 Bs and 5 BCs. 32 of you typed and only 3 of you wrote bluebooks.

Question 1

Average word count: 1528. Max: 1792. Min: 643.

There are four principal legal liabilities that Scroogle might be concerned about: copyright, trespass to chattels/CFAA, breach of contract and trademark.

Copyright Infringement

Scroogle makes at least two separate copies of Google's content. First, Scroogle downloads a Google search page into RAM. Second, Scroogle displays a portion of that page to Scroogle's user. Scroogle does not appear to store the content in a central database; in this regard, Scroogle differs from the search engine model we discussed in class. Nevertheless, both of the copies Scroogle actually makes may infringe Google's copyright if they contain any copyrighted material of Google's.

I think Google's search results page contains at some Google copyrighted material. It contains Google's page templates (which I think are likely copyrightable) and other Google elements (logo, self-promotion ads, etc.) that are probably copyrightable.

However, it's less clear that the extracted search results contain Google copyrighted material. Google can't claim a copyright in an individual search result, because they contain third party content that Google itself robotically aggregated. Therefore, when Scroogle extracts results, at most it takes Google's search results ordering. Nevertheless, I think the ordering could be copyrightable as a compilation to the extent that Scroogle takes Google's unique selection/arrangement/coordination of unprotectable elements. (We didn't discuss compilations in any detail this semester, so I wasn't expecting you to do a nuanced analysis here.)

Therefore, I think there may be two discrete acts of prima facie infringement—the downloading of the search results page and the extraction/republication of the search results.

These prima facie infringements may be excused by one of two principal defenses: implied license and fair use.

The search results page download may be covered by an implied license. Google wants and encourages users to download the pages, so it would be disingenuous for Google to turn around and sue users for doing so. However, three things:

- Google displays a user agreement (http://www.google.com/intl/en/terms_of_service.html) that says, among other things, “You may not take the results from a Google search and reformat and display them.... You may not "meta-search" Google.” I didn’t expect you to find or discuss this language because it wasn’t part of the question’s facts, but it suggests that Google is aware of Scroogle’s behavior. However, Google displays this agreement in a sufficiently obscure manner that it may not effectively communicate the limits on an implied license. (See the breach of contract discussion below).
- Even without the agreement, does an implied license to download pages into RAM also permit extraction and redisplay?
- Further, Google did block Scroogle in 2003, which is pretty strong evidence that Google has already disclaimed any implied license.

Scroogle could also claim that its activities are fair use. For example, in Tickets.com, the search page downloads were excused if the subsequent activity (in that case, extraction of unprotectable facts) was not an infringement. So, if the extract/republication can be excused, such as by fair use, it’s possible that the courts will ignore, overlook or excuse the search page downloads.

Fair use is a multi-factor test:

- Purpose and character of the use: the statute contemplates a spectrum between commercial uses and nonprofit educational uses. Scroogle’s behavior is systematic and “business-like,” but it’s nonprofit and part of a general anti-Google agitation. I think most courts would weigh this factor in favor of Scroogle.
- Nature of the work. Google has a very thin layer of copyright protection in its search results compilation, so I think this factor would favor Scroogle.
- Amount and substantiality of portion taken. Scroogle takes 100% of Google’s protected material with each search request. Further, Scroogle makes dozens/hundreds/thousands of such requests each day, thereby accessing large parts of Google’s overall search database. Furthermore, Scroogle takes exactly what users value the most—Google’s aggregation and sorting. I think this factor would favor Google.
- Effect on the market. Scroogle is a near-perfect substitute for Google. That’s the whole point—Scroogle wants users to use it instead of Google. And when users choose Scroogle over Google, that decision costs Google potential CPC revenue and perhaps even CPM revenue (if advertisers are paying CPM). If 100% of Google’s search users migrated to Scroogle, Google would get out of the search business. I think this factor weighs (strongly) in favor of Google.

Fair use is inherently unpredictable, and as many of you correctly observed, NEVER BUILD A BUSINESS ON FAIR USE. In Scroogle’s case, they are gripers, not businesspeople, so they have chosen to build an anti-business on a shaky foundation. This is a high-risk move because fair use could easily go against them. Certainly, I would not claim that I was “convinced” Scroogle’s behavior is legal. Their non-profit status helps with one of the four factors, but 2 important factors weigh against them.

As a final defense, Scroogle could argue that it is merely a proxy, i.e., that users are doing all the legally-significant activity. Scroogle hints at this when it refers to how citizens are scraping Google. However, copyright law does not recognize a “proxy” defense. If Scroogle makes a copy, even with the goal of helping its users, Scroogle is legally responsible for that copy.

In conclusion, I think Scroogle has a non-trivial risk of being deemed a copyright infringer without an adequate defense.

Trespass to Chattels/Computer Fraud & Abuse Act

The common law tort has two principal elements: unpermitted chattel use and damage. Scroogle’s automated access to Google’s servers constitutes unpermitted chattel use. Does its behavior cause recognizable damages?

There’s no question that Scroogle’s activities cause Google some damage. Google loses ad earnings and loses some insights into its users’ behavior. Google spent some effort trying to block Scroogle, and Scroogle consumes bandwidth and server processing power (which arguably are fixed resources as we discussed in class).

With respect to the latter, Scroogle would respond that it was not making any unusual use of Google’s computing resources. Instead, because Scroogle is a proxy for user searches, the computing resources would have been consumed by the user making a direct search query anyway—so if Google’s users aren’t committing trespass, then Scroogle isn’t committing trespass by standing in their shoes.

Even if that argument fails, Scroogle might be able to argue that its usage is de minimis. Google is a big company with lots of resources, and it’s doubtful that Scroogle’s traffic even registers a blip.

Accordingly, under the Hamidi precedent, Google may not be able to show adequate damage to establish a common law trespass to chattels claim. Google’s economic losses (i.e., loss of ad revenue) aren’t recognizable, and Google probably can’t show any harm to its computer systems. A court like Hamidi might also be sympathetic to Scroogle’s status as a non-commercial griper.

In contrast, Google might have better standing under the Register.com precedent. Google could argue that the aggregate effect of Google proxies could crash Google’s servers, or the court might be more sympathetic because Google has tried to block Scroogle technically.

As a result, any trespass to chattels claim might depend primarily on what law governs the dispute (Hamidi or Register.com).

Google would likely have better luck under the Computer Fraud & Abuse Act (18 USC 1030(a)(5)). The CFAA would consider Google’s remediation costs to block Scroogle technically and Google’s lost ad revenues as well. Google can show that Scroogle’s behavior

was unauthorized based on its prior attempt to block Scroogle. I think it should be fairly easy for Google to establish a CFAA claim.

Therefore, I think Scroogle's explanation, where it says "it's also legal for us to scrape them if we can" is incorrect. I don't think this is a correct restatement of Hamidi, and it's definitely not consistent with the CFAA. Playing hide-and-seek with Google's attempts to block will never impress a judge, even if some judges (e.g., the Hamidi court) might be willing to overlook it.

Breach of Contract

The facts didn't discuss Google's efforts to form a contract. If you chose to discuss it, I welcomed your observation that Google doesn't try to form either a clickthrough or "browsewrap" agreement on its main search page (<http://www.google.com>). Nothing on that page indicates that there may be legal terms binding on searchers. The fact that Google may contain restrictions somewhere on its website isn't sufficient unless "a reasonably prudent offeree... would necessarily have known or learned of the existence of the ... agreement prior to acting." (Specht). I don't think Google's presentation of its terms meet this standard.

However, this doesn't end our inquiry. Recall that Register.com (and, to a lesser extent, Tickets.com) found a possible breach of contract action based on knowledge of terms + continuing to take benefits (the infamous apple stand analogy). We have some evidence that Scroogle knows of Google's terms. Certainly, Scroogle is aware that Google blocked them and does not want Scroogle to scrape Google, yet Scroogle continues to do so. Under the Register.com precedent, Google may have a breach of contract claim in this circumstance even if it didn't form a mandatory non-leaky clickthrough.

Trademark Claims

Infringement

The name Scroogle is an obvious play off the name Google ("screw-gle"). Let's stipulate that the term "Google" is a strong protectable mark in the search space.

Use in commerce? Google might have a difficult time establishing this threshold condition. By definition, it should be hard for an actor who isn't making any money to be using a trademark in commerce. Note, however, that the Lamparello court punted on this point, so it's possible that a court would extend this factor to the limits of Congress' commerce clause power, in which case I think Scroogle's behavior could be deemed a use in commerce.

Likelihood of consumer confusion? First, the website makes it pretty clear that Scroogle is a Google proxy. Indeed, I'm confident most Scroogle users fully understand that they are dealing with someone other than Google. So there's good reason to believe that no consumers are ever confused about the relationship between Google and Scroogle—the distance between them (or Scroogle's independence) is Scroogle's principal value proposition.

Second, the names aren't identical, and the difference is material. If the name was spelled "Screw-gle," I think many (most?) consumers would immediately suspect that the website was an anti-Google site. So even if Google tried to claim that the name Scroogle, used in isolation of the website, created initial interest confusion, the Lamparello court would reject the argument. (The Lamparello court would also reject any analysis of the Scroogle name without considering the website content).

Defenses? As a griper, Scroogle might claim nominative fair use or some other type of parody defense. I don't think the defenses are all that availing, but then again, any trademark claim should be disposed on use in commerce or likelihood of confusion grounds.

Dilution

Google is probably a famous mark, and Scroogle's use began after the mark became famous. There could be some dilutive effects, although these are doubtful. Griping, even though it denigrates the target, isn't tarnishment. However, providing Google's search results in an incomplete fashion (i.e., without the benefits of the other links on Google's page) might be a tarnishing suboptimal search experience. And, in theory, Scroogle could blur Google's mark by creating a new definition for "Google" in consumers' minds, although this seems like a stretch. Further, I suspect Google could not show actual dilution sufficient to satisfy the Moseley standard.

Even if it could, I think there's no "commercial use in commerce"—as discussed above, it's hard to argue that a site generating zero revenues is engaged in commercial use in commerce. Alternatively, Scroogle should qualify for the noncommercial use defense (whatever that means).

ACPA/UDRP

I'm not sure we have the predicate confusion/dilution required by each. Even if we do, because of Scroogle's non-commercial griping status, I don't think we have the bad faith intent to profit under ACPA, and I think it's hard to argue that Scroogle has bad faith under UDRP (although there are some hyper-plaintiff-favorable UDRP decisions that could go against a griping but parasitic site like Scroogle).

Comments on Student Answers

At minimum, I expected you to discuss copyright, trespass/CFAA and contracts. If you left out one of these three, your score was capped. If you left out two of the three, your score suffered significantly. I didn't penalize omissions of the trademark discussion, but your score often improved if you discussed it.

Way too many of you discussed contributory/vicarious copyright infringement, Grokster and the 512 defenses. Virtually all of this discussion was *irrelevant*. You should have known that when (a) you found that Scroogle was a direct infringer, and (b) you had a really hard time establishing anyone else as a direct infringer. I generally tried to ignore this discussion, but the more you

discussed it (especially if you never identified as a direct infringer), the more frustrated I got. If you made this discussion the centerpiece of your answer, your score probably suffered.

In particular, the 512(d) was irrelevant. The defense would apply if a Scroogle-served search result linked to infringing content. There's almost no way that *Google* would be the proper plaintiff of such a claim, so any 512(d) defense would have addressed a cause of action outside the scope of the question.

I was also frustrated if you who ignored the fact that Google blocked Scroogle in 2003. Some of you even wrote that you would like to know if Google blocked Scroogle—*even though it was part of the facts*. As you can see from my answer, the 2003 blocking is a material fact for the copyright, trespass *and* contracts analysis, so failure to reference the fact generally depressed your score.

Some of you said that Scroogle would not be a criminal copyright infringer because it didn't engage in copying for commercial advantage or private financial gain. Recall that there are two other substantive prongs: dissemination of pre-release works (not relevant here) and the infringement of \$1,000 in 180 days. Some of you ignored the latter, but I think Scroogle's copying would clear the dollar threshold. While I doubt Scroogle has the requisite willfulness because of the thinness of Google's copyright, I was OK if you thought there was a risk of criminal copyright infringement here.

Question 2

Average word count: 999. Max: 1198 Min: 319.

Q2A

There are four main classes of liability that I should worry about: copyright claims, publisher/speaker claims. federal criminal laws and trade secret claims. I'm not too worried about trademark claims because I think it's hard to create a "trademark use in commerce" in the blog context I describe. I'm not going to discuss trade secret claims further because we didn't discuss the applicable law in class.

Copyright Claims

Let's assume Kelly or Jenny post infringing content. A plaintiff might argue that I, as the blog owner, directly infringe by "publishing" that content on the blog, but that argument is relatively weak. Instead, my principal concern is that I would be a contributory or vicarious infringer of Kelly's/Jenny's posts.

Contributory Infringement. The applicable standard is "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing activity of another." I may materially contribute to the infringement by providing the platform or venue for their infringement. At minimum, I would materially contribute if I failed to take down content after getting sufficient notice/knowledge.

As for the knowledge prong, I probably get the requisite knowledge from a 512(c)(3) notice. (Note: this has not been legally confirmed, but it seems a pretty safe bet). I might also get notice through my administrative activities, such as reading the posts and editing them. I would argue that those administrative activities might give me generalized knowledge of the content on the website but not particularized knowledge that any Kelly/Jenny-posted item infringes. This is also not legally resolved.

Because of the uncertainties about what constitutes sufficient knowledge to trigger contributory infringement, I am concerned about this possible liability.

Vicarious Infringement. The applicable standard is “right and ability to supervise the infringer’s acts + direct financial interest in the acts.” I presumably have a direct financial interest in any infringement based on the advertising—as infringement increases traffic, revenues should increase commensurately.

So the key question is—do I have the right and ability to supervise? With the facts given, this looks problematic—as the blog administrator, I have the ability to edit or delete posts. I would argue that I have no greater power than any other web host, and if I have the right and ability to supervise, then every other web host would also meet this prong. This “everyone is doing it” argument is problematic, of course—so what if the industry standard is infringing?—but I’d like to think that something more than mere administrative capacity to delete or edit content is required before the “right and ability to supervise” standard is met.

In any case, the vicarious infringement liability also looks problematic.

If I faced any copyright infringement liability based on posts from Kelly or Jenny, I could try to argue that I qualify for the 512 defenses. 512(d) would apply if Kelly or Jenny linked to infringing content, but as I said in class, this safe harbor may define a null set.

512(c) applies to hosting user content (the statutory language specifically says that it applies to material stored “at the direction of a user”). So the question is—can I claim that Kelly and Jenny are “users” of the blog enough that I am hosting their content at their direction?

I think Jenny, as a guest blogger, may qualify as a “user” based on her limited administrative powers. In some ways, she is the paradigmatic user contemplated by the statute.

The question is more complicated with respect to Kelly. As a joint blogger with equal powers to me, it is harder to argue that Kelly is a *user* of my blog; she (and I) both *are* the blog. I still think an argument is possible under the plain text of the statute—basically, that I am Kelly’s user and she is my user—but the statutory language fits less comfortably to Kelly than it does to Jenny. And even if it does apply, there may be other agency doctrines (partnership law, employment law, common law agency) that may set up vicarious liability for Kelly’s behavior. As a result, the 512(c) safe harbor is less reliably available for Kelly’s posts.

Furthermore, the 512(c) safe harbor may still be worthless if a court interprets the safe harbor as not applying to contributory and vicarious infringement claims. The Corbis case did provide a safe harbor defense for these claims, but not all courts have.

Finally, to qualify for the 512 safe harbor, I need to comply with some administrative requirements (discussed below).

All told, the copyright infringement risks are uncertain, but there is little good news for me. There are reasons why I could be contributorily and vicariously liable, and there are reasons why 512 would offer no or incomplete exculpation.

Publisher/Speaker Claims

To claim a 47 USC 230 defense, I need to meet the following three elements:

- “Provider or user of an interactive computer service.” The blog should qualify as an interactive computer service, and I should qualify as the provider of the blog.
- “Treated as a publisher or speaker.” This covers everything other than IP, ECPA and federal criminal law claims. As a result, this would cover defamatory or inaccurate postings, among others.
- “Provided by another information content provider.” Just like Jenny should qualify as a user under 512(c), it should be pretty clear that Jenny is another ICP under this standard. But as we saw above, Kelly may fit less reliably under this standard. The definition of ICP is “any person or entity that is responsible, in whole or in part, for the creation or development of information.” Arguably, this covers Kelly’s submissions even if she’s a joint blogger—so long as she is partially responsible for the post’s creation, then I can claim she’s another ICP. On the other hand, Kelly is also probably a provider of the ICS, so it seems odd to characterize her as *another* ICP when she *is* the ICS. As a result, there may be some risk that 47 USC 230 may not apply to Kelly’s posts.

Federal Criminal Claims

We don’t know exactly what standard applies here, although some scienter should be required before I can be liable. Nevertheless, there’s a risk that I could be liable under federal obscenity, child porn or other criminal laws if posted by either Kelly or Jenny. Note that 230 should preempt any state criminal laws.

Q2B

Steps I might take to reduce my potential liability:

- Complete the technical steps to qualify for the 512 safe harbor. This includes:
 - Adopt a policy to terminate Kelly or Jenny if they repeatedly infringe, and reasonably enforce that policy
 - Communicate my termination policy to Kelly and Jenny
 - Accommodate “standard technical measures,” whatever that means.

- Register an agent for service of notice with the copyright office, and post the associated contact info on the blog.

The essential point is that I must proactively take some steps to qualify. Unlike 230, I can't just sit back and claim 512 if a lawsuit ever arises.

- Turn off the ability to upload photos/videos, or dissuade Kelly and Jenny from uploading photos. Blocking photos/videos reduces some copyright exposure, and it would effectively eliminate the risk of federal criminal obscenity/child porn.
- Turn off the AdSense ads. This would reduce my exposure for vicarious copyright infringement. It might have other salutary benefits by converting the blog into a non-commercial enterprise. (For example, I might be able to qualify under my homeowner's insurance policy for some insurance coverage at no additional expense).
- Enter into a contract with Kelly and Jenny. The contract needs to contain the 512-mandated disclosures. It might also include an indemnity to put Kelly and Jenny on the financial hook if I get sued. (It could also deal with copyright licenses and some other messy questions).
- Get insurance. If I'm not already qualified under my homeowner's insurance, I might get some insurance that protects me from copyright claims (and maybe provides coverage for the publisher/speaker claims through the judgment on the pleadings). I don't think insurers are commercially offering "blog insurance" yet; it seems like a good market opportunity.
- Make sure I really trust Kelly and Jenny. Because I'm taking on some legal risk for their actions (no matter what I do), I should trust them to do the right thing. If I don't trust them, then I shouldn't give them posting power. Trust isn't a panacea, but I think it's an essential component of these joint/guest blogging arrangements.

Comments on Student Answers

If you failed to mention either 512 or 230 in your answer, your score suffered significantly. I also generally graded an answer down if I wasn't convinced that you clearly understood how the 230 safe harbor works or if I thought you misapplied it. For example, some of you did not understand that 230 preempts state criminal law.

A lot of you suggested that I make Kelly and Jenny go through a mandatory non-leaky clickthrough agreement. This isn't bad advice, but it would be a lot simpler just to get them to manually sign an agreement.

I don't see how a blog can qualify for 512(a). 512(a) refers only to entities passively carrying data and doesn't cover content hosting.