



Internet Law (Law 793)
Final Exam Sample Answer
Prof. Eric Goldman • Fall 2018

This was an easy exam because most issues were pretty straightforward and drawn straight from class, plus some issues overlapped with recent past exams (and your liberal cutting-and-pasting suggests that many of you recognized that). At the same time, it was a hard exam because you didn't have enough words to address everything. There were over 20 point-scoring issues, which means you could write an average of about 140 words per point-scoring issue. Figuring out how to make the most of those words was challenging. The number of words I allocate below to each topic provides one clue of how you might have prioritized them. I've also posted an answer from one of your peers so you can see what a student achieved within the exam's time and space limitations.

As usual, this question had its roots in real-life cases. *See* Bokenfohr v. Gladen, 2018 WL 2418553 (D. Or. 2018) and State v. VanBuren, 2018 VT 95 (Vt. 2018).

Reminder: if your exam answer doesn't discuss Section 230 and Section 512, you are likely to fail the course.

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Brittney's Claims Against Amanda

Defamation.

- False statement(s) of fact. The fake SweetDads profile contains several express or implied statements of fact, including that: Brittney would create a sugar baby profile; Brittney would publicly post a sexually suggestive photo; Brittney would provide commercial sex; and that she did all of the foregoing as a minor.
- Published to third parties. The fake profile was seen by the 8 people who clicked on the Google ad and likely the hundreds of phone callers.
- Injurious to reputation. Some statements are likely per se defamation, including that Brittney engaged in criminal prostitution. The potential conflicts between her private conduct and her professional identity as a psychiatrist could also be injurious. At minimum, her prospective or actual clients may feel like Brittney deliberately withheld information that affects their assessment of her professional expertise.

Brittney may be a public figure due to her infomercial work, and arguably criminal conduct by a leading medical professional would be a matter of public concern. Nevertheless, Amanda published the false statements of fact knowing they were untrue, so she has the requisite malice to overcome a First Amendment defense.

However, did readers believe the profile was credible? The age misrepresentation surely confused things. How could Brittney achieve all of her professional accomplishments and still be

a minor? (FWIW, this was the basic premise of the 1990s TV show *Doogie Howser*). Without seeing the photo, we can't evaluate if Brittney reasonably looked like a minor. Assuming her actual age is 30s or later, few people would think she's actually a minor despite the profile's reported age. If there's an obvious mismatch between the reported age and the apparent age of the person depicted in the photo, profile viewers might be skeptical of all claims on the profile. Plus, with the ubiquity of catfishing and dating puffery (some stats suggest 80%+ of online daters lie on their profiles), aren't all dating profiles inherently dubious?

Also, I wonder if a defamation lawsuit would be a good call. Brittney may not care about her reputation among the phone callers, and the 8 prospective clients who clicked on the search ads may not be worth the cost and hassle of a lawsuit—especially in light of the Streisand Effect risk.

Note: it was pointless to talk about Amanda's lack of eligibility for Section 230 for the profile content she created. At most, Amanda might be able to claim the photo constitutes third party content, but that would only marginally reduce Amanda's liability for non-IP claims.

False Light. The content of the search ad is all true, but it gives the false impression that Brittney placed it and that she provided the services mentioned at the SweetDads URL. The juxtaposition of the true photo with the false profile might also support false light claims.

Common Law Privacy Torts. Amanda may have made a public disclosure of private facts by publishing Brittney's private photo without sufficient public interest. It's less clear if Amanda made an intrusion into seclusion. Brittney may have taken the photo in a private space (like in her home without others around), and it was supposed to be destroyed; so by publishing the photo she "found," perhaps Amanda intruded into that private space.

Publicity Rights. Normally, it's a publicity rights violation to display a person's image and name in advertising without permission. However, the fake profile isn't really an ad because no goods or services are actually available for sale. The search ad copy also "uses" Brittney's name in service of promoting the fake profile. Some courts might stretch publicity rights to apply here, but I see it as a stretch.

Intentional Infliction of Emotional Distress. We didn't cover the elements in class, so I didn't expect you to discuss this. However, Amanda's attack campaign could overcome the rigorous standards for a successful IIED claim. I think Amanda's conduct is well outside the range of socially accepted conduct, and the facts specify that Brittney suffered "substantial emotional distress."

Nonconsensual Pornography (CA Civil Code 1708.85). This law doesn't apply because the Emoji Selfie didn't contain any nudity.

E-personation (CA Penal Code 528.5). Normally I discuss this doctrine in conjunction with *In re Rolando S*, but that case got smoked out. As a result, I didn't expect you to discuss it. If you look at the statutory elements, you'll see that it describes Amanda's conduct quite well. Though it's in the Penal Code, it provides a civil remedy.

Copyright.

- Valid copyright. Photographs generally qualify for copyright protection. The photo was fixed upon its taking, and normally photos constitute works of authorship even when they accurately depict factual information.
- Ownership. The photographer—in this case, Brittney as the selfie photographer—usually owns the photo’s copyright.
- Violation of exclusive rights. Amanda copied, distributed, and displayed the photo by posting it to the fake profile.
- Based on the foregoing, Brittney should be able to establish a prima facie case of copyright infringement for the photo.
- Some of you discussed the possibility that Brittney granted an implied license to Amanda to post the photo. The facts don’t support this. Brittney restricted the photo’s dissemination and then tried to erase it.
- Fair use defense.
 - Nature of use. Amanda’s use wasn’t commercial, but it was mean. Not the kind of use that courts favor in an equitable analysis. Amanda used the photo in a new context, but she didn’t add anything new, so her usage wasn’t transformative. Thus, I think this factor would weigh against Amanda.
 - Nature of work. The photo was unpublished, which in this case would weigh heavily against fair use.
 - Amount taken. Amanda took the entire photo, which weighs against fair use.
 - Market effect. Even though there is no current or anticipated market for the photo, Amanda overrode Brittney’s attempt to keep the photo out of any market. This probably weighs against fair use.
 - Conclusion: Amanda’s use is probably not fair.
- Brittney almost certainly didn’t register her copyright before Amanda’s infringement because she was trying to erase the photo, not protect it. This probably means that Brittney will not qualify for statutory damages or attorneys’ fees. Without those, the cost of copyright litigation might exceed the potential damages award.

Trademark Infringement

- Ownership of valid trademark. The federal trademark registration for the name “Brittney Smith” is prima facie evidence of this.
- Priority. The facts specify that Amanda is intentionally copying Brittney’s trademark.
- Use in commerce for the SweetDads’ profile. To the extent this factor isn’t coextensive with constitutional limits, normally advertising qualifies as a use in commerce. However, as discussed above, the fake profile isn’t really advertising. Recall that the Lamparello opinion punted on this point.
- Likelihood of confusion for the profile. The multi-factor test fits best when the litigants are marketplace rivals. Here, Amanda isn’t a rival; and her advertising isn’t actually promoting her goods or services. (For Lanham Act geeks, the false designation of origin cause of action would be a better fit than trademark infringement). Still, based on the fake profile, consumers are likely to believe that the trademark owner (Brittney) provides services she doesn’t actually provide. The problem is that those services aren’t actually available in the marketplace, so Brittney’s injury might be beyond trademark’s scope.

- Initial interest confusion for the search ad. Both the reference in the ad copy and the keyword triggering qualifies as use in commerce. However, Amanda’s keyword ads on Brittney’s trademark, without more, doesn’t constitute trademark infringement. There is no bait-and-switch here because there is nothing to switch to. Plus, the 1-800 Contacts v. Lens.com ruling indicated that a 0.8% clickthrough rate would be strong evidence against consumer confusion. (And your periodic reminder that the initial interest confusion doctrine is stupid). Otherwise, the Network Automation case indicates that the ad copy should be analyzed in conjunction with the fake profile for purposes of the multi-factor likelihood of confusion test. Bizarrely, a number of you cited the antiquated Brookfield precedent for the proposition that running keyword ads was per se infringing. To reach that conclusion, you had to completely ignore the Network Automation case, which repudiated that proposition.
- Nominative use defense. (Reminder: it’s “nominative,” not “normative”). Amanda is using Brittney’s trademark to refer to Brittney. However, the nominative use defense is likely to fail because consumers are likely to believe that Brittney sponsored/endorsed the ads, as evidenced by the first person reference in the search ad and the deluge of phone calls.

Rather than suing, Brittney could ask Google to stop showing her trademark in the ad copy, which might be a sufficient remedy in this case.

Trademark Dilution

- Famous mark. It’s dubious that Brittney’s trademark qualifies as famous. The legal standard is: “widely recognized by the general consuming public of the United States” as a source designator. Professional recognition among the medical community doesn’t count. The infomercial advertising could lead to national consumer recognition if it’s sufficiently pervasive and successful. However, the facts only suggest that she’s run “some” infomercials, which may not be enough to achieve the high requirements for fame.
- Use in commerce. As discussed above, this factor is confusing.
- Use commenced after mark became famous. With our doubts about fame, we’d need to check when fame occurred to validate this.
- Likelihood of dilution. Blurring normally refers to adding a second definition to a trademark, which isn’t the case here. However, perhaps Amanda “impairs” the trademark’s “distinctiveness” by falsely associating it with a service that the trademark owner doesn’t actually offer. Amanda’s association of the mark with sugar babies and prostitution likely degrades the mark’s reputation enough to constitute tarnishment.
- Defenses: fair use, news reporting, noncommercial use. The first two seem inapplicable. The noncommercial use defense seems plausible given Amanda’s lack of commercial interest....if only we understood what this defense actually means.

Common Law Trespass to Chattels. Brittney’s cellphone is a chattel. The unwanted phone calls constitute a physical contact with the cellphone (if electronic signals are treated as physical contact); or the phone calls constitute an intermeddling with the chattel. It’s like Amanda conducted a denial-of-service attack against Brittney’s cellphone instead of a server or router. While the callers didn’t know that their phone calls were unwanted/“unauthorized,” Amanda did.

Indeed, the unauthorized phone calls were the “payload” for her attack. This should meet the Restatements’ standard for chattel interference.

However, if the majority rule from *Register.com v. Verio* applies, Brittney hasn’t given any explicit notice to Amanda to quit her conduct, nor has Brittney taken any self-help efforts. I expect many courts would excuse both omissions because Amanda constructively knew she was attacking Brittney’s cellphone.

In terms of legally recognized harm, the Restatements may recognize Amanda’s difficulty managing her incoming calls (and thus overlooking some calls) as diminishing the value of the cellphone. The Restatements may also recognize Brittney’s emotional distress as harm to a legally protected interest.

If *Hamidi* applies, it will only recognize harm to the chattel itself. That means the overlooked calls and emotional distress won’t count. Possibly the extra expenses to store more voicemails would count; it’s a little like Intel having to buy more email routers or servers to handle increased incoming emails. Note that unlike the *Hamidi* case, we have a greater reason to believe that Amanda’s attack caused the need for additional voicemail storage given how the tsunami of incoming unwanted calls likely overwhelmed the ordinary volume of calls Brittney would receive. However, does Brittney have an independent possessory interest in the voicemail storage facility? Is it located on her phone, in the cloud, or somewhere else? Would it matter?

CFAA. The CFAA should protect a cellphone. We didn’t cover this in class, but the definition (1030(e)(1)) of “computer” is “an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions...but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.” In the context of the CFAA, written in the 1980s, a “portable hand held calculator” is an HP-12C, not an Internet-networked computer surrogate.

I’m unsure if unwanted phone calls constitute a “program/info/code/command” for purposes of 1030(a)(5)(A). I’m more confident that the phone calls create a chattel interference recognized by 1030(a)(5)(B) and (C). The harder point is showing sufficient legally recognizable damage. The definition of “loss” (1030(e)(11)) references “any reasonable cost to any victim, including...any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.” Interpreted broadly, the overlooked calls, extra storage costs, and emotional distress (as a consequential damage) all seem to count; but will they collectively add up to \$5,000? If Brittney can show the lost revenue with sufficient certainty, it seems like the overlooked prospective clients should count; and I’m not sure how a court would value the emotional distress.

CA Penal Code 502. The definitions of “computer services” and “computer system” in Penal Code 502(b)(4) and (5) are similar enough to the CFAA’s definition of “computer” to cover cellphones. As a result, similar to the foregoing discussion, I think Brittney could show that Amanda knowingly and without permission used (or caused to be used) Brittney’s computer services (the cellphone) and accessed (or caused to be accessed) Brittney’s computer system (the cellphone). Amanda’s behavior could also qualify as “disrupts or causes the disruption of

computer services or denies or causes the denial of computer services to an authorized user of a computer, computer system, or computer network,” another restriction in 502 (but we didn’t discuss it in class). Brittney’s extra voicemail storage costs would count as a loss; and perhaps the overlooked prospective clients and emotional distress would count as well (the applicable provision, 502(e)(1), simply refers to “compensatory damages”).

Brittney’s Claims Against SweetDads

Section 230-Preempted Claims. SweetDads can establish a prima facie case of Section 230(c)(1) immunity for several claims based on Amanda’s conduct:

- ICS provider/user. SweetDads’ website qualifies.
- Provided as publisher/speaker. This will cover all claims other than the statutorily enumerated exclusions. This should include the following claims against Amanda discussed above: defamation, false light, common law privacy torts, publicity rights (in the Ninth Circuit only), IIED, nonconsensual pornography (1708.85), and e-personation (528.5). I’m not sure if the immunity would reach the trespass to chattels claim, though I doubt its prima facie elements would reach SweetDads.
- Information provided by another information content provider. This covers the fake profile SweetDads hosts. If necessary, it would also cover Amanda’s search ad.

Section 230(c)(2) doesn’t seem helpful here. It would be most applicable to Amanda’s claims against SweetDads for filtering her content, which is both implausible as well as outside the question’s scope. Brittney won’t sue SweetDads for content it filtered; her claims all relate to what SweetDads didn’t filter.

Section 230 Exception for Federal Criminal Prosecution. This isn’t relevant to this question because Brittney can’t initiate a prosecution.

Section 230 Exception for IP. Federal copyright and trademark claims are excluded. Those are discussed below. Outside the Ninth Circuit (which is not applicable because both Brittney and SweetDads are located in California), Brittney’s publicity rights claim would be excluded from Section 230, in which case the applicable legal rule is uncertain.

Section 230 Exception for FOSTA. FOSTA just passed this year, so this is the first time I’ve tested it. I designed the entire question to implicate FOSTA, so I was really hoping you would discuss it!

FOSTA created a new prostitution promotion crime, 2421A, and extended the existing sex trafficking crime, 1591. I believe Section 230 immunizes any civil claim predicated on 2421A violations. Therefore, I’ll focus on the 1591 crime and associated civil claim.

1591 criminalizes “knowingly assisting, supporting, or facilitating” sex trafficking. We don’t have any evidence of sex trafficking taking place on SweetDads beyond the Brittney fake profile. The fake profile, however, arguably looks like a sex trafficking promotion. The profile lists Brittney’s age as a minor, and it uses prostitution codewords.

It's untested whether operating a user-generated website constitutes the element of "assisting, supporting, or facilitating" sex trafficking. That was clearly Congress' intent, and arguably SweetDads "profited" from the promotion due to Amanda's \$25 payment. However, normally we don't characterize publishing third party content as "assisting, supporting, or facilitating" illegal activity, and more importantly, it raises unresolved First Amendment issues.

Also, did SweetDads have "knowledge" of the sex trafficking? SweetDads deploys both automated and manual content moderation, so it's possible those efforts automatically confer "knowledge" on all published content. SweetDads has several good arguments to challenge scienter. First, it specifically looked for sex trafficking promotions and removed them when identified, so it was actively seeking to do the screening work Congress wanted it to do. Second, it had not manually reviewed the fake profile yet, so it hadn't had a chance to "know" about the putative sex trafficking. (Brittney might counterargue that SweetDads was unreasonably slow in doing the manual review and thus should be constructively charged with knowledge. The statute doesn't provide a turnaround time, and no cases have addressed it either). Third, even if humans had reviewed the fake profile, it's unclear if they would have identified it as a sex trafficking promotion given the codewords and the possible mismatch (discussed in the defamation section) between the photo and the reported age. Brittney could counterargue that SweetDads was filled with prostitution ads, so it "knows" that any minor on the site could be a sex trafficking victim.

Brittney's civil claim could run into one more snag: Because the profile was fake, there was never a minor or any actual prostitution. As a result, she wasn't actually a victim of sex trafficking, so she may not satisfy the requirements of the civil claim (see 18 USC 1595(a)).

In theory, SweetDads could also claim that it was taking advantage of its rights under Section 230(c)(2)(A) as a defense to Brittney's FOSTA civil claims. As I explained to Congress, I don't understand how Section 230(c)(2)(A) could come into play here, so I see this defense as highly speculative.

Nevertheless, although FOSTA creates an exception to Section 230, I'm struggling to see how Brittney could take advantage of it.

Some of you mistakenly believed that FOSTA constituted a general purpose exception to Section 230, i.e., if Brittney established a FOSTA violation, then SweetDads would lose immunity for all claims. With respect to civil claims, the FOSTA exclusion only applies to claims pursuant to 18 USC 1595 (applying 18 USC 1591). Section 230's applicability to all other claims is unaffected by FOSTA.

Common Law Section 230 Exception: Promissory Estoppel. Section 230 doesn't apply to promissory estoppel claims. SweetDads had numerous negative behavioral covenants in its TOS that Amanda breached. However, TOS restrictions on user behavior aren't promises that users won't engage in that behavior.

SweetDads' employee also made a promise on the phone to promptly suspend the profile, which didn't get done in 72 hours. However, we don't know if 72 hours is "prompt" or not. Furthermore, Brittney would need to show detrimental reliance on that promise, and we don't

have any evidence that she changed her behavior due to the promise. As a result, I think Brittney's promissory estoppel claims won't go anywhere, even if they bypass Section 230.

Common Law Section 230 Exception: Roommates.com.

- SweetDads encourages sugar relationships, but those are not illegal. SweetDads appears to tolerate prostitution advertising, but that's not encouragement. SweetDads actively combats sex trafficking promotions. On the 100% Free Signup page, SweetDads requires the input of information that can be protected from discrimination (such as ethnicity), but discrimination in sugar relationships isn't illegal.
- We don't have any evidence that SweetDads contributes to any alleged unlawfulness of Amanda's content.
- SweetDads helps users build their profiles using pulldown menus and automatically promotes "hot" and "new" profiles. One way of interpreting Roommates.com is that such active involvement in the profile building and post-publication promotion constitutes "partial development" of the content sufficient to overcome Section 230. I think that minority holding wouldn't be likely to help here; dating services routinely qualify for Section 230 protection despite deploying the same practices. Furthermore, even if SweetDads structured the data, a key to illegality was the fake age for Brittney. Amanda published that in the narrative, not via the structured data, and Roommates.com didn't limit Section 230's protection for narrative content.

Copyright

- Direct infringement. The infringing work is the Emoji Selfie. As discussed above, Amanda may be a direct infringer. SweetDads isn't likely to be a direct infringer because it lacks volition for Amanda's publication.
- Contributory infringement. Brittney notified SweetDads about the fake profile. However, it's unclear if Brittney specifically communicated to SweetDads that the photo was infringing. If not, arguably nothing has conferred knowledge of the infringing photo on SweetDads. The fact that SweetDads uses automated filters to find potentially infringing files doesn't necessarily confer knowledge either. Otherwise, that would discourage websites from deploying automated filters. If SweetDads had sufficient knowledge of the infringement, then its continued publication of the photo would be a material contribution to the infringement. However, there may be a turnaround time between notice and removal before contributory liability starts; and that turnaround time might be longer than 72 hours (there have been surprisingly few cases addressing this turnaround question). So SweetDads may not be liable yet for contributory infringement even if it got knowledge and failed to act in 72 hours.
- Vicarious infringement. SweetDads has the contractual right to remove infringing content and terminate infringing users, as virtually all online services do. This contractual right usually doesn't support vicarious infringement (otherwise, no defendant would qualify). SweetDads obviously has the technical right and ability to stop infringing activity on its service, as evidenced by the many steps it takes to prevent and police unwanted content. However, something more may be required to satisfy the elements of vicarious copyright infringement. Either way, we don't have any evidence that SweetDads had any direct financial interest in the infringement. It did get a fixed fee payment of \$25 for the fake profile, but it does not mean its revenue/profits increase as infringement increases.

- Inducement. We don't have any evidence that SweetDads promoted its service as a tool for infringement.
- Fair use. As a for-profit enterprise, SweetDads may be deemed a commercial user of the photo, even though its user made an editorial usage. SweetDads didn't transform the photo beyond Amanda's repurposing. The photo remains unpublished and used 100%. We are still unsure how to measure the market effect. SweetDads isn't likely to license photos directly; and indeed, it's already taking proactive steps to eliminate duplicate photos. Still, fair use seems like a stretch.

Regarding SweetDads' DMCA online safe harbor (512(c)): We don't have enough information to completely evaluate this defense. On the plus side, SweetDads stored Brittney's photo at Amanda's direction. Also, in the TOS, SweetDads told users about its repeat termination policy (sort of) and disclosed a physical address for notice (but not the statutorily required email address or phone number).

On the other hand, SweetDads hadn't made the agent designation with the Copyright Office before Brittney's first complaint. As far as I can tell, 17 USC 512 doesn't specify whether a Copyright Office designation must be made before a takedown notice is sent (which would make sense) or just before the lawsuit is filed.

Although she contacted SweetDads, Brittney did not appear to send a 512(c)(3) notice. So did SweetDads have disqualifying knowledge of the infringement? Some of you argued that Brittney's email/call created red flags of infringement. This is incorrect. Veoh seems to say that a copyright owner cannot create red flags of infringement through non-512(c)(3) notices.

Does SweetDads' filtering efforts create disqualifying knowledge? The automated filter should not have any impact on scienter, but the manual review could be more problematic. However, several cases have indicated that a customer support representative simply looking at a file doesn't immediately confer knowledge because infringement is rarely apparent on its face from a simple inspection (as would be the case here; SweetDads would have no idea who held the copyright to the Emoji Selfie simply by inspecting it). Instead, it often requires legal expertise to determine the legal status of copyrightable material. Perhaps SweetDads' specific implementation could lead to a claim of willful blindness because employees were implicitly instructed to ignore infringing material.

Some of you claimed that SweetDads' use of automated filters satisfied its requirement to accommodate standard technical measures. This is not correct. A standard technical measure might be something like copyright owners' automated robots looking for infringing copies, but no court has designated any technology as a standard technical measure.

Contributory Trademark Infringement. If Amanda infringed Brittney's trademark, then SweetDads could be liable for contributory infringement if it continued to host the fake profile after getting notice. So the question is whether Brittney gave SweetDads sufficient notice of the trademark infringement in her email about the fake profile or the subsequent phone call. If so, we again must decide whether a 72 hour removal time is reasonable.

If SweetDads qualifies as an “innocent publisher” (1114(2)), it could further avoid liability for damages. However, 1114(2) defenses rarely work, and SweetDads’ innocence could be questioned. That legal standard acts as a lens for the judge’s normative views.

SweetDads’ Contract Claims Against Amanda

Formation. I’ll focus on the word “Terms” at the bottom of the 100% Free Signup page.

- Call-to-action placement. The call-to-action is below the “Join Now” button and in the smallest font on the screen. Both of these are suboptimal, especially if the screen cuts off between the button and call-to-action on some devices/OSes. However, the font is big enough, the colors are dark enough, and there is enough defensible white space around the call-to-action that I expect most courts would conclude that Amanda got “reasonably conspicuous notice of the existence of contract terms.” Linking to the TOS, rather than displaying on this page, doesn’t change the legal conclusion. The pink-colored hyperlink might throw off some users who expect hyperlinks to be in blue. We’d need to see what a reasonable online user thought the pink meant. (From my anecdotal view, I’d say the pink clearly communicated that the text was hyperlinked).
- Call-to-action wording. The conditional statement, “By clicking ‘Join Now’ I...agree to the SweetDads Privacy Policy and Terms” makes the consequences of Amanda’s action clear. The “Join Now” reference is identical to the button labeling, so no problem there. The absence of a second checkbox is suboptimal, but the clarity of the wording should succeed nonetheless.
- Leakiness. The facts specify that Amanda completed the form, so leakiness isn’t an issue.
- Alternative: the TOS says “your use of this service represents your agreement with these terms.” This is a meaningless statement because of its buried placement and the ambiguous call-to-action where using the service might be done without knowing of the terms or intending to be bound.
- Alternative: Register.com v. Verio. SweetDads could argue that Amanda took the benefits knowing of the terms. However, how did Amanda learn the terms, other than by the clickthrough? Plus, we don’t have any evidence of Amanda’s repeated use of SweetDads. For all we know, she set up the fake profile once and never came back.

Amendment. The TOS says SweetDads can unilaterally amend the terms with or without notice. This sets up yellow flags about the contract per Blockbuster. However, the provision continues that SweetDads will “use any reasonable means available to let you know of any changes.” This promise should cure any concerns about notice, but not about SweetDads’ unilateral amendment power. Amanda could argue that power renders the entire contract illusory. I don’t think that argument would prevail, but it’s not frivolous either.

Breach. Amanda breached many TOS provisions, including the restrictions on “inaccurate, misleading, or false” content, photos of third parties without permission, and impersonation. (There are more provisions to cite). I think SweetDads’ breach of contract claim against Amanda would succeed.

California Jurisdiction Over Amanda

General jurisdiction. The facts specify that Amanda lives in Nevada, and we don't have any other evidence of her physical presence in California. She will not be subject to general jurisdiction in California.

[California's long-arm statute is co-extensive with the Constitutional boundary.]

Specific jurisdiction—minimum contacts. The facts don't specify much to support Amanda having minimum contacts in California. There's no evidence of her offline activity in California. We only have evidence of her online behavior, and even that isn't resolute. She did engage with Google, headquartered in California, and SweetDads, also located in California (the address is in its TOS). Per ALS Scan, she directed electronic activity into California through her geofenced ad buys at Google; and that manifested an intent to interact with Californians; and those interactions lead to the relevant causes of action. The Toys 'R' Us test is less clearly applicable; Amanda didn't target the fake profile to California, though she did target the ad buy to California.

The Hemi case might say that Amanda opted into California law by affirmatively choosing to send her search ads into California (and she could have opted out of California jurisdiction by directing the search ads to exclude California). However, unlike an e-commerce site, the delivery of Amanda's search ads into California didn't take advantage of California's laws or public infrastructure.

Specific jurisdiction—Effects test. Did Amanda expressly aim intentional tortious actions at California and cause foreseeable harm? That seems exactly like what she did. Knowing that Brittney was located in California, Amanda set up a fake profile to attack her. More importantly, Amanda then advertised that fake profile only to California residents, with the intent of disrupting Brittney's base of potential clients. I think Brittney could establish personal jurisdiction in California over Amanda on this basis, and possibly the minimum contacts basis as well.