



Internet Law Sample Answer

Fall 2010

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This question is based on JustSpotted.com. See <http://blogs.forbes.com/kashmirhill/2010/10/15/celebrity-stalking-site-justspotted-just-got-spurned-by-twitter/>. This exam had more IP material than normal, but make sure you don't forget this is an Internet Law course, not an IP course.

CT = CelebrityTrax

Liability to Jill

Copyright is CT's biggest exposure to Jill

- CT's direct infringement
 - Ownership of a valid copyright
 - A 140 character post might not qualify for copyright protection due to the idea/expression dichotomy. There's only so much possible variation of the expressed facts. I was surprised how many of you assumed without discussion that the 140 character post was copyrightable.
 - Even if Jill has a copyright, she probably does not have a copyright registration, so her copyright lawsuit is probably not very dangerous.
 - Copyright infringement
 - CT makes a verbatim copy of Jill's post
 - CT's fair use
 - Nature of use: CT is a commercial republisher
 - Nature of work: Jill's post is very factual
 - Amount/substantiality of portion taken: 100%
 - Market effect: no real copyright market for a 140 character post
 - For a commercial entity, this is a decent fair use possibility.
 - CT's implied license to republish. Jill posted it freely on Thwarter with the idea/hope that people would see it. However, is the implied license trumped by Jill's explicit license to Thwarter in its user agreement?
- CT's secondary infringement
 - Per the Cablevision case, CT could argue that it simply effectuated its users' requests, in which case CT's subscribers are the direct infringers.
 - CT only searches keywords requested by its users
 - CT then routes responsive Thwarter messages to individual subscribers' accounts
 - Because they are individuals, users may have a better claim for fair use than CT. Fans may have better fair use claim than paparazzi because of the paparazzi's commercial interests.

- If users infringe, then CT's contributory liability exposure:
 - Knowledge of infringement: CT has generalized knowledge of infringement but does not know if a specific Thwarter post is copyrighted or not
 - Material contribution: CT runs the system and hosts the infringing content, but we have no evidence it does so knowing of any specific infringement
- If users infringe, then CT's vicarious liability exposure:
 - Right and ability to supervise infringement. CT runs its system and hosts the infringing content, so it has the capacity to cut off infringement.
 - Direct financial interest: it charges subscription fees, although these do not vary with infringement.
- Overall, the secondary infringement case is hard, at least without something more—like a takedown notice or other indicia that CT had specific knowledge of users' infringing activity.
- A few of you talked about robots as legally autonomous actors who would be directly liable. Copyright law doesn't yet distinguish between the actions of robots and their "owners."

Jill does not have a privacy violation claim against CT because she published her post via Thwarter. See *Moreno*.

Jill doesn't have an ECPA claim unless she was sending a private communication, which does not include posts to Thwarter if CT can freely scrape them.

Liability to Thwarter

CT is scraping Thwarter. As a result, all of the standard anti-scraping legal doctrines apply:

Copyright Infringement

- We didn't get much information to evaluate this claim. However, we can follow the general model set by *Ticketmaster v. RMG*.
- When its robots access Thwarter's page, CT's robots make a complete copy of the page, including any Thwarter-owned copyrightable elements on the page. This is the browsing = infringement argument.
- Depending on how long CT keeps this copy, it might be able to argue that this copy isn't fixed.
- CT can argue that it made the browsed copies only to extract the uncopyrightable page elements (e.g., Jill's posts), and this should support a fair use claim (*Perfect 10 v. Amazon*: if the last copy is a fair use, all prior intermediate copies are excused as well).
- If the court follows the *RMG* precedent, then CT probably infringes *something* owned by Thwarter, and the court isn't likely to find that fair use.
- CT can also try an implied license to access the pages, but the express contract agreement (the user agreement) should negate that.

Reminder: if you are discussing contributory/vicarious copyright infringement, you always explain who you think is directly infringing. (This goes for TM infringement too). If you can't find a direct infringer, then secondary infringement does not make sense.

Common Law Trespass to Chattels

- CT “used” Thwarter’s servers by conducting searches.
- CT may have had actual/constructive notice of that its usage was unwanted due to the user agreement.
- No evidence of Thwarter’s efforts to engage in technological self-help.
- Damage?
 - Intel v. Hamidi would reject CT’s current usage as damage because there’s no data loss or slowdown
 - But, per Register.com, could Thwarter argue that follow-on users, in aggregate, will cause damage? CT copycats are more likely than Hamidi copycats.

CFAA/California Penal Code 502

- CT uses Thwarter’s server.
- Is the usage unwanted? Thwarter’s server usage restrictions in its user agreement will suffice for most judges. Some of you assumed that server authorization could be restricted only through a binding user agreement, i.e., if the site doesn’t have a mandatory non-leaky clickthrough agreement, then the site hasn’t effectively restricted server usage. This would make both CFAA and 502 subservient to a breach of contract claim, i.e., the a CFAA/502 violation would succeed only if you also had a valid breach of contract claim. The case law does not support this proposition at all, although the caselaw remains unclear what steps provide a defendant with actual or constructive notice.
- Damage?
 - CFAA = \$5k of loss? There’s no harm to computer systems, so Thwarter would have to find \$5k of remediation efforts.
 - 502 = not required, so this is the strongest claim.

A few of you incorrectly suggested that the existence of statutory claims (CFAA/502) trump/eliminate the common law TTC doctrine.

Breach of Contract

- Formation
 - Thwarter does not present its terms as a mandatory non-leaky clickthrough
 - Footer placement probably too obscure to satisfy the Specht standard
 - Plus, the contract language is more obscure than the placement in search results like Register.com v. Verio.
 - Is there some other reason why CT has knowledge of the terms? For example, it is an industry player, so it may suspect terms exist. Or, it had to visit the site to configure the robots, and that visit may have conferred knowledge. Or, its repeated visits to the site may have formed a Restatements 69 contract like Register.com v. Verio, although the obscurity of the footer link may make that argument harder.
- Breach

- If the contract is properly formed, CT breaches its express terms.

Liability to Jason Fiever

Publication of Fiever's Dating Status, Fiever's Location and the Resulting Personal Injury

- Fiever's defamation claim for republishing Amber's false statement of fact about Fiever's relationship status
 - Jill and Amber's other statements are true or opinions (or are properly raised by other plaintiffs, such as the comments about Katy's relationship and location).
 - First Amendment defense: Fiever may be a public figure, but his dating status may not be a matter of public concern. No idea about Amber's scienter.
 - Amber's statements do not constitute false light (a true statement that creates a false impression) or the publication of harmful/inaccurate information (like saying a mushroom isn't poisonous when, in fact, it is; or misquoting a stock price that causes an investor to make a bad investment decision)
- Fiever's claim for public disclosure of private facts is weak.
 - He was at a public location (the club), although if the club had restricted entry, he might be able to argue that it was a private location.
 - Even so, the information was already published at Thwarter before CT republished it.
- Fiever has a personal injury claim
 - However, did CT "cause" the injury? Intervening tortfeasor. Recall our discussion about the Moreno case and the liability for the gunshots taken at Moreno's family
- Irrespective of the prima facie merits of the defamation, public disclosure and personal injury claims, all three claims are preempted by 47 USC 230 because they are state law non-IP claims based on third party content.
 - Regarding the personal injury, see *Doe v. MySpace* for 230's preemption of offline personal injury caused by publication of third party content.
 - The content remains "third party" content even though CT scraped the third party content without explicit permission.
- A Roommates.com attack is likely to fail
 - Standard: "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."
 - CT does editorially filter posts picked up from Thwarter, so arguably it could do a better filtering job. However, its failure to filter out the posts doesn't change the Roommates.com analysis.
 - Further, CT is more like a "neutral tool" (whatever that means). It does not try to produce illegal content.

From a grading standpoint, I was OK that some of you reached the conclusion that 230 didn't apply to CT, but I think that's the wrong conclusion. I see this as an easy 230 win for CT.

Note: we normally don't talk about "contributory" or "vicarious" "infringement" or liability outside the IP context. Usually, you have to fit secondary liability into some other legal form.

Publicity Rights Claim

- Is CT making a commercial use of Fiever's name? They sell monthly subscriptions to track 3 people's names.
 - Argument #1: This means they are in the business of selling information keyed to people's interests in the celebrity
 - Argument #2: They commercially publish information, and their users decide how to search that database. Would Westlaw be liable for publicity rights violations because they let their subscribers set up Westclips on third party names?
- Can CT claim 230 protection for the publicity rights claim?
 - Publicity rights are state IP claims. State IP claims are preempted in the Ninth Circuit but not elsewhere.
 - Even in the Ninth Circuit, arguably the publicity rights claim is based on CT's commercial offering, not on third party content.

Trademark Claim

- Even if Fiever's trademark claim is based on third party content (which it probably isn't), 230 is irrelevant to the federal trademark claim, which aren't preempted by 230.
- Prima facie infringement case
 - Ownership of valid TM: stipulated
 - Priority: stipulated
 - Defendant's use in commerce?
 - Argument #1: users select the celebrities to track, so the users make the trademark reference.
 - Argument #2: CT offers the option to track Fiever and then commercializes his trademark as a search term. This is a little like Google selling trademarks as keyword ad triggers, except that here CT was getting paid by searchers, not advertisers.
 - Argument #3: CT did not "use" Fiever's trademark as an identifier of CT's marketplace offering
 - Likelihood of consumer confusion. We don't have a lot of evidence here. Given that users pick their search terms, it's hard to see how they are confused by any step in the process. Plus, users aren't like to think Fiever sponsored CT.
 - WRT initial interest confusion, I didn't see much to talk about.
- Infringement defenses
 - Whatever CT does should fit the nominative use bucket. Irritating typo: "noRmative use" instead of "nominative use"
- Contributory trademark infringement. Like the discussion with respect to Jill's liability, CT could try to argue that its subscribers are the direct trademark infringers, so it is at most a contributory infringer. It's hard to see how the users could be direct infringers.
- Dilution
 - Regarding fame, some of you advanced a circular argument that CT's desire to track Fiever was prima facie evidence of his fame. In fact, many "minor" celebrities do not have trademark rights in their name, let alone the requisite degree of nationwide consumer recognition to achieve dilution-level "fame."
 - Prima case of dilution is possible, although how is there blurring or tarnishment?

- Even if so, CT has a good argument that its activities fit into the fair use or news reporting defenses.

Things CT could do differently

Some ideas:

- Publish only snippets of the Thwarter posts to minimize copyright exposure (take less than 100% of the posts). For example, CT could strip out content that doesn't directly bear on geolocation. Given the posts' brevity, this may not be possible, although it could have been in Jill's case by publishing only the first sentence of her post.
- Publish only links to the Thwarter posts rather than publishing the posts themselves.
- Strike a deal with Thwarter to get a real-time feed of their posts rather than scraping.
- Get permission to republish individual posts. Is that feasible, especially on a time-responsive basis?
- Restructure the technological implementation to look even more like a technology provider effectuating subscribers' instructions. I don't have any specific suggestions on this front, and frankly, the setup as described in the question's facts are pretty good.

I didn't penalize you if you totally skipped this part of the question, but in future exams, I may not be so magnanimous.

Scoring Chart

I'm making the unprecedented (for me) and potentially risky move of providing you the points chart I used to grade your answer. I've never provided this level of grading transparency before, and depending on how much antipathy I get in response, I may not do it again. I fear that showing you this chart will cause more angst than it relieves, especially for those of you who mistakenly view it as an invitation to advocate why your answer should have been scored better. I'm not interested in having rescoring negotiations (and in any case, any grade change requires the dean's approval, which he will do only for clear arithmetic error).

I expected every exam to discuss 5 topics:

- Jill's copyright claim against CT.
- Thwarter's contract claim.
- Thwarter's trespass to chattels claim.
- Fiever's trademark claim
- Fiever's other tort claims and 230 preemption

WRT each of these 5 points, I scored your answer +2 for a competent answer that met my basic expectations, +1 for a topical but deficient answer and -1 for omitting the issue. Examples of recurring deficiencies: discussing TM infringement but not dilution (or vice versa), discussing the contract claim without exploring both Specht and the Register.com workaround, and discussing only one TTC doctrine.

I further awarded +1 each for discussing:

- how CT might use Cablevision to shift direct copyright liability to users
- Thwarter's copyright claim against CT
- all three of Fiever's tort claims (defamation, privacy invasion and personal injury) and properly applying 230 to them
- Fiever's publicity rights claim

I also gave out +1 bonuses and -1 deductions in my discretion to make ordinal adjustments (i.e., where I didn't think the point formula fully captured the strength or weakness of the answer).