



Internet Law (Law 793) Final Exam
Eric Goldman • Fall 2013

This exam has 1 question worth 100% of your final exam grade. Your answer may use up to 2,750 words.

This is an “open book” exam. You may use any written materials you want, but during your exam, you may not communicate about the exam or your answer with anyone (orally, electronically or otherwise), other than law school staff regarding exam administration. You don’t need to do outside research, and such research is unlikely to affect your grade. However, if you aren’t sure exactly what a statute says, don’t rely on summaries from class—read the statute!

This is a take-home exam. Download the exam from www.examssoft.com/sculaw. You must electronically return your answer, in an ExamSoft-supported format, there. You can upload your answer only once, so don’t submit it until you are completely finished. The earliest time you may download the exam is Dec. 4, 2013, 9 am Pacific. The latest time you may upload your answer (provided it’s less than 73 hours after your exam download timestamp) is Dec. 19, 2013, noon Pacific. ExamSoft’s timestamps are irrefutable evidence of your download and upload times. **IF YOUR EXAM DOWNLOAD AND YOUR ANSWER UPLOAD ARE MORE THAN 73 HOURS APART, EVEN BY ONE MINUTE, YOU WILL FAIL THE COURSE. THERE IS NO EXTRA GRACE PERIOD. NO EXCUSES!** Don’t gamble by waiting until the last minute to upload your answer. If you run into ExamSoft problems, call Lisa Willett (6 am-12 am) at (408) 569-1109.

Include page numbers and your 4 digit blind grade ID number, but don’t otherwise include any information that would identify yourself in your answer or its file name. At the top of your answer, tell me how many words your answer has. **I DON’T PLAN TO GRADE AN ANSWER THAT EXCEEDS THE WORD LIMIT BY EVEN ONE WORD. OMITTING OR MISSTATING YOUR WORD COUNT MAY INCUR SIGNIFICANT PENALTIES.**

Some additional thoughts for you:

- All relevant parties are, and all relevant actions take place, in the United States, and all parties are over the age of majority. Don’t discuss any statutes of limitation.
- Read the question very carefully. Answer the questions actually asked. Don’t answer questions I didn’t ask.
- Allocate your word count cap smartly. You score most points from issue-spotting and applying the correct law to the facts. Organize and prioritize your answer accordingly. It’s OK to use bullet points, short citation forms and unambiguous abbreviations. Please quote statutes or cases only as needed to make your point. It’s OK to use IRAC/CRAC, but it’s also OK to use any methodology that effectively communicates your points.
- If additional information would help your analysis, indicate what information you’d like and why it would help, and then state your assumptions and proceed with your analysis.
- While generally your answer should be based on legal principles, you are welcome to address other perspectives and concerns.

GOOD LUCK ON THE EXAM AND HAVE A GREAT WINTER BREAK!

Heartsick is an online dating website for people with sexually-transmitted diseases (STDs). Members can build a profile page, participate in discussion boards, send private messages to other members and conduct structured searches for other members (e.g., find other members who live in the same metro area). Members build their profile page by answering questions via a “profile wizard” that uses pull-down menus with answers to standardize the data. One question in the wizard, which members must answer to complete their registration, is “Which STD do you have?” The pull-down answer options are (1) Chlamydia, (2) Genital Herpes, (3) Gonorrhea, (4) Hepatitis, (5) HIV/AIDS, (6) Human Papillomavirus (HPV), (7) Syphilis, or (8) Other. This question helps members find other members with the same STD so they can’t infect each other. Member profile pages also can include a member-uploaded photo and a personal narrative (written as unstructured content). Before other members can see them, Heartsick employees review all submitted profile photos to confirm the photos aren’t pornographic.

At no cost, members can create and view profile pages (except photos) and participate in discussion boards, but members must pay with “credits” for most on-site activities. Posting a profile photo costs 1 credit; viewing another member’s profile photo costs 1 credit; sending a private message to another member costs 2 credits; reading private messages received from another member costs 3 credits. Members typically buy packages of credits, such as 20 credits for \$50.

To spur increased usage by new or inactive members, Heartsick operates automated accounts representing non-existent people that send computer-generated messages to members and automatically reply to members’ messages sent to those profiles. The member agreement discloses that Heartsick uses automated accounts, but profile pages for automated accounts are indistinguishable from real members’ profiles.

Heartsick members may terminate their accounts, but to make Heartsick’s database appear larger to potential new members, Heartsick continues displaying members’ profiles even after members terminate their accounts. This fact is also disclosed in Heartsick’s member agreement.

Smiley Papyrus is a well-known television personality and singer. Smiley maintains her own website where she offers membership in a “fan club” for a monthly subscription fee. Fan club members get an exclusive newsletter and announcements, as well as early access to buy concert tickets. Smiley has a federal trademark registration in her name for online services, and her name has achieved secondary meaning.

Jessica runs GhouLove, an online dating site for people who fantasize that they are vampires, zombies or otherwise undead. GhouLove doesn’t directly compete with Heartsick, but some online dating customers only maintain one online dating membership at a time. To grow GhouLove’s customer base, Jessica creates a fake Heartsick member profile for Smiley, indicating (incorrectly) that Smiley has HPV and including a profile photo of Smiley (Smiley doesn’t own the photo’s copyright). When Heartsick members send private messages to Jessica’s fake Smiley profile, Jessica (still pretending to be Smiley) responds with a private message saying that Smiley prefers to hang out on GhouLove and inviting message recipients to create a GhouLove account.

Krista posted some modeling photos (in which she owns all IP rights) to her personal website. She discovers that hundreds of different Heartsick members have used one of her photos as their own profile photo, because those members think Krista's photo will be more attractive to other members than photos of themselves. Krista believes Heartsick could easily prevent misuse of her photo by adopting commercially available facial recognition software.

Heartsick properly implements its member agreement as a mandatory non-leaky clickthrough. The member agreement's terms have not changed since the site's launch. The member agreement includes the following terms (the agreement may contain relevant terms not mentioned here—if you think other terms may be important, let me know what you'd look for and why):

- Members may not:
 - Violate any third party intellectual property rights.
 - Distribute any information concerning any other person or entity, including photographs of others.
 - Distribute unsolicited commercial email or any other advertisements.
 - Distribute false, misleading or illegal information or content.
 - Impersonate another person.
- “We may, at our discretion, modify these terms at any time. Any updated version supersedes and replaces any prior versions upon posting. We will indicate the last update date at the end of these terms. You agree to note that last update date of the revision you read and agree to periodically check these terms for changes. If the last update date has been changed, then you will know we have made changes to these terms and that you must review the terms to determine how your rights and responsibilities under the terms have changed. Your continued use of this site following the posting of changes to these terms will mean you accept those changes.”

Heartsick's member agreement designates an agent for service of notice and says that repeat infringers will be terminated, and Heartsick has made an appropriate 512 filing with the Copyright Office.

Identify and evaluate (1) Smiley's legal claims against Jessica and Heartsick, (2) Krista's copyright claims against Heartsick, and (3) Heartsick's legal claims against Jessica. Also discuss if you think Heartsick should do anything differently.

Don't discuss jurisdiction, 17 USC 1201 (anti-circumvention) or 1202 (copyright management information), criminal copyright infringement or HIPAA.

END OF EXAM