

Fall 2018 Internet Law Final Exam
Student Sample Answer

[Eric's introduction: this is an actual exam submitted by a student in the Fall 2018 Internet Law course. It provides an example of what one of your peers actually accomplished within the exam's time and word count limitations. I have not attempted to correct any errors or identify any omissions in the exam. Please refer to my sample answer for a more comprehensive and possibly more accurate answer to the exam.]

Word Count: 2,792

Brittney v. Amanda

Copyright

Direct Infringement.

By uploading Brittney's selfie Amanda directly infringed Brittney's copyright. Selfie's are an original work of authorship and its likely Brittney owns the copyright. Therefore, Amanda uploading it to SweetDads qualifies as a violation of Brittney's public distribution, public display and reproduction rights. Amanda could argue she had an implied license to the photograph. This is unlikely considering Brittney made an effort to prevent Amanda from seeing it. Also Brittney didn't give Amanda an express license to publicly distribute the selfie. Given the private and provocative nature of the selfie, Brittney probably didn't register the copyright in time to qualify for the statutory damages and attorneys fees, but could likely recover actual damages.

Fair Use:

Amanda will assert a fair use defense for the upload. The purpose and character of the work is neither commercial nor non-profit educational use. This wasn't a transformative use, since nothing suggests Amanda modified it, which weighs in Brittney's favor. While photos are factual, the selfie was unpublished, which weighs against Amanda. It's presumed 100% of the selfie was taken. Even if portions were cut, its likely Amanda maintained the more sexually suggestive parts, since she likely sought revenge, for the affair, and this weighs in Brittney's favor. A market effect is unlikely: the photo was not meant to be published, making it unlikely Brittney intended to profit from the selfie. The selfie was private matter, and given Amanda's bad faith, even if there's a market for sexual selfies a court will likely protect Brittney's interest.

Privacy:

Public Disclosure of a private fact: There are two potential private facts: 1) Brittney took the photo – specifically she’s posing in lingerie and 2) the posting of her cellphone number and full name on the profile. With regards to the photograph, the facts do not specify whether it was taken in public or in private, but it was presumably taken in a private place given the selfie’s sexual nature, making the publishing a public disclosure (revenge porn claim). Brittney taking the selfie is a private fact. Brittney could argue by publishing her full name and cellphone number, unlike *Zaren*, people could clearly identify. Also within 24 hours of the posting she experienced hundreds of calls so there was a misuse of the information. Amanda can argue the information was in the public domain (i.e the yellow pages), and wasn’t a public disclosure of a private fact. Brittney likely has a claim because of the misuse.

False Light: Brittney could bring a false light claim against Amanda for both the content in the profile’s narrative and the Google ad. The juxtaposition of the selfie with the narrative Amanda wrote creates a false impression that she’s selling sex. The ad posted to Google indicating she’s a psychiatrist and “offered a wide range of services,” juxtaposed with URL to the fake profile also implies she sells sex. Although both the selfie and Brittney offering a wide range of services are true, Amanda created a false impression in both scenarios.

Defamation:

Prima Facie Case: Brittney will argue she has prima facie cases of defamation. First, the narrative of the profile contains purely false statements of fact: “2 hours for 200 [roses]” and “overnight for 500 [roses],” “the more you pay…” and Brittney being 17. The narrative isn’t written in a funny way, and because the rose emogji’s are an industry standard for commercial sex, a SweetDads user will likely think it’s true. Second, it was published on SweetDads for others to see. Amanda could argue after viewing the selfie users realized Brittney was older than 17 and realized it was a joke, but it’s possible for teenagers to look older. Also her association with commercial sex could severely harm her reputation: she could lose business opportunities because patients or doctors might see the profile and not want to be associated with her. Brittney could claim Amanda’s Google advertisement defamed her, but because her infomercials promote

self-improvement resources and she's also a psychiatrist so the statement that she offers "a wide range of [psychiatric] services," is likely true.

Amanda could claim first amendment protection because the matter is of public concern since Brittney is a public figure. Brittney might be a public figure because of her nationally broadcasted infomercials, and the trademark in her name. Thus, Brittney selling commercial sex could be a matter of public concern. Yet, if she was selling sex, she'd likely find other private channels to solicit work because of its illegality. If Amanda created the narrative to get revenge against Brittney, she might have acted with malice (recklessness about the veracity of the facts). It's likely Amanda was seeking revenge making and therefore the 1st amendment claim will fail.

Brittney's defamation suit could cause a Streisand effect and Amanda might be judgment proof, so it might not be in Brittney's best interest.

Intentional Infliction of Emotional Distress & Anti-Stalking/Harassment: Brittney could claim the high number of volumes resulting from Amanda publishing the profile caused her emotional distress. Brittney will argue the amount of calls received amounted to harassment by Amanda.

Cal Civ. Code 1708.85: In California Brittney have could have a claim because Amanda intentionally distributed the sexually provocative photo without consent, but it's not a nude selfie so it might not satisfy the exposure of a body part requirement.

Trespass to Chattel:

For all these claims the unauthorized use requirement poses a barrier to Birttney's claim.

Common Law: Brittney might have a possessory interest in her voicemail, although she's likley a lessee, leasing from the cloud storage owner. Since the lessor probably doesn't care about the Brittney's voicemail, Brittney likely has a possessory interest. There could be a measurable loss to the system (Hamidi), because the hundreds of calls caused the system to exceed capacity and lose productivity [assuming we hold Amanda responsible for calls]. This could also qualify as harm under the majority rule. Amanda will argue her acts weren't the proximate cause of the harm because the line is Brittney's business line and her patients could've taken up the storage.

Amanda lacked actual and constructive notice the use was unpermitted. There's no breach of contract and it's possible Brittney could've sent a cease and desists, if she knew it was Amanda. Amanda was a griper, like Hamidi, and the likelihood of subsequent actors acting similarly and going after Brittney because of an affair is low (Register.com). Brittney did exercise self-help by purchasing more storage. However, the unauthorized use poses a barrier to this claim.

CFAA: Brittney could still have a claim under the CFAA – even if she lacks possessory interest - because it applies to the impairment of the integrity or availability of data because of unauthorized use. There's a barrier with the unauthorized use requirement (see above). Brittney would need to prove the calls resulted in losses of \$5,000, Brittney bought more storage and also lost business while her voicemail was at capacity. The facts don't indicate this but maybe she spent money changing her number. Thus she spent time on remediation and this could reach \$5,000 of damages, but it's uncertain.

Cal Penal Code 502: Amanda accessed the computer system or network and caused harm because Brittney had to buy more space and lost business. However, it's unlikely she did so “knowingly without permission.”

Trademark:

Direct Infringement: Brittney owns a valid trademark, that's registered giving her priority over Amanda. Amanda made a use in commerce by buying the keyword ad and the trademark is in the copy. In terms of consumer confusion: the mark might be strong since it's in national infomercials, and also Amanda had bad faith –revenge - in using the mark, both of these factors weigh against Amanda. Sophisticated consumers could solicit Brittney's services, because people extensively research potential psychiatrists, and thus clicking the profile link in the ad they'd realize it was fake. If the click through numbers from the URL in the ad validly indicate consumer confusion, then only 8/1,000 were confused, which weighs against Brittney. Brittney would argue there was initial interest confusion because the profile URL received 8 clicks, which means the mark was used to capture initial consumer attention. This doctrine is likely dead letter. The claim could go both ways.

Brittney could've had Google block ads with her trademark in the copy.

Nominative Use Defense: Amanda can argue the profile refers to Brittney, who owns the trademark, which qualifies as nominative use. However Amanda's use of Brittney's photo and her full name doesn't support she used the minimal amount to identify the Brittney. Therefore it's unlikely she has a defense.

Trademark Dilution: Brittney has national infomercials and has national recognition with doctors, but this might not establish the requisite fame: it's pretty rare someone gets fame from infomercials although it has happened. Amanda didn't add a second meaning to the trademark so there's no blurring. If she satisfies the requisite fame, there could be tarnishment due to the URL link to the SweetDads profile in the advertisement. This could harm the trademark's reputation because the profile implies she's selling sex causing people to not solicit her psychiatric services and the broadcast might take down infomercials. (See above for nominative fair use defense).

Publicity Rights: Although Amanda's keyword ad uses Brittney's name and likeness it might not be a publicity rights violation because Amanda isn't getting any commercial gain from it – not receiving money from the profile visit- so this is unlikely. Also this claim might've required a takedown notice from Brittney for violating her publicity rights, which didn't occur.

Brittney v. SweetDads

Copyright:

Direct Infringement: Brittney will argue SweetDads directly infringed her copyright by publishing Brittney's profile containing the selfie. This claim is unlikely to succeed because SweetDads lacks volition. Although SweetDads has employees look for profiles promoting sex trafficking and SweetDad filters out pornographic photos, this editorial discretion doesn't mean SweetDad's had volition. (Cablevision). SweetDads can argue they were effectuating the request of Amanda (user) to publish the content. (Cablevision).

Contributory Infringement: If Amanda is held directly liable for the copyright infringement, SweetDads could be contributorily infringing, but its unlikely. SweetDads will argue they lacked actual knowledge, because Brittney didn't send a 512(c)(3) take down notice, just said fake profile. Generalized knowledge a fake profile could contain copyrighted content is insufficient. SweetDads isn't inducing infringement by requiring profile photos, because they don't require infringing profile photos.

Vicarious infringement: Brittney will argue SweetDads has the right and ability to control or if this is in the 9th circuit they had substantial influence on the infringer's acts. Most user generated content sites have control. However, there needs to be control over the specific infringing post, it's not just the ability to remove the content. (Veoh). There is a financial interest because SweetDads makes money - \$25- off publishing profiles.

Fair Use defense: This is a defense to direct, contributory and vicarious infringement. There's no transformative use of the selfie, and SweetDads gets revenue from publishing the profile with the copyrighted selfie, which weighs in Brittney's favor. Although there's no market it's likely there's not fair use defense.

DMCA Safe Harbor 512(c): SweetDads has an agent for 512(c)(3) notices, and because Brittney didn't send a 512(c)(3) notice they are eligible for the safe harbor, since it's likely the remaining 13 elements are met. The material is stored at the direction of users: users deliver the content to SweetDads for the express purpose of SweetDads publishing it. Since Brittney didn't send a takedown notice, SweetDads likely lacked actual knowledge. Generalized knowledge that users could post photos that are copyrighted is not enough. The selfie itself is unlikely a red flag because the person in it takes and could have a copyright, but the knowledge of the fake account could be a red flag. It's unlikely SweetDads had the ability to control the infringement because it would need to be with regards to the specific infringing post (Veoh). There's no evidence of inducement nor is there of any willful blindness.

Defamation: If Brittany brings a defamation suit against SweetDads, § 230 eliminates liability for third party -Amanda's- content. SweetDads is an interactive computer service provider -it's a

website - and it will be treated as a publisher of Amanda's content, and the information was provided by Amanda who is a third party. Despite filtering for pornographic content, and the increased promotion of user content –promoting Brittney's profile in "new" and "hot" profiles - SweetDads is eligible for protection. Receiving notice of the fake profile from Brittney and promising to take it down doesn't prevent § 230 protection and neither do the privacy and defamation claims against Amanda.

230 Exceptions:

Federal Criminal Law: § 230 doesn't protect SweetDads against federal criminal prosecution.

Federal IP Law: If the copyright or trademark claims succeed § 230 doesn't apply.

State IP Law: If we are in the 9th circuit 230 still applies despite the publicity rights claims, but outside it does not.

FOSTA: The content in the narrative box might prevent 230 protection if it violates FOSTA, specifically SweetDads could be seen as violating 1591 – supporting or facilitating commercial sex trafficking – or it could be seen as promoting prostitution which violates 2421A. The content might violate state criminal laws.

Roommates.com Exceptions: 1) SweetDads doesn't encourage illegal content through the drop-down menus, unless requiring someone put in their ethnicity is illegal. The facts don't show the options in the ethnicity bracket, but it might offer a no response option, which supports the legality. The narrative box is a form of encouraging users content and SweetDads is just amplifying member messages. 2) There's no contribution to alleged unlawfulness of member content, the promotion of the page doesn't support this. 3) The site isn't designed to advance an illegal objective, though people might expect sex it's not meant for that.

Trademark Infringement:

Direct: Brittney will argue SweetDads is directly infringing the trademark because of the profile, and because they got money for Amanda publishing it there was a use in commerce (commerce clause reaches it). This is weak because SweetDads didn't make the account.

Contributory: Brittney will argue SweetDads is contributorily liable for Amanda's trademark infringement because it has control over the website which was used to infringe her trademark. Brittney will argue her notifying them of the fake account and to take it down gave SweetDads actual notice. Thus it's likely there's actual knowledge.

Publicity Rights: Amanda pays SweetDads to publish her profile, so by using Brittney's name and likeness SweetDads gets a commercial advantage and they likely infringed.

SweetDads v. Amanda

Contract Breach: To join SweetDads its mandatory that users navigate through the account registration page. Nothing suggest it's leaky so its mandatory and non-leaky. Below the "join now" button there's a clear if then statement, indicating the consequences of joining. The privacy policy and the terms are hyperlinked and in red, drawing the users attention, and users can see the terms. The space between the "join" button and the terms, makes it possible that users on different browsers might not see the terms and join without assenting to the terms. Despite this it's likely enforceable.

The modification provision in the terms gives SweetDads the ability to unilaterally modify the terms which can deem a contract illusory. (Blockbuster). SweetDad can change the terms when it wants and will notify users, but the facts don't indicate how users will identify the changes. A redline with the changes may be sufficient. Alternatively if users need search for the changes it might not be proper notice. Nothing suggests there is a way to accent to the amendments, which is problematic. However, the notification to users might support the enforceability of the contract.

Although Amanda’s conduct violates most of the “content posted by users terms” – impersonation, inaccurate and false information etc. – the amendment provision puts the entire contract at risk. Even if SweetDads hasn’t amended, its existence weakens the contract. Amanda could also argue the amendment provision is unconscionable.

Brittney v. Amanda: California

For Brittney to pursue the claims in California the court needs to have jurisdiction over Amanda, which they likely have. California lacks general jurisdiction over Amanda: she isn’t a California resident, doesn’t have systematic contact with the state and hasn’t consented to being sued there. California could have specific jurisdiction over Amanda because she directed electronic activity towards the state by purchasing the Google ads and running them in California only. Therefore she intended to engaging in business there. (ALC Scan). Amanda’s conduct could’ve established minimum contact with California because she only wanted the ads running there. We lack facts to suggest why she chose California. If it was to avoid being haled into court in other states (Hemi) then this satisfies the minimum contacts test.