



Internet Law (Law 793)
Final Exam Sample Answer
Prof. Eric Goldman • Fall 2021

Overview

Compared to past years' exams, this is an easy exam for two reasons. First, I reduced the number of issues in play; it's at least 10% less than in prior years. Second, I structured the plaintiff-defendant pairs in a way that guided you to the issues. Prior years' exams typically use a more open-ended call-of-the-question, which is substantially harder because it requires more judgment about whether or not to discuss an issue.

Sam v. Heidi

Defamation

False Statement of Fact. Heidi made two main statements: (1) Sam has an STD, and (2) he fails to disclose this information to romantic partners. Though Dylan compiled the video, Heidi instigated the video and provided the video script with the statements at issue.

Bauer v. Brinkman helps analyze if the statements are fact or opinion/rhetorical hyperbole.

- Definite/unambiguous meaning.
 - Many ailments can be characterized as STDs, so the reference is ambiguous. Still, most people would consider *any* STD as problematic, even if the precise ailment is undefined.
 - Failing to disclose STD status has a definite meaning—it's typically viewed as a lie by omission.
- Objectively capable of proof.
 - Each STD has a medical definition that can be tested negative/positive.
 - Failing to disclose STD status can be confirmed by finding out what Sam said to romantic partners.
- Context around the statement.
 - The “joke” of quoting a song lyric undermines the seriousness of the entire statement. The whole statement sounds like a spiteful ex who may be motivated to exaggerate. Plus, Taylor is well-known for teasing her fans with hints about her future activities (she [has said](#): “I love to communicate via Easter eggs”), so fans could interpret any Taylor Swift video details as an Easter egg, not a fact claim. However, for viewers who think Taylor Swift is a goddess who would never lie to them, Taylor uttering the statements boosts the statements' credibility.
- Social context.
 - Viewers are inherently skeptical of online videos. If viewers know this is a Cameo video, they may assume the stars are relaying third-party messages without doing independent fact-checking. This context reduces the likelihood that the video's

statements are considered facts. I'd like to know if viewers knew the video was from Cameo and what they think of the credibility of Cameo videos.

On balance, I think a court would conclude that Heidi made two statement of facts. Accusing someone of having an STD and failing to disclose that information isn't so obviously hyperbolic or exaggerated to tip off someone that it's a joke.

Of and Concerning the Plaintiff. The statements refer to Sam by name and identify that he's her ex.

Published to Someone Else. Heidi "published" the video to her friends and family.

Injurious to Reputation. Accusations of an STD are per se defamatory. Failing to disclose an STD raises serious concerns about trustworthiness and truthfulness, which also hurts Sam's reputation.

First Amendment Defense. If Sam is surreptitiously spreading an STD through the community, that could become a matter of public concern. More typically, private intimate behavior is not a public concern. If it is a matter of public concern, Sam apparently would qualify as a private individual. Either way, Heidi likely satisfies the scienter requirement (including an actual malice standard) because either she would know that Sam didn't have an STD or she would be making it up. (Perhaps if Heidi has seen symptoms she misinterpreted as an STD, she could defeat actual malice). I don't think the First Amendment defense limits Sam's claims.

[Note: some of you thought that if the First Amendment defense didn't apply, then Sam would need to prove Heidi's negligence. Without a First Amendment defense, defamation is generally a strict liability tort.]

Overall, Sam probably has a tenable claim for defamation against Heidi.

Other

False light and public disclosure of private facts don't apply because Heidi's statement was false, not true.

We didn't review intentional infliction of emotional distress (it was a part of the Moreno case we didn't discuss), but Heidi's misbehavior could potentially support that claim.

Another thing we didn't cover in class: the "picture to burn" reference could be a criminal threat, but anyone familiar with Taylor's song lyric would not view it a credible threat of arson or murder.

Sam v. Dylan

Sam's defamation claim against Dylan looks the same as his claim against Heidi, with two exceptions. First, Dylan "published" the video by posting it to Cameo. Posting the video link to

the Swifties may not be a publication to the extent that links are just pointers. Second, Dylan had less scienter than Heidi, which could increase the odds of Dylan's success in a First Amendment defense.

Dylan also could argue Section 230(c)(1):

- ICS provider/user. Dylan doesn't provide an ICS, but Dylan qualifies as a user of ICSes (Cameo & the Internet access provider, among others).
- Publisher/speaker claim. Defamation is a paradigmatic example.
- Provided by another ICP.
 - Heidi provided the video script containing the defamatory statements. Dylan implemented that script verbatim, so the defamatory content came from a third party.
 - However, Dylan produced the final video, including acquiring and integrating the vocal rendering of Heidi's statements and syncing the video's lip movements to Heidi's script. Some people might call Dylan's video a "deep fake." Dylan's efforts enhanced the credibility of Heidi's statements by falsely attributing them to Taylor. Per the ICP definition, Dylan's production of the revenge video probably constitutes "development in part" of Heidi's statements. Alternatively, per Roommates.com, Dylan arguably "materially contributed" to the video's defamatory sting through packaging Heidi's statements.
 - I think Dylan will not qualify for Section 230(c)(1) for the video due to Dylan's production role.

Some of you analyzed Sam's publicity rights claim against Dylan for using the video to promote Dylan's services. This is a tricky publicity rights issue because the video wasn't initially an ad.

Sam v. Cameo

Cameo's Section 230(c)(1) defense for the video:

- ICS Provider. Websites like Cameo qualify as ICS providers.
- Publisher/Speaker Claim.
 - Defamation qualifies.
 - However, Cameo functions as a marketplace, and it processed the Heidi/Dylan transaction. Numerous cases, especially the Ninth Circuit's HomeAway case, indicates that Section 230 may not apply to marketplace transactions. But unlike the HomeAway case, Cameo's transaction processing wasn't actually illegal; and a case that came out after finals, *Smith v. Airbnb*, found that Section 230 protected Airbnb from a transaction gone wrong despite having processed the transaction. So it's unclear if Section 230 protects Cameo due to its marketplace status.
- Provided by another ICP. Heidi/Dylan qualify as the ICPs with respect to the revenge videos. Unlike Dylan, Cameo has not materially contributed to the video's content.

If Cameo isn't protected by 230, it may have lacked scienter about the video's falsity, which could help with a First Amendment defense and any "republisher" defense.

Taylor v. Dylan

Copyright Infringement

Prima facie case of infringement:

- Ownership. The facts specify that Taylor owns the copyrights to her works and has obtained the applicable registrations.
 - I think the lyric line "As far as I'm concerned, you're just another picture to burn" is too short to qualify as an original work of authorship (or for copyright geeks, it'll be covered by the merger doctrine). However, I gave equal scoring credit if you analyzed this as the subject copyright work.
- Violation of 106 rights. Reminder that copyright is a strict liability tort.
 - Dylan copied 20-30 seconds of Taylor's music video, a violation of the reproduction right. Dylan then changed the lip motion on the video and added different sound, a violation of the derivative work right. Dylan posted the video to the Cameo service, a violation of the distribution right. Dylan also likely publicly performs the video, but we didn't dig into this in class.

Taylor should be able to establish a prima facie case of copyright infringement of her music video.

Fair use:

- Nature of Dylan's use.
 - Dylan used the video to prepare a commercial video for sale. This weighs against Dylan.
 - Dylan modified Taylor's video to create the fakery. This could be transformative, because Dylan added new material to present the fake video for a different purpose (revenge rather than entertainment). Dylan could also claim the new video parodies the original because both riff on getting revenge on exes. This weighs in favor of Dylan.
 - Note how copyright law may not always restrict fake modifications of real videos. However, fair use is an equitable defense, and judges are likely to take a dim view of Dylan's inauthentic behavior.
- Nature of Taylor's work. A pop star's music video often will be characterized as fiction, which weighs against Dylan.
- Amount taken. 20-30 seconds of video is less than 20% of a typical music video, a low percentage that could weigh in Dylan's favor. Also, Dylan only took the video, not its sound. This factor could go either way.
- Market effect. Dylan's video isn't likely to affect the demand for Taylor's original video, especially for rabid Swifties who may view the revenge video as an homage. Taylor wouldn't license the video for Dylan's purpose. We would benefit from more information about other licensing efforts regarding the video to assess its licensing potential.

- Some of you talked about how Dylan’s imposter account displaces Taylor’s ability to create her own Cameo account. I doubt this is true because the Swifties would swamp any account actually promoted by the goddess herself. With respect to fair use, the question is whether the secondary use harms a market *for the copied works*.

I think most judges would condemn the revenge video and weigh the factors against Dylan to the maximum extent possible.

Trademark Infringement

The trademark at issue is the name “Taylor Swift.”

- Ownership of valid TM. Personal names start out as descriptive trademarks and become protectable trademarks only after they achieve secondary meaning. The trademark registrations are prima facie evidence of protectability.
- Priority. Taylor Swift had the registrations before Dylan’s activity.
- Defendant’s use of Taylor’s trademark in commerce. Dylan was selling videos marketed as Taylor’s, so this factor is met whether the court uses the broad or narrow interpretation of this element.
- Likelihood of consumer confusion about product source.
 - It seems likely Taylor could establish this. Consumers are purchasing Dylan’s video believing it is a genuine video from Taylor, not a fake. This kind of brand impersonation likely qualifies as counterfeiting. The standard multi-factor test easily weighs against counterfeiters. Dylan likely creates a likelihood of consumer confusion
 - The fact that discerning viewers could eventually identify the fakery doesn’t help Dylan. First, they aren’t consumers making the purchase. Second, it shows that even sophisticated and careful purchasers could be misled, something that weighs against defendants in the multi-factor test.
 - Some of you discussed the “taylorswift” URL reference as an example of initial interest confusion, but as usual, IIC doesn’t add much to the analysis. Also, ACPA and UDRP only apply to domain names, not post-domain name URLs.

Dylan is using Taylor’s trademark to refer to Taylor, which implicates the nominative use defense. The Ninth Circuit test:

- There is no other good way to refer to Taylor Swift other than by her name.
- Dylan used more than just Taylor’s name to create the fakery. I don’t think this element is satisfied.
- Dylan suggested Taylor’s sponsorship/endorsement. This element is not satisfied.

Overall, I think Taylor has a strong trademark infringement case against Dylan.

Trademark Dilution

- Famous mark. Taylor is one of the most successful musicians of the last 15 years, though I had no idea she offers greeting cards under her name (e.g., trademark registration # 4289371, though this covers her name in script). Given that even GenX suburban dads know her, she likely qualifies.
- Defendant's use in commerce. Established above.
- Use commenced after fame. I'll assume this.
- Likelihood of dilution. I don't think there's blurring. Dylan isn't adding a new meaning to the "Taylor Swift" mark; Dylan is using it referentially. Dylan might be tarnishing the mark (even though there's no sexual associations with her brand) by making consumers think she's petty enough to advance an ex's revenge or greedy enough to do Cameo videos despite her estimated \$400M net worth.

Publicity Rights

Dylan is using Taylor's name (and possibly other aspects of her personality, like her photo or likeness) to advertise Dylan's services. This is a straightforward publicity rights violation.

Taylor v. Cameo

Direct Copyright Infringement

Cameo's servers copied and distributed Dylan's infringing revenge videos. However, Cameo can argue that it's not liable for direct copyright infringement because it lacked volition (Cablevision). Cameo has a good argument that it isn't the proximate cause of the infringing activity. Cameo's fair use defense would look similar to Dylan's.

Contributory Copyright Infringement

- Direct infringer. Dylan
- Induces/causes/materially contributes to infringing activity. If Cameo keeps hosting the video after knowing it's infringing, that would constitute a material contribution.
- Knowledge of the infringing activity. There's evidence that Cameo had generalized knowledge of infringement, but "actual knowledge of specific acts of infringement" are required (this language traces back to Napster). There's no evidence that Cameo actually knew that Dylan's revenge video infringed.

I don't think Cameo is liable for contributory copyright infringement.

Vicarious Copyright Infringement

- Direct infringer. Dylan
- Right and ability to supervise the infringer's acts. Every Internet service has the technical capacity to supervise their users' activities. In theory, this element should mean something more than just standard hosting services, but some opinions say that's enough.

For example, Napster (quoted in Veoh) said “merely having the general ability to locate infringing material and terminate users’ access” satisfied this element. A reminder that scienter isn’t required.

- Direct financial interest in the acts. Cameo takes a cut of Dylan’s infringing activity, so it profits as Dylan engages in more infringements. This element should be satisfied.

I think Taylor can establish a prima facie case of vicarious copyright infringement against Cameo.

[Note: a few of you incorrectly applied the vicarious trademark test to the vicarious copyright analysis. Please don’t do that.]

DMCA

If Cameo can establish it qualifies for the DMCA online safe harbor, it can avoid damages for copyright infringement.

- “Service provider.” Websites qualify as providers of online services.
- Material stored at user’s direction. User Dylan uploaded the video.
- Adopt repeat infringer policy, implement policy, and communicate to users. The facts specify that Cameo has communicated its repeat infringer policy, which implied it has also adopted one. As for implementation, Cameo’s interaction with Dylan doesn’t raise any obvious problems because Dylan isn’t a known repeat infringer. Cameo’s laxness towards impersonators doesn’t address this issue because impersonation isn’t necessarily copyright infringement.
- Accommodate copyright owners’ “standard technical measures.” No technology currently satisfies the statutory requirements.
- Designate agent and post agent’s info on the website. Facts specify that Cameo did this.
- Scierter/Control.
 - There’s no evidence Cameo has actual knowledge of infringement. Most notably, the facts don’t specify that Taylor sent a 512(c)(3) notice to trigger Cameo’s takedown “duty.” I also don’t see any red flags of infringement with respect to Dylan’s video; and the quality of the faked video may make the infringement not apparent even upon Cameo’s reasonable inspection.
 - Regarding the right/ability to control infringement, Veoh said defendants must “exert substantial influence on the activities of users.” Cameo hosts third-party content, which Veoh indicated did not constitute “substantial influence.” Cameo brokered the Heidi-Dylan deal, but Cameo didn’t “influence” their activities beyond the match-making.
 - Regarding direct financial interest, if this means the same as the common law factor, then Cameo won’t qualify. However, Veoh indicated that the right/ability to control infringement means something different, so that may apply to this element too. Cameo could argue that it takes the same percentage regardless of whether the activity infringes. Taylor could argue that if taking a percentage isn’t a direct financial interest, what is?

- With respect to willful blindness, Cameo is ignoring the impersonation problem on its service, including Dylan’s impersonation specifically; but as discussed above, impersonation doesn’t necessarily require infringement.

Based on these facts and without a 512(c)(3) notice from Taylor, I think Cameo will likely succeed with a DMCA defense to Taylor’s copyright infringement claims.

Contributory Trademark Infringement

- Direct infringer. Dylan
- Supply product with actual/constructive knowledge that product used to infringe; where the service provider directly controls/monitors instrumentality used to infringe. Cameo has supplied marketplace and hosting services to Dylan, but what about its scienter? If Cameo had previously identified Dylan as impersonating Taylor, possibly that could qualify as constructive knowledge of Dylan using the services to infringe her trademark rights.

Still, I think the contributory trademark infringement claim would fail.

Section 230 and Publicity Rights

I said above that Cameo should qualify for Section 230 for the revenge video, but that doesn’t apply to federal IP claims (other than DTSA). Then, I said Dylan violated Taylor’s publicity rights by promoting Dylan’s services. Cameo may be able to claim Section 230 for that claim because this is a California case and ccBill said that publicity rights are not an IP right for 230 purposes.

Cameo v. Dylan

Breach of Contract

Cameo’s TOS says that users can’t use a false identity or provide false information, and Dylan did both. If Dylan agreed to the TOS, Dylan has likely breached it.

The TOS formation is a “sign-in-wrap” (blech), but regardless of nomenclature, courts will consider if Dylan objectively manifested assent to the TOS. I’ll follow my “best practices” standard:

- Call-to-action placement. Cameo is using sub-optimal practices. The font size is smaller than several others, though it’s not the smallest on the screen. The font is medium grey on a black background, and it’s overshadowed by other fonts on the screen, such as the more eye-catching aqua fonts. The location is also sub-optimal. I assume that everything in the screenshot is above-the-fold. However, the call-to-action is located at the very bottom of the page, with two different modules spatially separating it from the “create your account” button. The call-to-action will be cut off if the screen size is any smaller than depicted; and it will get blocked by any pop-up keyboards. Even if neither of those

conditions occur, a user completing the account formation process has no reason to look below the button. And if they do, they could easily stop at the checkbox associated with the email opt-out (with a more prominent call-to-action).

- Call-to-action wording. The sentence properly uses if/then grammar (by doing X, you agree to Y). The cross-reference to the action button is also correct—the call-to-action references “create my account,” virtually identical to the action button wording. The TOS’s hyperlink is indicated by an underline, but with a grey font instead of the blue font in Meyer. I think most consumers would figure out the links. This part generally looks OK.
- No leaks. The “continue with Facebook” button creates a serious problem. It’s at the top of the screen, while the call-to-action is all the way at the bottom, and there’s no reason why users would look down the screen if they connect via Facebook. Thus, they won’t likely see the call-to-action or connect to Facebook knowing of the associated legal consequences. Further, the call-to-action wording doesn’t tie to the “continue with Facebook” button wording; it doesn’t explain that “continue with Facebook” is the same as “creating an account.” Thus, diligent users reviewing the whole screen may not realize that the “continue with Facebook” button forms the TOS.

Overall, I rank the contract formation process as a 50/50. The unnecessarily low visibility of the call-to-action, plus the Facebook leak, create serious risks that a court will say that Cameo users didn’t objectively manifest assent to the terms.

Trespass to Chattels Doctrines

Chattel Use. Dylan engaged with Cameo’s servers like any other ordinary user—offering videos for sale and posting completed videos. However, if Dylan disregarded Cameo’s rules for server usage, then Dylan’s “normal” activity could still be unwelcome/unpermitted.

Was Dylan’s Use Unauthorized? Cameo communicated the limits of Dylan’s server usage (1) through the TOS, and (2) through the warning not to commit further impersonations. TOS formation might not delimit access for CFAA purposes (Van Buren), but is it enough for common law TTC and 502 purposes? We don’t know. If Dylan didn’t form the TOS, then it’s less likely the TOS delimited server access for any of the doctrines, but the subsequent warning might be enough. Either way, for CFAA purposes, Cameo also didn’t apparently lower any technological gates on Dylan, making it even less likely that the CFAA claim will succeed.

Causation.

- Dylan’s promotion of the revenge video led to a Swifties deluge that contributed to brief server crashes and slowdowns.
- Dylan can argue that the overload was “caused” by other simultaneous users, not Dylan. We identified this problem when discussing Hamidi.
- Dylan could also argue that each Swiftie was independently authorized to access the servers, so Dylan should not be responsible for their conduct.
- However, the Swifties traffic was a foreseeable consequence of Dylan posting a video that violated Cameo’s rules—especially given Dylan’s promotional efforts. So the Swiftie-caused crash can be attributed to Dylan’s violation of Cameo’s rules.

Damage.

- For California TTC purposes: Dylan “caused” a measurable loss to computer system resources because the server crashes and glitches are quantifiable. However, a court might deem these losses de minimis because Cameo suffered no other adverse consequences (e.g. data loss).
- For majority TTC purposes: the crashes/glitches could count as a harm, plus Dylan made an unwanted system usage contrary to Cameo’s expressed intentions. The majority rule might also credit the risk of follow-on imposters who collectively could stress Cameo’s network even more. However, courts might question why Cameo didn’t take any self-help steps.
- For CFAA purposes: both the crashes/glitches and the IT department’s remediation efforts would be legally recognizable harm, but Cameo may have difficulties showing \$5k of total damages.
- For 502 purposes: the server impacts and remediation efforts count as legally recognizable harm, without any financial minimum. That makes 502 the most likely TTC doctrine to succeed if Cameo sufficiently delimited authorization.

* * *

BONUS: my grading assistant this semester:

