

**Fall 2021 Internet Law Final Exam
Student Sample Answer**

[Eric's introduction: this is an actual exam submitted by a student in the Fall 2021 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: 3000

Sam v. Heidi

Defamation

Heidi's statement that Sam has STD he won't tell his girlfriend about is a defamatory statement. Sam can establish a defamation prima facie case:

- It's a false statement of fact that has a definite meaning and is objectively capable of proof. Sam doesn't have STD, and context around the statement wasn't a nonsense chatter – it's a famous star's statement which can become publicly available
- Statement was concerning Sam
- Published to Cameo's servers and posted on Swifties
- Statement about someone suffering from STD fits a defamation per se category, yet it's definitely injurious to Sam's reputation as people wouldn't want to date a person who has STD and is dishonest about it

Heidi's statement is false, it isn't opinion or hyperbole. CA statute gives P 20 days upon discovery to request retraction. Assuming Sam will, Heidi will try to claim First Amendment protection, yet her statement isn't a matter of public concern and Sam, as a private figure, only needs to prove her negligence to prevail. Section 230 won't immunize defendant creating defamatory content. Heidi isn't anonymous and since video identified Sam by his full name, it's reasonable that he'll want to clear it. There is no evidence of video causing Sam substantial emotional distress to sue for intentional infliction, and other publication torts are inapplicable.

Sam v. Dylan

Defamation

Dylan, posing as Taylor, prepared the video using Heidi's defamatory statement verbatim, and based on the analysis above, he is liable for defamation and can't claim any defenses, except for Section 230. Prima facie case:

- Dylan is a user of Cameo, an ICS
- He is treated as a speaker/publisher
- Content provided by another ICP - Heidi is responsible for content's development, making it third-party. Statutory and common law exceptions are inapplicable, and Dylan is eligible for §230 defense

Sam v. Cameo

Defamation

Based on the above, Sam will be able to establish a prima facie defamation claim against Cameo. However, Cameo will successfully raise Section 230 defense. Cameo is a user-generated content site, and as discussed in further detail below, Section 230 will preempt all claims based on third-party content. Sam can't satisfy Section 230 exceptions and other privacy torts are inapplicable.

Taylor v. Dylan

Trademark

Ownership of a valid trademark. Taylor owns federal trademark registrations in her name for a wide range of goods/services.

Priority. Dylan's use began after Taylor's.

Use in commerce. Dylan poses as Taylor creating and selling his fake personalized videos on Cameo. Also, Dylan posts the Revenge Video's URL to Swifties in attempt to entice future customers. These satisfy both the definition of use in commerce as regulable under the Commerce Clause and the "use in commerce" test of using the trademark in ad copy or product packaging.

Consumer confusion. Several ways to test consumer confusion:

a) *Sleekcraft* factors

- *Mark strength.* Taylor is a well-known and successful singer-songwriter. Pro-plaintiff.
- *Similarity of services.* Assuming Taylor makes holiday/celebration greeting cards since she has trademark registrations for various services, both Taylor and Dylan are direct competitors, both catering to same market segment – Taylor's fans, Swifties. Pro-plaintiff.
- *Mark similarity.* Dylan explicitly used Taylor's likeness (appearance and voice-alike) for his videos and in his advertising. Pro-plaintiff.
- *Evidence of actual confusion, not mere diversion.* Facts don't state how many videos Dylan sold (likely many), yet *most* viewers assumed Taylor makes them and only one careful viewer complained after realizing video isn't genuine. Pro-plaintiff.
- *Defendant's intent.* Dylan created a fake profile impersonating a star in bad faith, with intent to derive benefit from Taylor's mark. Pro-plaintiff.
- *Marketing channels.* Assuming Taylor markets her services/goods online, both use the Internet as a marketing channel. Pro-plaintiff.
- *Purchaser care.* Dylan is impersonating Taylor on Cameo, a service that sells "personalized videos featuring your favorite stars." Customers use Cameo seeking exactly that, a real star creating a video. Pro-plaintiff.
- *Product line expansion.* Likely that litigants will, if not already, soon develop directly competing services. Pro-plaintiff.

b) Initial Interest confusion. Though all factors appear to be pro-Taylor, alternatively, a judge could decide that Dylan caused initial interest confusion as he made "use of another's trademark in a manner reasonably calculated to capture initial consumer interest." Dylan posed as Taylor, using her trademark to bait consumers, making most people believe it's the real deal. In *Lamparello*, court noted the key factor to

prevail under the doctrine is business's use of another trademark for its own financial gain – exactly what Dylan did.

Dylan can't use descriptive trademark fair use defense, as he isn't using dictionary words in a descriptive trademark for their descriptive meaning. However, he might argue that Cameo is generally aware that impersonators have accounts on the service, so consumers won't be more confused by his fake Taylor's profile than others existing on the site. However, it's unlikely to help, though it might raise the "baseline" level of consumer confusion about the overall Cameo's profiles legitimacy.

Dylan may try nominative use defense claiming he references Taylor to relate his products to her. However, this defense will fail due to Dylan not simply referring to Taylor, taking the minimum amount necessary to make a reference, but impersonating her, using her likeness and image to his benefit.

Dilution

For a trademark dilution prima facie case, there must be:

- *Famous mark.* Taylor's mark is widely known by the general consuming public of the United States, qualifying her mark as famous.
- *Defendant's use in commerce, and after mark became famous.* Dylan used her likeness to sell his videos after she became a well-known star.
- *Dilution.* Dylan didn't cause dilution by blurring as his association with the mark doesn't impair its' distinctiveness. However, there is a strong argument for tarnishment, an association that harms trademarks' reputation. Dylan associated Taylor with a video where she belittles a person who lies about having STD, which in fact isn't even true. Though Taylor is known for ripping her exes to shreds in her songs where she has personal knowledge of the facts, Dylan simply relied on Heidi's submission about Sam. Consumers might think it's weird that Taylor will go onto "exposing" people she doesn't personally know, without confirming the story's accuracy. This might degrade consumers' willingness to transact with Taylor's goods and services if she will become a "puppet" saying anything people want her to, without acknowledging the power of her voice and its impact.

Dylan could assert a nominative fair use defense, yet it'll fail based on the above reasoning as trademark isn't being used as a reference, but used in bad faith.

Publicity Rights

Dylan used Taylor's name and likeness, incorporating it into the actual commercial product, to derive financial benefit – an easy publicity rights violation.

ACPA (Trademark)

Dylan registered his account posing as Taylor and Cameo automatically assigned him the URL "taylorswift", a domain name that's identical to a famous mark. Dylan engaged in bad faith intent to profit, collecting 75% of commission for his fake videos.

Copyright

Taylor's official videos qualify as original works of authorship fixed in a tangible medium of expression. Taylor owns and obtained all appropriate registrations for all rights to her songs and music videos. Taylor's ownership of a valid copyright is presumed with registration. Dylan directly infringed by

uploading segments of her official videos to Cameo constituting reproduction, distribution, and public display. Thus, Taylor would easily establish a prima facie case of copyright infringement against Dylan.

Dylan can't argue duration (copyright protections last for owner's life + 70 years, & Taylor is alive and well) or that he had an express or implied license, as that's not true. However, Dylan may argue fair use, though it will likely fail:

- *Nature of use.* Though Dylan could argue he transformed the video by only taking 20-30 seconds and using soundalike's audio, creating a new meaning and altering the message, it'll fail, and Dylan's use is commercial in nature.
- *Nature of work.* Dylan used factual works; however, this factor isn't dispositive.
- *Amount taken.* Taking 20-30 seconds of Taylor speaking could arguably be deemed the "heart of the work", as she's getting her message across.
- *Market effect.* Taylor published her videos with intent to commercialize, and Dylan's secondary use harms the market and undermines Taylor's commercial expectations.

As Taylor owns a valid registered copyright and she will establish prima facie case, she should be able to get statutory damages and attorney's fees.

Taylor v. Cameo

Section 230

Section 230 will generally preempt all of Taylor's claims based on third-party content. However, it will not preempt IP claims, and Taylor can bring federal trademark and copyright claims against Cameo. Taylor's publicity rights claim against Dylan is a state IP claim, and if we are in 9th Circuit, Section 230 preempts it; if not, it won't apply. 230(c)(1) prima facie case:

- *Provider of ICS.* Cameo service sells "personalized videos featuring your favorite stars" and qualifies as a user-generated content website.
- *Treated as Publisher.* Taylor will try to hold Cameo liable as a publisher of impersonating videos.
- *Provided by Another ICP.* Content at issue is third-party to Cameo, as users create and upload the videos. Dylan is not Cameo's employee, and Cameo is eligible for 230 defense.

However, Cameo could be vulnerable to *Roommates'* holding stating that Section 230 immunity applies unless the service encourages illegal content or designs its website to require users to input illegal content. Here, the "illegal" content is the impersonators' videos and Cameo did several things which can be viewed as encouraging illegal content:

- Failed to enforce its TOS
- Failed to reprimand *all* infringing users it knew about through complaints or otherwise
- Failed to adopt identity verification process urged by critics

Conversely, Cameo never explicitly required/encouraged illegal content. Unlike *Roommates* where users had to answer discriminatory questions, Cameo doesn't require people to impersonate a star, and doesn't encourage its users to say derogatory things, as stars have the ultimate discretion. Taylor might argue Cameo failed to warn her after their written warning to Dylan, yet such claim will fail as Cameo doesn't owe a duty to non-users. Thus, Cameo qualifies for Section 230 immunity, though Taylor can take advantage of Section 230 IP exception for her IP claims.

Copyright

Direct Infringement. Cameo operates servers that users utilize to publish their content. Even though Taylor might argue that Cameo violated her exclusive right by having her videos reproduced, distributed, and displayed publicly, Cameo lacks the required volitional conduct.

Contributory Infringement. To contributorily infringe, Cameo, *with knowledge* of the infringing activity, must induce, cause or materially contribute to the infringing activity of another. Indeed, Cameo hosted infringing content and its failure to remove constitutes material contribution. Cameo might argue it lacked sufficient scienter, but Taylor will point to their receipt of a third-party complaint against Dylan. Though it wasn't a 512(c)(3) notice, Cameo's employees likely reviewed it to issue a written warning which means Cameo had proper notice, and since they failed to further restrict Dylan's behavior, Cameo has requisite scienter for contributory infringement.

Inducement. Cameo isn't inducing infringement. It welcomes authentic videos from the stars and explicitly asks users in its TOS to agree they won't use the service under a false identity or provide false information. Per *Grokster*, Cameo isn't offering a service with the goal of promoting its use to infringe copyright. Per *Sony*, Cameo is capable of commercially noninfringing uses and isn't liable for its service being used for infringing purposes.

Vicarious Infringement. Cameo has a right and ability to remove infringing videos, as it did for some impersonators after getting complaints. Also, Cameo had a reason to supervise Dylan's work, as he had impersonated before, and Cameo has direct financial interest in acts of all its users, including Dylan's, as it gets 25% commission – revenue isn't primarily generated from the infringing content, yet it increases with infringement.

Fair Use. Since Cameo infringes, it will argue fair use, which will likely fail as factors analyzed above weight against Cameo, a commercial service, even more than they did against Dylan.

Section 512(c) Safe Harbor.

- Cameo qualifies as a “service provider” and stores material at the direction of its users, making URL available
- Cameo's TOS discloses its' repeat infringers policy, which it adopts and reasonably implements by having removed some of the prior impersonators, and it did the appropriate filing with the Copyright Office
- Though there was no 512(c)(3) notice, Cameo received a complaint about Dylan, which could trigger “red flags of infringement” per *Veoh*. Taylor will argue Cameo had red flags of Dylan's infringement, but failed to further restrict his behavior, being willfully blind. Cameo might argue that complaint didn't come from the copyright owner herself (otherwise, they would've removed the videos upon receipt of proper 512(c)(3) notice) and that it doesn't have a right and ability to control the content, only to supervise and “store the video at the direction of its users” without the ability to curate content in any meaningful way. Though 512(c) doesn't impose investigative duties on service providers when it comes to infringement, placing the duty on copyright owners, Cameo arguably has right and ability to control, exerting substantial influence over its users when it comes to known instances of infringement. Cameo had removed impersonators from its service before without receiving 512(c)(3) notices from copyright owners, exercising its authority to restrain infringement basing solely on third-party complaints. This suggests for harsher treatment than in *Veoh*.

Trademark

Contributory Infringement. Taylor will argue that Cameo continued to supply its service to Dylan with actual knowledge that he used the site to infringe. Cameo will argue lack of requisite knowledge, as it didn't receive a proper takedown notice from Taylor and that it qualifies for an "innocent publisher" defense under § 1114(2), entitling Taylor only to an injunction against future publishing. Section 512 is not a defense for trademark infringement.

Publicity Rights. Section 230 applies to publicity rights claims within the 9th Circuit, and Cameo will avoid liability.

Cameo v. Dylan

Breach of Contract

Online Contract Formation. Proper formation standard is a reasonably conspicuous notice of existence of contract terms and an unambiguous manifestation of assent to those terms.

- *Call-to-action placement.* Call-to-action is placed at the very bottom, in light grey which is hard to see and in small font, without much defensible space, though there is a hyperlink to the TOS and it's visible without the need to scroll down.
- *Call-to-action wording.* Cameo's signup screen states that "by creating an account, you agree to Cameo's TOS" making it a proper if/then statement.
- *Mandatory checkbox.* Checkbox that user must check to proceed with account creation is absent.
- *Contract visibility.* Though TOS are not displayed for user to scroll through, they are available as a hyperlink, and a reasonably prudent user knows that's where additional information can be found, that terms are connected to creation of users account, and clicking "create account" button is agreeing to TOS regardless of whether they clicked and read TOS.
- *Leakiness.* Cameo provides users with option to log in with Facebook instead of continuing with email, allowing users to reach their desired outcome of using Cameo without going through the contract formation. It'll be good to know whether Dylan used his email or Facebook account to sign-up.

Alternatives to Proper Formation. Though online contract formation doesn't appear to favor Cameo and though Dylan will state he never manifested assent to be bound to TOS, Cameo will argue Dylan took the benefits of the service by always coming back to create more videos, providing him ample opportunities to check Cameo's TOS. Although language and page's interface could certainly be improved, the court will likely uphold contract formation.

Breach. Cameo's TOS state that user agrees not to create an account using false identity or providing false information, and Dylan breached both terms by impersonating Taylor. If Cameo would decide to terminate his account, as it did with other impersonators, it likely won't face any repercussions. Breach of contract claim would likely support an injunction against Dylan's future impersonations and possibly damages for past activity.

Trespass to Chattels

Dylan's usage was in violation of TOS, unlike real celebrities' usage. Though, as discussed above, member agreement was likely not properly formed, restriction on chattel use can be effective even without a binding agreement. Thus, Dylan is trespassing on Cameo's servers by using them in a way that violates Cameo's TOS. Dylan had an explicit notice, a written warning from Cameo, instructing him not

to engage in any further impersonations before he accepted Heidi's order. Dylan's conduct checks off the "chattel interference" box for all three trespass to chattels doctrines.

Common law trespass to chattels. Dylan's use likely resembled that of an ordinary member making personalized videos upon request, until he enticed future customers by posting the Revenge Video's URL to Swifties, causing the deluge of fans watch the video and Cameo's servers to crash. However, only three out of many Cameo's servers crashed causing viewers minor discomfort, and Cameo's IT team restored servers to full functionality within 10 minutes. This will not qualify as a measurable loss to a computer system under *Hamidi* and such "loss" is less serious than in *Register*. Under majority common law rule, Dylan's unauthorized usage after receiving actual notice use is unpermitted, yet harm caused was for an unsubstantial time period and was quickly fixed.

CFAA. Cameo can try to secure evidence of a \$5K/yr loss attributable to Dylan's conduct, which could be comprised of complaint review costs/lost revenues from potential refunds Cameo had to issue for Dylan's videos. Since Cameo retained 25% commission, it will be good to know how much Dylan charged. Even if remediation could be accomplished by deleting Dylan's account, Cameo can count the following towards \$5K: costs of its investigations, processing the refunds, lost revenue from canceled accounts due to fake star profiles on the site.

State Computer Crime. PC §502(c) requires any damages or loss, including verification expenses. The costs discussed above would easily meet this standard.

In summary, state computer claim is most likely to succeed, then the CFAA, and common law claim is the least likely to succeed.