



**Internet Law (Law 793)**  
**Final Exam Sample Answer**  
Prof. Eric Goldman • Fall 2020

I derived this question from an ongoing lawsuit, *Cornette v. Graver*. I reviewed these two rulings while drafting the question:

- 2020 WL 1643370 (W.D. Pa. April 2, 2020),  
[https://www.govinfo.gov/content/pkg/USCOURTS-pawd-3\\_19-cv-00219/pdf/USCOURTS-pawd-3\\_19-cv-00219-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-pawd-3_19-cv-00219/pdf/USCOURTS-pawd-3_19-cv-00219-0.pdf)
- 2020 WL 4059589 (W.D. Pa. July 20, 2020),  
[https://www.govinfo.gov/content/pkg/USCOURTS-pawd-3\\_19-cv-00219/pdf/USCOURTS-pawd-3\\_19-cv-00219-1.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-pawd-3_19-cv-00219/pdf/USCOURTS-pawd-3_19-cv-00219-1.pdf)

This was an easy exam. All of the issues are obvious. As a result, most of you discussed most of the big topics. However, there were many sub-issues to address. Nearly every paragraph in my sample answer was a point-scoring opportunity. If you discussed the big issue but omitted the specific issues in each paragraph, you probably left points on the table.

While I generally didn't make scoring distinctions based on these issues, the exam had some subtler issues, including:

- Shopify's scienter regarding Graver's first store compared to Graver's second. Many of you talked only about the scienter for one store, not both, or treated them as the same.
- Graver's different trademark uses and how trademark law might treat those uses differently.
- The implications of a print-on-demand service that hosts Graver's files online and then prints and ships ordered items offline. As we discussed in class, Section 230 doesn't apply to offline activities, and Section 512 probably doesn't extend that far either. A precise answer would have distinguished between the online and offline activities.

A reminder (for my sanity): never use the term "Internet service provider" or "ISP."

\* \* \*

### **Graver's liability**

#### *Trademark Infringement.*

- Ownership. The facts specify that Cornette has a protectable trademark (personal names are descriptive trademarks, which means Cornette achieved secondary meaning).
- Priority. Graver referred to Cornette's existing brand.
- Use in commerce. Graver made four uses of Cornette's name: (1) the Clownette product name, (2) the domain name, (3) the store's name, title tag, and keyword metatags, and (4)

the hashtag. If “use in commerce” means the Commerce Clause’s scope, then all four activities qualify as a use in commerce. Otherwise, the uses only qualify if they appear on product packaging or ad copy.

- The product name is clearly a use in commerce.
- The domain name and hashtags advertised an e-commerce website, so they probably qualify. Not all hashtags are commercial use, but Graver used the hashtag for advertising purposes. *See* Alexandra J. Roberts, [Tagmarks](#), 105 CAL. L. REV. 1099 (2017).
- Graver displayed the name and title tag on the store page to promote it, so they should qualify.
- Keyword metatags probably are a use in commerce even if consumers don’t see them (Rescuecom).
- Likelihood of consumer confusion about product source.
  - Graver made three different usages of the trademark:
    - the “Jim Cornette Clownette” term
    - the “Clownette” term in isolation
    - the phrase “Tattoo Jim Cornette”
  - The “Clownette” term appears on the t-shirt and in some of Graver’s disparaging remarks. “Clownette” looks and sounds similar to “Cornette,” but it differs in spelling and meaning. The associated image isn’t flattering to Cornette. However, wrestlers sometimes adopt self-disparaging aliases, so wrestling fans might wonder if Cornette adopted the Clownette term for himself. The “Jim Cornette Clownette” store title, in isolation, could further exacerbate consumer confusion by implying that Jim Cornette adopted a Clownette alias. However, in light of Graver’s taunts and disparagements directed to Cornette, few consumers would misunderstand that Clownette reflects Graver’s criticisms, not Cornette’s self-description. Also, wrestling fans will proceed carefully to ensure they publicly represent the right team.
  - The term “Tattoo Jim Cornette” might reflect Cornette’s ambition to get a(nother?) tattoo, but in light of Graver’s shtick and threatening words, adding the word “tattoo” is ominous.
  - Looking at Graver’s marketing materials in total, I think most consumers would easily conclude that the t-shirts aren’t from Cornette or authorized by him.
  - Note: some of you misunderstood the “Defendant’s Use of the Mark” factor from the Ninth Circuit’s consumer confusion test. It considers the similarity of the parties’ respective goods/services using the trademark. Consumer confusion isn’t likely with dissimilar goods (e.g., plaintiff sells pianos; defendant sells enterprise software). Confusion is more likely when the goods are identical or related (e.g., restaurants vs. packaged food sold in groceries). In this case, both parties sell identical goods (t-shirts), so this factor weighs in Cornette’s favor.
- Initial interest confusion. Several of Graver’s activities arguably “capture initial consumer attention” using Cornette’s trademark (Brookfield). However, Cornette needs to “demonstrate likely confusion, not mere diversion” (Network Automation). As discussed above, Graver’s disparagements ultimately dispel any confusion. Also, his domain name, standing alone, doesn’t create initial interest confusion (Lamparello), and I

think the same principle applies to title tags. But courts may treat third-party trademarks in keyword metatags as per se trademark infringement.

- Defenses
  - Nominative use.
    - Graver has no good substitute for referring to Jim Cornette other than his name (unless Cornette has well-known aliases).
    - Graver used the Jim Cornette trademark multiple ways, so a court might say that he used more than was reasonably necessary. For example, Graver would be in a stronger legal position if he hadn't used the "Tattoo Jim Cornette" domain name or hashtag.
    - Graver strongly dispelled consumers' reasons to think Cornette authorized Graver's activity.
  - Descriptive fair use. Personal names are descriptive trademarks, and Graver used Cornette's name to describe his t-shirt offering.
- Trademark conclusion: I think Graver's usages don't create actionable confusion and, if they do, the fair use defenses should apply.

#### *Trademark Dilution.*

- Famous mark. Cornette has some consumer recognition, as demonstrated by his 2M listeners/month and 170k Twitter followers. However, I think this is niche fame. Wrestling aficionados may know Cornette, but I doubt "the general consuming public of the United States" does.
- Use in commerce. See above.
- Use began after fame. I assume.
- Dilution likelihood.
  - Blurring. Graver refers to Cornette, so he does not create a new definition for "Jim Cornette." However, Graver creates the variant "Clownette," but there's no blurring if consumers think that's a different term than "Cornette."
  - Tarnishment. Graver disparages Cornette with his marketing and the Clownette term, so Graver may harm the mark's reputation. However, Graver isn't associating a mark with pornography, the paradigmatic form of tarnishment.
- Defenses. Fair use is a defense to dilution, and I think both fair use defenses help Graver.

#### *ACPA.*

- Graver registered and used the domain name "TattooJimCornette.com," which includes the trademark verbatim. However, the addition of "tattoo" may distinguish it enough from the trademark to make it not "confusingly similar." As discussed, I don't think Graver dilutes the trademark.
- I'm not sure Graver has a bad faith intent to profit from the domain name, either. He didn't try to sell the domain name, so he's not a traditional cybersquatter; plus his seeming fair use legitimizes his actions. I think Graver's risk of ACPA liability is low.
- We didn't discuss 15 USC 8131 in class. It protects people's names from being registered as domain names for profitable resale, which the facts don't support. California's state

domain name law, which protects individual names, may apply if not preempted by the Dormant Commerce Clause.

### *UDRP.*

- As just discussed, the domain name isn't identical, and may not be confusingly similar, to "Jim Cornette."
- Graver's fair use gives him legitimate interests in the domain name.
- Graver's mean-spirited activities are not necessarily "bad faith."
- A UDRP action makes no sense because transferring/suspending the domain name won't make Graver any less annoying. (An ACPA action makes sense only if Cornette is already suing Graver for other reasons).

### *Publicity Rights.*

- "Clownette" isn't Cornette's name. However, the store title and tweets contain Cornette's name and act like ad copy. The t-shirts merchandise Cornette's face, and publicity rights get weird with merchandising. Also, the First Amendment likely protects Graver's criticisms.

### *Copyright.*

- Ownership of valid copyright. The facts say Cornette owns the IP rights to his photo.
- Violation of 106 rights. Graver created the Clownette image using Cornette's photo, which means Graver may have reproduced the photo, or his embellishments might constitute a derivative work. Graver distributed the image through his store and t-shirt and displayed the image in his store.
- Fair use.
  - Nature of use. Graver sells the t-shirts, a for-profit commercial use. However, Graver arguably transformed the photo. Graver added the clown imagery to the original, plus the "clownette" name. The resulting image added something new to the original, with a different character or purpose (disparagement of Cornette).
  - Nature of work. Headshot photos are often fact-like, and the photo was "published."
  - Amount taken. It's not clear if Graver cropped the original photo. Graver couldn't depict "Clownette" without taking 100% of Cornette's face.
  - Market effect. Both Cornette and Graver sell t-shirts with similar images, but the t-shirts probably don't compete given the parties' feud. Graver also isn't encroaching a licensing market because Cornette wouldn't license the photo to Graver for disparaging purposes.
  - I think Graver qualifies for fair use, despite his commerciality.
- Economic viability. If Cornette made a timely copyright registration, he can get statutory damages (probably \$30k at most) and attorneys' fees. Otherwise, actual damages won't exceed \$25,000—less than the likely attorneys' fees.

### *Criminal Threat.*

- Graver urged his followers to “permanently tattoo a clownface” on Cornette. The threat contains specific details, like the rusty needle, and the domain name and hashtag reinforce it. However, it’s hard to take the threat seriously. The wrestling community is notorious for beefs, trash talk, and fake threats (often scripted, which this isn’t); the clown emoji might reduce the perceived threat; and we don’t know if anyone is physically close enough to Cornette to implement the threat. With the ongoing war of words between Graver and Cornette, it feels like a hyperbolic joke.

### *Defamation.*

- False statement of fact. Graver accuses Cornette of stealing money from his employer, a claim that can be proven true/false. Graver bolsters the statement’s credibility by calling it “evidence.” Nevertheless, as part of the beef between wrestlers (who are notorious for play-acting their personae even outside the ring), it’s hard to take anything Graver says seriously—especially because courts assume readers generally are more skeptical of everything they read online. We don’t know if Cornette actually stole money, so we can’t judge its falsity.
- Publication. Graver communicated his claim to store page visitors.
- Injury to reputation. Accusations of a crime may be per se defamatory. At a minimum, it likely lowers people’s willingness to deal with Cornette.
- First Amendment defense. Cornette may be a public figure given his big podcast audience, his Twitter following, and his wrestling industry visibility. Is employee theft a matter of public concern? Ordinarily not (until it leads to a criminal conviction). If Graver’s accusations are a matter of public concern, then Cornette needs to show Graver had actual malice. We don’t know if Graver had support for his claim (which might defeat actual malice) or just made up the claim, which would be actual malice.
- Economic considerations. Cornette could lose an anti-SLAPP motion and have to pay Graver’s defense costs. Also, Cornette risks the Streisand Effect by calling attention to Graver’s claims, though Cornette might like the additional publicity.

### *Breach of contract.*

- Formation.
  - Manifestation of assent. Shopify’s “create an account” page is a “sign-in-wrap” (ugh). As *Meyer v. Uber* indicates, we need evidence that Shopify provided reasonably conspicuous notice of the contract terms’ existence and Graver unambiguously manifested assent to those terms. Some considerations:
    - Call-to-action placement. The placement is just OK. The page is relatively uncluttered, which makes each element somewhat conspicuous. However, the call-to-action’s font size is smaller and grayer than the rest of the page. Also, its placement next to the CAPTCHA, instead of the “create account” button, may be confusing.
    - Call-to-action wording. The language uses an if/then grammar, but the “by proceeding” call-to-action doesn’t match the “create account” button label.

Because of the call-to-action's location, consumers may think that completing the CAPTCHA is "proceeding." This isn't fatal if the CAPTCHA is mandatory; but the CAPTCHA's "terms" create a potentially confusing collision of calls-to-action.

- Presentation of terms. The call-to-action displays the words "Terms and Conditions" in blue, like Uber did, but without the underline. Is the blue enough to signal a link to reasonably prudent consumers? Probably.
- Conclusion. The call-to-action should be larger, in darker font, moved next to the "create account" button, and phrased to link the if/then statement with the action consumers will take. A second click would clinch the deal. Still, I rate formation likelihood at 90%.
- Register.com. Could Shopify use Register.com v. Verio as a backstop? Shopify emailed Graver a warning not to come back; Graver did anyway and "took the benefits" of a replacement account. Did Graver know the terms applicable to his return? It may depend on whether Shopify's warning communicated restrictions on Graver's use, but Graver knew he was no longer welcome on Shopify's service.
- Breach. Graver breached several TOS terms, including the restrictions on use for "illegal purposes" (see the legal violations discussed above) and creating a new account.
- Amendment. Shopify's TOS says "we can amend at any time with no notice," which may invalidate some or all of the contract per Blockbuster.

### *Trespass to Chattels.*

- Common Law.
  - Chattel use. Graver operated both his first and second stores on Shopify's servers.
  - Lack of authorization.
    - Store 1: Graver violated the TOS that he apparently agreed to (see above), so he may have exceeded his authorization.
    - Store 2: In addition to the TOS restrictions, Shopify emailed Graver actual notice that further server use was unauthorized.
  - Self-help.
    - Store 1: Shopify took self-help by terminating Graver's account.
    - Store 2: No evidence of further self-help.
  - Harm.
    - From store 1, Shopify's only apparent "harm" was Cornette's complaint, which Shopify easily remedied. I don't think this is enough "harm" to support common law TTC.
    - Regarding store 2, Shopify's harm included:
      - 1 million visits in 24 hours. That sounds like a lot, but was this an unusual volume or did it impose unusual strain or cost on Shopify's systems?
      - 30 minutes of 0.1% visitors getting a "server too busy" response. This is a measurable loss to system resources that nominally satisfies Hamidi. Nevertheless, a court might view this as de minimis harm; after all, the server worked 99.9%, and the problem lasted for only 30 minutes. Further, did Graver cause this outage? As we discussed in class, it's not clear if we

should treat Graver's activities as part of the base or the marginal activity that put Shopify over the edge. Also, Graver instigated the traffic, but potential shoppers clogged the servers, not Graver directly.

- Customer complaints about Graver's store. These complaints imposed a real cost on Shopify, and I think they count as cognizable harm in the majority test. However, I don't think the complaints and their associated costs would count under Hamidi because they don't harm computer system resources.
  - Overall, I think Store 2 constituted common law TTC.
- CFAA
  - Unauthorized usage. I discussed authorization above, except for CFAA purposes, the TOS may not define authorization (Nosal), and Shopify's email warning to Graver should count as a "cease & desist" (Power Ventures).
  - Harm. With respect to Store 2, Shopify can count the costs from the server problems (e.g., extra operating costs and lost revenue) and shutting down Graver a second time, but I'm not sure if the customer complaint costs count towards the \$5k threshold.
  - Shopify probably has a CFAA claim against Graver.
- 502. Same as the CFAA, except that 502's reduced harms mean that Store 2 should create liability, and perhaps the TOS breach with Store 1 does too.
- Graver also might have criminal liability under CFAA and 502.

## Shopify's Liability

### *Section 230.*

#### Prima facie case:

- ICS provider/user. Shopify's website makes it an ICS provider, but not with respect to the t-shirts that Shopify manufactures and delivers because those activities take place offline.
- Publisher/speaker claims. Section 230 covers defamation and publicity rights claims.
- Provided by another information content provider. The claims relate to Graver's content.

#### Section 230 exclusions:

- Federal crimes exception. Section 230 preempts any civil claims based on federal crimes but doesn't apply if the USDOJ prosecutes Shopify for Graver's threats. Indeed, arguably Shopify "transmits" Graver's messages. However, the First Amendment probably protects Shopify.
- IP exception.
  - Section 230 doesn't apply to federal copyright or trademark claims.
  - In the Ninth Circuit, Section 230 applies to state IP claims, including publicity rights, but not for making and shipping the t-shirts.
- Promissory estoppel exception. Cornette could claim he relied on Shopify's TOS restrictions on illegal activities. While Section 230 doesn't preempt Cornette's promissory estoppel claim, it won't succeed because standard contract terms normally

can't support promissory estoppel, Cornette isn't a beneficiary of the TOS restrictions (Noah v. AOL), and I'm not sure how he detrimentally relied.

- Roommates.com exceptions. Shopify doesn't encourage illegal content. Instead, Shopify's TOS restricts illegal content and Shopify actually shut down Graver's alleged illegality (which demonstrates that Shopify *discouraged* illegality, even if not required by Section 230). No evidence suggests that Shopify required Graver to input illegal content.
- Marketplace exception. Section 230 may not protect any liability for accepting orders. This doesn't affect the defamation claim, which is pre-transaction, but it might restrict Section 230's application to post-sale publicity rights violations.

Graver's account termination claim. Section 230(c)(1) preempts Graver's claims against Shopify for terminating his account. Section 230(c)(2)(A) should also apply because Shopify probably acted in good faith by terminating Graver's account for illegal conduct, but it will be more costly for Shopify to win.

#### *Trademark.*

- Direct infringement. Shopify selling, making, and shipping the t-shirts may directly infringe (if the t-shirts infringe at all). Shopify could invoke the 1114 defense for "innocent" printers/publishers, but will that apply to Shopify's retailing?
- Contributory infringement. Shopify may be contributorily liable for Graver's alleged infringement. Shopify supplies the physical products used to infringe (making and shipping the t-shirt), and it controls the online instrumentalities Graver uses to infringe, including the store. Shopify terminated Store 1 in response to Cornette's notice, but Shopify didn't terminate Store 2. Shopify didn't get a notice about Store 2, so it continued supporting Store 2 without knowing it was infringing; but Cornette could say Shopify should have known of the infringement because Store 2 was identical to Store 1 and Shopify got customer complaints about Graver. I think Shopify defeats contributory infringement because it honored the takedown notice for Store 1 and never got a takedown notice for Store 2.
- Vicarious infringement. The facts don't suggest any principal/agent relationship between Shopify and Graver.

#### *Copyright.*

- Direct infringement. Shopify would say it lacks volition because Graver created his stores using Shopify's tools. Either way, Shopify may be directly liable for physically manufacturing (reproducing) and shipping (distributing) the t-shirts. Shopify's fair use defense will look similar to Graver's.
- Contributory infringement.
  - Direct infringer. I assume Graver infringes Cornette's copyright (but he may not).
  - Knowledge of infringing activity. When Cornette complained, Shopify terminated Store 1. Does Shopify have knowledge of Store 2's infringing activity, either because it's identical to Store 1 or from the customer complaints? Note: a 512(c)(3) notice is sufficient, but not necessary, to create knowledge for the prima facie test.



- Material contribution. If Shopify has the requisite knowledge, continued hosting of Store 2 constitutes a material contribution.
- Vicarious infringement.
  - Direct infringer. Again, I assume Graver directly infringes.
  - Right and ability to supervise. Shopify's TOS gave it supervisory authority and Shopify had the technical capacity to terminate Graver, but in both cases, Shopify had the typical authority of any online service. In contrast, Shopify could monitor and cut off its physical manufacturing and shipping services. I'm not sure how a court would evaluate this factor.
  - Direct financial interest. Shopify gets paid per item, so it profits as sales increase.
- Section 512(c) defense. Thoughts about selected elements:
  - "Stored at the direction of a user." Graver uploaded the image in question, but the offline manufacturing and shipping may not qualify as "storage."
  - Repeat infringer policy. Store 2 is a repeat infringement, but Shopify may not know that Store 2 is infringing and Shopify isn't obligated to ensure staydowns. 512(m) says that Shopify doesn't need to affirmatively police for infringements.
  - Actual knowledge. Shopify terminated Store 1 based on Cornette's notice, even if it wasn't a 512(c)(3) notice. The facts don't indicate that Cornette sent a 512(c)(3) notice about Store 2. If Cornette didn't send a second notice, so Shopify shouldn't have actual knowledge that Store 2 infringes. We need more details about the customer complaints to determine if they could create red flags of infringement.
  - Right and ability to control. Shopify resolved the specific known instance of infringement in Store 1. Veoh also required that Shopify "exert substantial influence" on Graver's activities (whatever that means). Graver appears to have substantial control over how he builds and markets his store.
  - Direct financial interest. Veoh says that this element must mean something different than the prima facie element, but what? I'm not sure what alternative articulation governs the 512(c) context.
- My view: Shopify may be directly liable for its offline manufacturing and shipping activities. Regarding Graver's online activities, like hosting the Clownette image, Shopify may face vicarious copyright infringement, but 512(c) probably protects Shopify if it properly satisfied the formalities.