



## 2009 Cyberspace Law Sample Answer

By Eric Goldman

### Overview

Because of the short exam period (8 hours), I tried to make this exam a little easier and more structured than prior years' exams. First, the exam only had one question. Second, the exam question told you whose claims to analyze (setting up a maximum of 6 possible litigant pairs). Third, the exam omitted some topics that have been commonly tested on prior exams—most obviously trademarks.

With only 1 question, I could not use my typical grading approach (a holistic five point scale based on an answer's overall merit). Instead, I created the structured scoring chart described below. Although the point system appears to create high precision, in reality I relied on it mainly to establish ordinal rankings among students. The scoring chart does help you do your own scoring estimate. Note that I frequently awarded fractional points and other bonuses and penalties that may not be entirely clear from this chart.

The theoretical point range was 16 points to below-zero. Actual points ranged from 12.5 to zero, with a mean, median and mode of 7.5. Your final grade also reflected your wiki entry grade if you chose that option. Based solely on the exam scores (before modifications for the wiki entries), there were 8 As, 23 Bs and 14 below Bs.

### About the Question

This question is based on an actual site called "YoBusted." The site is gone (surprise!), but you can read about it at BusinessWeek:

[http://www.businessweek.com/technology/content/feb2009/tc20090211\\_007201.htm](http://www.businessweek.com/technology/content/feb2009/tc20090211_007201.htm). You can read YoBusted's press release at <http://www.pr.com/press-release/97264>. Some of you may have noted possible parallels to the "harasstem.com" example that Judge Kozinski discussed in his original Roommates.com opinion and the allegations against the Ripoff Report. I expect we will see future examples of similar websites.

As one of your peers described it, YouTabloid is in the "crowdsourced blackmail" business. As all of you figured out, the website wants people to submit embarrassing photos. Once submitted, the site indexes the photos in the search engines, which effectively coerces the photos' subjects to pay to de-index the photos. To encourage photo submissions, YouTabloid gives a cut to the photo submitter, which implicitly encourages fake photos that will be more offensive and therefore more valuable to de-index.

## Scoring Chart

Note: all point values are a maximum; fractional points were frequently awarded.

### Suzy's claims (5 points)

- 1 point: Direct copyright infringement against Kip
  - Photos are copyrightable subject matter.
  - Suzy fixes the photo by taking the picture.
    - However, if Suzy hasn't registered the copyright, she may be unable to establish any damages from infringement.
  - Kip infringes Suzy's 106 rights by copying the photo (several times, including a copy to his hard drive and the upload to YouTabloid), modifying it and distributing and displaying the modified version via YouTabloid.
- 1 point: Kip's copyright defenses
  - Implied license: by posting the photo to Facebook, Suzy impliedly consents to her friends viewing the photo. However, her implied license presumably does not cover Kip's subsequent copying, modification or republication of the photo. In particular, Suzy might assume that her implied license does not permit republication due to Facebook's user agreement restriction.
  - Fair use:
    - It would help to know why he uploaded the photo to YouTabloid. Was he seeking the referral fee? If so, the fact he potentially gets paid for the photo points towards commercial use. Revenge? Hooliganism? Something else? Kip arguably "transformed" the photo by modifying it, which gave the photo new meaning. Hard to determine which way this factor points.
    - Photos are generally more factual in nature. Pro fair use.
    - Kip took 100% of the photo. Against fair use.
    - The photo probably has no commercial value to Suzy. It is circular to say that YouTabloid's scheme creates a market for Suzy's photo. Pro fair use.
    - Overall, Kip has a potentially viable fair use defense based on a rote consideration of the factors. However, Kip's morally condemnable behavior makes it likely the equitable-driven fair use analysis will go against him.
- 2 points: Prima facie copyright infringement against YouTabloid
  - Direct infringement:
    - YouTabloid's servers publish (i.e., copy and distribute) the photo. However, YouTabloid may lack the requisite volition. YouTabloid would argue, per Cablevision, that Kip has the volition, not it.
    - In theory, if YouTabloid is a direct infringer, Kip could be secondarily liable for YouTabloid's behavior. However, it's hard to imagine a circumstance where Kip wouldn't be directly liable but YouTabloid would be, making Kip's secondary liability exposure mostly academic.
  - Contributory infringement

- Legal standard: “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing activity of another.”
    - Knowledge? YouTabloid generally knows that users are posting infringing photos, but it may lack specific knowledge of infringement with respect to any particular photo, at least until it gets a 512(c)(3) takedown notice. Although the cases are split, I think YouTabloid’s generalized knowledge isn’t enough to satisfy this requirement.
      - Some of you argued that YouTabloid should contractually require users not to submit infringing photos. Such language is fine, but how does it help?
    - Material contribution? This occurs when YouTabloid continues to host infringing photos after obtaining knowledge of the infringement.
  - Grokster-style inducement of copyright infringement against YouTabloid
    - Legal standard: “distribute a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement”
    - YouTabloid isn’t a “device.” However, YouTabloid’s marketing and payment system encourages users to make infringing uploads.
    - I personally think this case could qualify as inducement. Cf. the [Dec. 2009 Isohunt opinion](#) (which came out after the exam).
  - Vicarious infringement
    - Legal standard: right/ability to supervise infringer’s acts + direct financial interest in acts.
    - Direct financial interest: YouTabloid is running a commercial opt-out scheme, although its profits do not correlate perfectly with infringement (the value of a photo lies in its capacity to embarrass, not its infringing nature).
    - As *Io v. Veoh* indicates, just hosting the content isn’t enough to constitute the right/ability to supervise infringer’s acts. YouTabloid may not satisfy this element.
    - Some of you equated vicarious copyright infringement with agency law. This is incorrect. Vicarious infringement covers more activity than traditional agency doctrines.
  - YouTabloid’s fair use? Very similar to *Kip*’s, except that YouTabloid’s usage is more clearly commercial. “Never build a business on fair use.”
  - Generally, there was a scoring penalty for kludging together the elements of contributory and vicarious infringement, such as by talking about scienter as evidence of vicarious infringement.
- 1 point: YouTabloid’s 512 defense
  - YouTabloid stores the photos at users’ direction.
  - YouTabloid has general knowledge of infringement but may not have obligation to act until it gets 512(c)(3) takedown notice.
    - But YouTabloid is effectively charging for content disabling. If it removes photos based on copyright complaints, that undercuts its business model. So it has some incentives not to respond to 512(c)(3) notices.

- It remains unclear if 512 eliminates all three flavors of infringement or just direct infringement. Compare the Veoh decision, which implies that 512 could preempt all three, with [the Dec. 2009 Isohunt opinion](#), which says that an inducing website is categorically ineligible for 512 protection.
- Other points:
  - Suzy could bring a breach of contract claim against Kip if she is a third party beneficiary of Facebook's contract. However, we didn't see a successful TPB claim this semester, and Facebook's user agreement actually disclaims it.
  - Suzy cannot invoke any chattel protection doctrines (TTC, CFAA, Penal Code 502), and I typically subtracted a point for arguing this. Suzy doesn't own the servers hosting her Facebook page or photo; Facebook does. A digital photo isn't a chattel, which by definition is a physical object. Further, copyright law preemption generally precludes efforts to provide chattel protection to intangibles.

### Jonas' claims (7 points)

- 1 point: Defamation claim against Kip
  - Prima facie defamation case:
    - The photo evidences an inaccurate fact that Jonas wore a seemingly offensive shirt. The modified photo also may suggest a second fact that Jonas has offensive views. We would need to know if Jonas actually held those offensive views to determine the second fact's falsity, but the fact of him wearing the shirt is false in all circumstances. However, if the depiction were so exaggerated that no one would believe it, or if the Photoshopping were done so poorly that everyone knew it was a fake, then viewers may not credit the photo.
    - the photo is published on YouTabloid.
    - it would be injurious to Jonas' reputation for people to falsely believe that he holds offensive racist views. It's less clear that being depicted wearing an offensive shirt would injure his reputation; we may need to know more about the shirt, the context and how people assess that.
  - First Amendment defense? Jonas' racial attitudes is probably not a public matter, and there is no evidence that Jonas is a public figure.
- 1 point: Public disclosure of private facts against Kip
  - The fact: Jonas enjoying the party.
  - Was the fact private? (1) Was the party public? If so, Jonas' presence probably was not a private fact. (2) If the party was private, did Suzy eliminate the privacy by posting the photo? She disseminated the photo only via her private Facebook page. Contrast Moreno, who posted her article to her public MySpace page. But if Suzy has thousands of friends, we might have difficulty characterizing the photo as private.
  - Public disclosure: the photo is posted to YouTabloid and findable in search engines.
  - Sufficient public interest? Generally there is no real public interest in frat parties.

- Some of you discussed false light, which is also possible depending on the circumstances. However, if the claim is over the shirt's falsity, that would be defamation and not false light.
- 1 point: Because of 47 USC 230, YouTabloid is generally not liable for any defamation and public disclosure of private facts claims arising from Kip's submission
  - YouTabloid is an ICS provider
  - Kip is third party content provider of Suzy's content
  - 230 preempts all claims except federal crimes, ECPA and [federal] IP claims
- 1 point: Possible 230 exclusion: Roommates.com
  - Standard: "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune"
  - YouTabloid arguably encourages illegal content by soliciting photos that are embarrassing, infringing, private and protected by SNS's user agreement.
- 1 point: Possible 230 exclusion: Publicity rights claim based on Jonas' activity.
  - Did Kip violate Jonas' publicity rights? Doubtful, but he did publish Jonas' photo for the potential commercial benefit of YouTabloid's payoff. Even so, 230 would preempt YouTabloid's liability for state publicity right claim in the Ninth Circuit.
- 1 point: Direct right of publicity claim against YouTabloid for using Jonas' name/photo for its commercial opt-out scheme.
- 1 point: Spam by YouTabloid
  - CAN-SPAM
    - Commercial? Email designed to sell commercial opt-out service, but YouTabloid doesn't automatically violate by sending unrequested email
    - Jonas doesn't have standing under CAN-SPAM. CAN-SPAM can be enforced only by the government and email service providers.
  - Jonas may have standing under state spam laws, but many state laws are preempted by CAN-SPAM (especially if email isn't false) or dormant commerce clause
  - Only 0.5 points for discussing CAN-SPAM without acknowledging state anti-spam laws

#### Facebook's claims (2 points)

- 1 point: Breach of contract against Kip
  - Facebook's user agreement prohibits taking and republishing other users' photos.
    - The facts specify that the contract is validly formed.
  - Kip engaged in the prohibited behavior.
- 1 point: misuse of Facebook's computer servers (TTC/CFAA/Penal Code 502) against Kip. This is a little like Lori Drew's prosecution. However, can Facebook establish the requisite damages for TTC or CFAA? A single photo download won't impact Facebook's system in any measurable way. Penal Code 502 is a stronger claim given its minimal damage requirements.
- In addition, like the RMG case, Facebook could also have a copyright claim against Kip for browsing its website. This is a weak claim because the browsing is almost undoubtedly protected under fair use or an implied license. Facebook does not have any copyright claim over Kip's downloading of Suzy's photo, and I usually deducted a point

for discussing Facebook's copyright claim without a clear understanding that Facebook's copyrights would only extend to Facebook's page templates (or an acknowledgment of your argument's limits).

- Facebook's claims against YouTabloid are all tenuous and didn't warrant much discussion. In particular, I deducted a point for discussing YouTabloid's possible 512 defense against Facebook unless you acknowledged its sheer illogic/inapplicability.

#### Other Common Scoring Adjustments

- -1 point for incorrect cause of action.
- -1 point for misstated rule.
- -1 point for discussing cause of action by someone other than Suzy, Jonas or Facebook, such as criminal claims (which can only be brought by the government).
- -1 point (or more) for unusually bad confusion or disorganization.
- -1 point (or more) for strong evidence that you didn't understand 47 USC 230, such as treating it as a defense to Suzy's copyright claim or simply ignoring it when talking about YouTabloid's liability.
- Bonus points were occasionally awarded for general or specific merit, such as a particularly strong analysis of a topic.