



Cyberspace Law
2006 Sample Answer
Professor Eric Goldman

Introduction

I thought this was a comparatively easy exam. There wasn't too much tricky stuff here from either a technology or a legal standpoint. There were 5 As, 13 Bs and 4 Cs.

Question 1 (average word count: 1749. Median: 1855. Max: 2000. Min: 1241)

My wife showed me this site when she made a custom cake for our son's fourth birthday (he wanted a schoolbus cake). I think it's a great example of a useful site that lives in constant legal jeopardy.

I wanted you to address three main topics: copyrights, trademarks and 230.

Copyright

Let's start with a plaintiff's prima facie case:

Ownership of a Valid Copyright. As I mentioned in class, diligencing copyrights can be a real pain. Here's a good example. There are several possible copyright owners of the user-submitted material:

- The cake's photographer. Although not every photo is copyrightable, most are.
- The recipe author. The recipe/instructions may be original to a source other than the submitter, such as a recipe book or a competitive site. Recipes ordinarily aren't sufficiently original to be copyrightable, but in some cases they are written in prose that clears the copyrightability bar.
- The cake "constructor." A cake can be an artistic work just like a sculpture (it doesn't matter if the chosen medium is consumable rather than durable). There are a variety of limits on the copyrightability of consumable sculptural works, but a sufficiently original cake could be protected.
- The source of graphical designs put onto the cake, such as the copyright owner of the Simpsons' TV show. Note that it's possible that the cake creator bought a cake stencil or other authorized edible depiction, in which case there may be implicit permission to incorporate the design into a cake.

[Note: this was a cyberlaw course, not a copyright course, so I didn't expect you to see all of these. But, at minimum, I was hoping that you'd identify the copyright interests in the Simpsons' design and that its owner differs from the cake baker/photographer.]

Infringement

Direct infringement. CBC hosts the photos, so its servers reproduce and distribute them. However, the *Field* case suggests that hosting third party content isn't volitional, so CBC may lack the requisite *actus reus*. On the other hand, CBC does more than just provide passive servers that act on users' instructions. CBC reviews submissions, affirmatively posts them, and superimposes its URL on the photo. So collectively, these interventions might expose CBC to direct infringement.

Contributory infringement. The submitter, photographer or cake baker, or any combination of these three, could be a direct infringer. (They may have applicable defenses, but let's ignore those for now). CBC's material contribution is the posting and hosting of the photos. But does it have the requisite knowledge? In many cases, absent some type of notification, it will not—for example, often it won't be clear to CBC if the photo is being posted by someone other than the photographer. However, with respect to the Simpsons' cartoon depiction, it is fairly obvious that the depiction is protected by copyright. Even so, CBC might argue that it didn't know if stencils were available in the marketplace or if there were other legitimate ways for a baker to create such depictions. As a result, CBC's contributory infringement liability will turn on its knowledge, and this is not entirely clear based on the facts we have.

Vicarious infringement. CBC generates revenues from AdSense. In theory, as exposures to infringing photos increase, so do CBC's revenues. Therefore, it probably has a direct financial interest in the infringement. Based on its review of submissions before posting, arguably CBC has the right and ability to supervise the infringement. Therefore, CBC has a serious risk of vicarious copyright infringement.

Criminal infringement. As illustrated in the contributory infringement discussion, CBC probably lacks the requisite scienter for criminal infringement.

Defenses

Implied license. When the submitter owns the applicable copyright(s), CBC's behavior could be excused via an implied license.

Fair use. Depending on the plaintiff's identity, CBC might be able to assert other people's fair use right. For example, if the photographer isn't the same person as the cake baker, CBC could assert that the photographer was protected by fair use. In addition, CBC can assert its own fair use defense:

- Nature of the use. CBC makes money from AdSense, so most courts would characterize it as a commercial actor. CBC itself doesn't transform the works, although someone else in the chain might (for example, the cake baker might be making a transformative use of the Simpsons' characters). This factor ordinarily will weigh against CBC.
- Nature of the work. Photographs and recipes often can be fairly factual in nature, so if the plaintiff is the photograph owner, this factor may weigh in CBC's favor. Otherwise, the cake design and applied graphics typically will be closer to fictional works, in which case this factor may weigh against CBC.

- Amount taken. In most cases, CBC will be taking 100% of the copyrighted work, in which case this factor will weigh against CBC.
- Market effect. This factor depends on the plaintiff's identity. With respect to cake photographs and sculptural works, often there will be a thin or non-existent market. Recipes can have a market, but rarely on an individual basis. Owners of graphic designs like the Simpsons probably will have a market even if they have never exploited it. Where any of these plaintiffs have actually tried to exploit the market, CBC's arguments will be further degraded (see Perfect 10).

Fair use is context-specific, so there's no single answer to whether CBC's behavior is protected by fair use. However, my maxim is never to build a business on fair use, so CBC's odds are generally unfavorable. In this situation, often some or all of the fair use factors will weigh against CBC.

17 USC 512(c). CBC manually posts photos, so it's not entirely clear that CBC meets the threshold requirement that the photos are stored at a user's direction. However, I think 512(c) still applies despite this manual intervention. The bigger question is whether 512(c) preempts only direct liability or all forms of liability. Because of the risks of vicarious infringement (and possibly contributory infringement), preemption of only direct infringement would not be that helpful to CBC. Either way, CBC must comply with the applicable 512 formalities.

Trademark

Ownership of a Valid Trademark. Obviously, this varies case-by-case. For now, I'll focus on the Marlboro example. I assume that Marlboro has trademark rights both in its name and the trade dress of its box.

Cake Baking. Users bake the cake incorporating the trademark, but simply baking the cake for personal enjoyment doesn't constitute a use in commerce. Thus, CBC should not be contributorily liable for the cake baking.

Page Creation. CBC creates pages that contains trademarked phrases (such as "Marlboro") on the page. The Marlboro page will be indexed by the search engines. Further, the page may contain a photograph depicting the Marlboro marks. When combined with CBC's AdSense revenue generation, these activities could constitute a use in commerce of Marlboro's trademarks. However, in the context of an amateur cake recipe site, users who visit the page aren't likely to be confused about either the source of the cakes or the source of the page. Nevertheless, Marlboro could argue that users experience initial interest confusion based merely on the inclusion of such pages in the search results, before they even reach the page to see its obvious disconnect with official Marlboro sources. In response, CBC will argue that its inclusion of Marlboro on the page is like the title of a book or otherwise constitutes a nominative fair use. As a practical matter, we have seen very few trademark cases based on the use of trademarked phrases visibly displayed on a web page (as opposed to, say, in the keyword metatags)

Ad Triggering. Using the phrase “Marlboro” to trigger ads could independently constitute trademark infringement. Some courts have held that such under-the-hood triggering isn’t a use in commerce, which would end the inquiry in CBC’s favor.

If it is a use in commerce, the question is—who is making that use in commerce? Is it CBC, Google or the advertiser? If it’s the latter two, then we analyze CBC’s liability as a contributory infringer. CBC at that point would argue that it lacks the ability to control the instrumentalities of infringement, as it neither selects the keywords nor serves the ads.

If a court says that CBC itself is making a use in commerce from the ad triggering, CBC would then argue that there’s no likelihood of consumer confusion. In my opinion, this depends on the ad copy itself, which we cannot resolve on the facts given, but other courts focus simply on confusion about the ad’s source (Netscape) or turn to the initial interest confusion crutch. Finally, even if CBC is deemed an infringer for providing the ad space, CBC would argue that its liability should be limited to an injunction based on the printer/publisher doctrine. This seems like a real possibility given that CBC couldn’t pick the keyword itself.

Trademark Dilution. Dilution requires a use in commerce, so in all places above where CBC avoided liability for lack of a use in commerce, it should similarly avoid dilution liability. Further, there is no such thing as contributory dilution, so where liability in the trademark infringement analysis was predicated on contributory infringement, CBC should not have corresponding dilution risk.

Otherwise, Marlboro probably qualifies as a famous mark and CBC’s use began after the mark was famous. But is there a likelihood of dilution? CBC enables redeployment of the trademark in a new medium (cakes), and I don’t think this type of redeployment qualifies as a blurring of the mark—it doesn’t add a new definition to the mark. It is possible that the mark is being tarnished in one of two ways: (1) the sloppy depiction of the mark in the homemade cake, or (2) if the instructions/directions are harmful or produce a bad-tasting cake. This is pretty far away from the paradigmatic tarnishing-by-porn, so courts may overlook such redeployment.

Publisher/Speaker Claims

Beyond copyright and trademark infringement, there are a variety of other harms that might arise from the user submissions, including:

- Defamation, if the photos or instructions contain an untrue assertion about someone
- Publicity/privacy rights, such as depicting a child next to the tank cake
- Inaccurate or harmful information, such as if the cake instructions end up hurting someone

In general, CBC’s liability for all of these harms should be preempted by 47 USC 230(c)(1). However, can CBC claim 230 based on the manual intervention it makes? In other words, a plaintiff will try to argue that CBC’s manual interventions turn CBC into the information content provider itself rather than remaining the publisher of content provided by another information content provider. CBC will respond (rightly, in my opinion) that all of its manual interventions

constitute exactly the kind of editorial function that 230 expressly protects. This view is entirely consistent with *Zeran* (and reinforced by the *Barrett v. Rosenthal* California Supreme Court opinion that came out at the end of the semester). This type of claim might also be preempted by 230(c)(2).

There is also an issue whether CBC can use 230 to defend against claims related to publicity/privacy rights, such as the tank kid depiction. 230 doesn't protect against IP claims, so plaintiffs can argue that publicity rights are an IP claim (some precedent supports this) and privacy rights are just an extension of publicity rights (less solid footing here).

As a result, I think CBC's 230 defense is robust.

Other Claims

A smattering of other claims that could apply but warrant very few words:

- Obscenity/child pornography. If CBC posts a user-submitted picture depicting obscenity or child pornography, it might be liable for federal prosecution if it has the requisite scienter.
- 17 USC 1202. Arguably, CBC's adding the URL to photos constitutes the false addition of copyright management information.
- Trade Secrets. Recipes/instructions might constitute trade secrets and the republication on the website may constitute misappropriation. However, we didn't discuss trade secret law in class.
- COPPA. The website discusses cakes for kids to eat, not cakes for kids to make. It's like a website with instructions for a nursing mother; the instructions relate to a baby, but we don't expect those baby to read them or take advantage of them. Because CBC doesn't market to kids (and doesn't collect age information), it is not covered by COPPA.

What Should CBC Do?

- Fulfill all of the 512 formalities (register with Copyright Office, etc.). At minimum, this should mitigate its liability for direct copyright infringement.
- Drop the ads. Obviously, this is a cost-benefit analysis. From a legal standpoint, killing the ads should improve its position under trademark infringement and dilution and may tilt the copyright fair use analysis in its favor. However, this foregoes the ad revenue, which may or may not be substantial.
- Stop adding its URL to user-submitted photos. This would lessen CBC's involvement with user content and avoid 1202 issues.
- CBC should consider stopping its prescreening.
 - Pros: this improves the 230 defense and the copyright liability analysis
 - Cons: if CBC doesn't prescreen, it may be overrun by junky submissions
 - If CBC prescreens, it should screen out all submissions that obviously involve copyrighted subject matter—this avoids the red flags of infringement. CBC might also choose to knock out trademarked subject matter to reduce its trademark liability.

- When creating pages, CBC should avoid using the trademarked term to describe the page. For example, with the Marlboro cake, CBC could use the term “cigarette” instead of “Marlboro.”
- CBC should block all photos depicting people. This eliminates most risks of obscenity and child pornography as well as any (low-risk) privacy rights claims.

Comments on Student Answers

- Remember to include word counts!
- Failure to discuss 230 was heavily penalized
- It wasn't a great idea to use legal articulations from Jay Monahan's slides where those rules differed from the ones I articulated in class. I trust you recognized that Jay's positions represent his advocacy on behalf of eBay, while I try to distill the courts' various articulations into a single widely applicable rule.
- Some of you discussed 230 or copyright fair use in response to Q1(B). This was OK but organizationally odd.
- CBC's copyright disclaimer is mostly worthless from a legal standpoint. It certainly has no meaningful impact on any inducement claim.
- There is no real benefit to turning the copyright disclaimer into a mandatory non-leaky clickthrough agreement except as that would contribute to fulfilling a 512 formality.

Question 2 (average word count: 823. Median: 863. Max: 998. Min: 506)

UnFaced's Liability

Breach of Contract

Facebook's contract has several applicable restrictions:

- Data only may be used for personal use
- Cannot incorporate data into database
- Cannot use automated scripts
- Cannot register for other people/entities. Thus, Arrow cannot register for UF.

It appears that Facebook has multiple breach of contract claims against UF.

Common Law Trespass to Chattels

By accessing Facebook's servers, UF is “using” the chattels. This use is unauthorized based on the contract.

So the issue is whether UF caused legally recognizable damage. If Hamidi applies, UF needs to cause damage to the computer servers themselves. This creates a type of lottery effect; if UF uses Facebook's chattels at a time when they are most vulnerable, then perhaps UF will trip this wire. Otherwise, because UF sends its robots “on demand” as opposed to continuously, there's a good chance that UF's usage is trivial.

However, if Register.com applies, there may be adequate grounds for recourse, including: (1) the fact that UF was clearly on notice, and (2) the combined hypothetical effect of all similarly situated aggregators of Facebook content.

Computer Fraud & Abuse Act

UF may violate (a)(5) by making unauthorized access (where the contract sets the boundaries of authorization). Although we didn't discuss it this semester, UF also may violate (a)(2) by taking information from a protected computer. Thus, UF will be liable if Facebook can come up with \$5,000 of damage. This is an area for creative lawyering, but Facebook should have no problem showing that it spent \$5,000 trying to block/remediate UF's actions.

California Penal Code 502

UF appears to violate all three of the 502 provisions we discussed in class, including (2) taking data from a computer without permission, (3) using computer services without permission, and (7) accessing a computer without permission.

UF's Arguments

A) UF can argue that its robots behave just like human users browsing the website. As a technical matter, this argument is correct. Further, if UF sends robots on demand, the robots do not act so quickly that they impose a higher system load than humans would. Nevertheless, Facebook can respond that it permits humans but not robots, and it indicated this in the mandatory user agreement. Thus, even if the robots look like humans, Facebook can still choose to allow one and not the other.

B) UF is acting just as a proxy for its users. This argument could find support in the Field case's discussion about Google's transparency in matching users and publishers. Nevertheless, there is generally no "proxy defense." Facebook can say in its agreement that its users can do X but its users' agents cannot do X.

UnFaced's Options if Terminated and Blocked

- Get user data from Facebook with permission by striking a license
- Get user data from Facebook without permission
 - Get a new registration. However, this is barred by the user agreement and violates the CFAA.
 - Use new unblocked IP addresses. This defeats Facebook's self-help, which will not impress most judges, and leaves the CFAA liability in place. However, it may be OK under common law trespass to chattels.
 - Move offshore, out of reach of Facebook's legal options. This works so long as UF truly remains out of Facebook's reach.
- Get user data from another source
 - Users could send the contents of their Facebook profiles to UF
 - Users could manually reinput their Facebook data

- Give up. It's possible that Facebook has run its legal affairs successfully so that it has boxed UF in.

Comments to Student Answers

- Read the instructions carefully. For example, I told you not to discuss IP issues in this question.
- The ECPA isn't really applicable here. For our purposes, we studied how the ECPA applies to the interception of private messages in transit. There are no private messages here—the Facebook pages are open to all Facebook users, even if they are behind a registration scheme for non-Facebook users.
- The damages analysis differs between common law trespass to chattels and the Computer Fraud & Abuse Act. Indeed, this is their principal distinction. I wasn't impressed if you treated them the same.
- Some of you recommended that UF continue to get the data from Facebook without permission. This was OK if you acknowledged that UF would still face liability for doing so. If you didn't acknowledge this, I applied a penalty.