

**Fall 2023 Internet Law Final Exam  
Student Sample Answer**

[Eric's introduction: this is an actual exam submitted by a student in the Fall 2023 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.]

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Word Count: 2987

**(1)  
Anderson v. Morgan**

Defamation

*Statement at Issue:* Morgan said Anderson spied on rival searchers by surveilling them with drones.

Definite/Unambiguous Meaning – “Spying” might have an ambiguous meaning, but Morgan saying it’s with drones makes it definite.

Objectively Capable of Proof – We can ask Anderson whether he used a drone to surveil rival searchers of the treasure.

Statement Context – Morgan posted to sticky topic “Tesouro Sagrado” where users discuss the company and its search efforts. Anderson is a leading member of TS Consortium (TS), so readers are likely to take the post seriously.

Social Context – If Morgan posted multiple messages where it was obvious she was “particularly upset,” other users might assume Morgan’s just feeling threatened by TS and consider the comment hyperbolic/untrue.

On balance, I think a court would conclude Morgan made a statement of fact.

*Of and Concerning:* The statement identifies Anderson by name. It’s possible there are multiple Andersons, making it difficult to identify who Morgan is referencing. This is unlikely because users subsequently bombarded Anderson’s workplace, indicating it was easy to identify who the comment concerned.

*Published to Someone Else:* The comment was published on THOR to other users.

*Injurious to Reputation:* Among treasure-hunters, this is injurious because the norm is each hunter must do their own work and this comment makes Anderson seem like an untruthful cheater. Outside of this community, it’s probably still injurious because spying on people with drones is generally frowned upon.

## *First Amendment Defense*

Matter of Public Concern – If Anderson cheated in search of the treasure, this is of public concern among treasure-hunters. If he is spying on others with drones, this might be of general public concern because it implicates people's privacy. If it is a matter of public concern, Anderson would qualify as a private individual.

Scienter – Morgan probably meets the negligence scenter requirement because in other posts searchers claimed they have been surveilled by drones, though none alleged Anderson operated the drones. This suggests Morgan was sloppy in her diligence of the facts and may have outright fabricated the facts. I don't think the First Amendment defense limits Anderson's claim.

*Conclusion:* Anderson has a tenable defamation claim against Morgan.

## Other

If Anderson was using a drone for unproblematic purposes and Morgan falsified the context, Anderson might have a false light claim.

Morgan anticipated users would be outraged at Anderson, and they did bombard/mock Anderson following her post. Per *Moreno*, Morgan's misbehavior could support an IIED claim.

## Section 230(c)(1)

Morgan's post doesn't qualify for immunity because she published first-person content.

## Direct Copyright Infringement

The work at issue is Anderson's photos of the treasure box's alleged location.

*Ownership* – Anderson owns the photos because he took them, but it's unclear whether he registered them for copyright. If he didn't, he won't be able to sue, and his remedies may be limited.

*Violation of 106 Rights* – Assuming Anderson registered for copyright, Morgan volitionally violated his reproduction rights when she downloaded Anderson's photo off TS's private server, and his distribution rights when she uploaded the photos to THOR.

Assuming Anderson registered his photos for copyright, he will be able to establish a prima facie copyright case.

## Fair Use

*Character of Use* – A wash. The facts don't indicate Morgan transformed the images, but they also don't indicate she used them for commercial benefit.

*Nature of Work* – Against Morgan. The images are factual, and Anderson's photos were presumably unpublished.

*Amount/Substantiality Taken* – Against Morgan. Morgan took the photos in their entirety.

*Market Effect* – Uncertain. There's no evidence there was a commercial demand for Anderson's photos, but Morgan thought they were valuable. Anderson probably wouldn't have licensed the photos to Morgan for upload to THOR.

*Conclusion*: Morgan took Anderson's work without consent in violation of "strongly held" treasure-hunter community norms – I think a judge would find that Morgan is unsympathetic and doesn't merit an equitable defense.

## **Tesouro Sagrado (TS) v. Morgan**

### Trespass to Chattels

*Chattel* – Morgan engaged TS's private server by accessing and downloading files.

*Unauthorized Use* – Receiving the URL anonymously might indicate access was unauthorized.

Potentially, Morgan didn't use the chattel like other users because her download consumed so much bandwidth that TS owed its IAP an extra fee for exceeding its allotted monthly bandwidth. If most users engaged with the server this way, TS would probably have a different contract with its IAP.

TS might have TOS that delimit access to their server. Per *Van Buren*, TOSes are potentially insufficient for CFAA purposes. (Plus, Morgan probably didn't assent to TOS). No additional facts show TS tried to keep Morgan out (e.g., login credentials, IP blocks, robot exclusion headers, cease and desist). The private server was freely accessible to anyone who knew the URL so it's possible TS was fine with non-member access.

*Causation* – Morgan's download consumed so much bandwidth that TS exceeded its monthly contractual allotment and owed an extra fee to its IAP. We don't know how close TS was to exceeding its bandwidth allotment before Morgan downloaded. A court might find TS was going to exceed its limit regardless of Morgan's downloads and that exceeding bandwidth was "caused" by other simultaneous users. However, Morgan could've foreseen downloading the entire server would consume significant bandwidth.

## *Damages*

California TTC – No evidence of functional impairment and others probably won't copy. Per *Hamidi*, TS incurred measurable cost (the fee) to computer operations. We don't know whether the fee was \$0.01 or a large amount, so a court might find the loss was de minimis.

Majority TTC – Per *Register.com* TS's server didn't suffer impairment or lost use. Even if the extra fee qualifies as harm to a legally protected interest, Morgan's use isn't likely be repeated and courts might question why TS didn't self-help.

CFAA – Unclear whether extra fee is remediation per *Van Buren*. Regardless, unlikely TS suffered \$5k damages/year.

502 – Recognizes any damage, so fee counts. With no financial minimum, 502 is the most likely TTC doctrine to succeed.

*Conclusion:* Given Morgan's access wasn't clearly unauthorized, and causation is questionable, TS' trespass to chattels claim has a serious risk of failing.

## Direct Copyright Infringement

At issue are the confidential details about where the TS members thought the treasure box was located. The details are originally created by TS members. To the extent they are ideas or facts, only the way their ideas are expressed is protectable under copyright law.

*Ownership* – TS owns the confidential details but it's not clear whether TS registered for copyright. If TS didn't, it won't be able to sue, and remedies may be limited.

*Violation of 106 Rights* – Morgan volitionally violated TS' rights when she downloaded (reproduced) and distributed the details on THOR.

Assuming TS registered for copyright, TS has a tenable prima facie copyright infringement claim against Morgan.

## Fair Use

*Character of Use* – A wash. Morgan doesn't profit from copying/distributing the details. Morgan didn't transform the details.

*Nature of Work* – Uncertain. If the treasure is fake, the confidential details are fictional and less likely to qualify for fair use. If the details are factual, they're more likely to qualify for fair use.

*Amount/Substantiality Taken* – Against Morgan. Morgan copied/distributed entire files.

*Market Effect* – Uncertain. Unclear there's a market demand for TS' theories, but Morgan valued them. TS wouldn't have licensed the details to Morgan and TS already shares the details among all TS members.

*Conclusion:* Morgan's fair use defense isn't likely. As discussed above, Morgan isn't a sympathetic defendant.

## (2) **THOR's Legal Risks**

### Defamation

THOR could be liable for defamation via Morgan. THOR has a solid Section 230(c)(1) defense:

- THOR is a provider of ICS.
- Defamation is a quintessential publisher/speaker claim.
- Information was provided by a third party, Morgan.

THOR could also win per First Amendment defense because THOR lacks scienter.

### Recommendations

- Remove Morgan as a user. Not worth having users that create liability.
- Apologize to Anderson and clarify Morgan's statement isn't reflective of THOR's views.
- Collect court-usable evidence that shows Morgan made the post.

### Direct Copyright Infringement

Direct infringement is unlikely because THOR probably lacks volition per *Cablevision*. More likely, Morgan took the significant action by uploading the materials and THOR's contribution to their reproduction via review isn't the proximate cause of infringement (*per Giganews*) because they "took no action."

### Contributory Copyright Infringement

*Direct Infringer* – Morgan.

*Knowledge of the Infringing Activity* – THOR may have known the materials infringed because staff reviewed them, but we don't know what their review entailed. There's no evidence THOR gained knowledge through Anderson or TS because neither has contacted THOR.

*Induces/Causes/Materially Contributes to Infringing Activity* – If THOR knew the materials infringed, that will constitute a material contribution. THOR isn't inducing infringement by encouraging users to upload content to THOR because they're not overtly encouraging *infringing* uploads.

*Conclusion:* THOR's exposure to contributory infringement liability depends on what the review discovered.

### Vicarious Copyright Infringement

*Direct Infringer* – Morgan.

*Right and Ability to Supervise the Infringer's Acts* – Every Internet service has technical capacity to supervise its users' activities. Some opinions say the ability to locate and terminate infringers is enough to meet this element (*Veoh, quoting Napster*). If it is enough, THOR had the right/ability to supervise Morgan's acts.

*Direct Financial Interest in the Acts* – THOR doesn't run ads or charge subscriptions, so direct financial interest is unclear. More content might generally help lure users into buying a paid hunt, but THOR isn't selling this specific content. At best, the materials are a "draw" to consumers as discussed in *Napster*.

*Conclusion:* THOR is exposed to a weak vicarious infringement claim.

### Section 512 Defense

If THOR qualifies for Section 512(c)'s safe harbor, it can avoid damages for direct, contributory, or vicarious copyright infringement.

*Service Provider* – Yes, THOR is a website.

*Stored at User's Direction* – Upload didn't automatically occur because THOR reviewed the materials. But THOR only reviewed to determine why the upload was so large and did not take any action. THOR probably meets this requirement.

*Adopt/Communicate/Reasonably Implement Repeat Infringer Policy* – THOR's TOS state "discussion of illegal activities such as ... intellectual property violations are not allowed." This is likely insufficient as a repeat infringer policy. There's no evidence of any other policy adopted, communicated, or implemented.

*Standard Technical Measures* – No technology currently satisfies this requirement.

*Designate Agent with Copyright Office* – Facts indicate no designation has been made.

*No Actual Knowledge/Red Flags* – THOR might not "know" of any infringing acts until it receives 512(c)(3) notice and THOR hasn't received notice.

*Right/Ability to Control Infringement* – Per *Veoh*, THOR must exert "substantial influence of the activities of the user" and merely hosting content doesn't qualify. It's unlikely reviewing upload size is enough to find substantial influence.

Direct Financial Interest in the Infringement – Unlikely because the site doesn't run advertisements or charge subscriptions.

Inducement/Willful Blindness – THOR's TOS state admins/moderators will attempt to keep objectionable messages (maybe including infringing ones?) off site, but the facts don't indicate THOR had subjective belief infringement was occurring or that THOR avoided acquiring knowledge (*YIGM v. Redbubble*).

THOR doesn't qualify for Section 512(c)'s safe harbor.

### Recommendations

- Complete all formalities required to satisfy 17 USC 512(c). Emphasis on creating/communicating/implementing repeat infringer policy and designating an agent.
- Give up 512 safe harbor for sticky topics and fully vet for infringing content. Get insurance to cover any missed infringements.
- Remove these materials/block future uploads of this content.
- Purchase/acquire TS's site or strike some other deal with Anderson/TS.

### **(3)**

#### **Sticky Topics**

##### Section 230(c)(1)

Sticky topics might disqualify THOR from Section 230(c)(1) immunization.

##### *Common Law Exceptions*

*Roommates.com* – THOR could be vulnerable to a *Roommates.com* Section 230 bypass because “How far would you go?” may encourage tortious conduct/content (e.g., physically harming rivals). Certainly, THOR doesn't encourage ONLY illegal content (it's TOS even ban discussion of illegal activities), so THOR should still have immunity.

Failure to Warn – Users might claim THOR failed to warn about the dangers of the “extreme efforts” taken to find the treasure described under “How far would you go?” Users would need to prove THOR had a duty to warn and they likely can't.

Negligent Design – Sticky topics might implicate the negligent design exception to Section 230 because like *Lemmon*, they are “a content authoring tool that potentially motivates unsafe behavior” created by THOR staff. For example, on “How far would you go?” and “Addicted” users enable using unsafe methods to get the treasure box, post about the search taking over their lives, and decreased happiness. The success of these arguments is currently being debated across the U.S.

False Advertising – Because the treasure has not been found, it's possible it doesn't exist. THOR might be accused of advertising a fake treasure to get users to buy their profitable online treasure hunts. To the extent this is false advertising, it disqualifies THOR from Section 230, violates the Lanham Act, and is treated as an IP claim.

### *Statutory Exclusions*

Federal Criminal Prosecution – Users might follow advice on how to enter government restricted areas posted under the “Government property” topic. Unauthorized entry can be a federal crime, and in theory, THOR could be prosecuted for aiding-and-abetting or otherwise materially assisting the criminal violation by creating the sticky topic. (Though note, *Taamneh* limits aiding-and-abetting claims). If THOR is federally prosecuted, Section 230 won’t apply.

Federal Trademark – As discussed below, THOR might commit federal trademark infringement by using TS’s name. Section 230 doesn’t apply to federal trademark claims.

### Trademark Infringement

*TS’ Ownership* – “Tesouro Sagrado” translated as sacred treasure, might be a suggestive mark because there’s a weak connection to Fenn’s treasure. If suggestive, its automatically protectable upon use in commerce.

I think “Tesouro Sagrado” is a descriptive mark because it describes a characteristic (sacred) of the good (treasure). Descriptive marks must achieve secondary meaning for protection eligibility – at least some THOR users appear to associate “Tesouro Sagrado” with a single company.

Assuming “Tesouro Sagrado” is protectable, TS presumably used it “in commerce” through ad copy/logo use/consumer-facing materials.

*TS’ Priority* – Often established via registration (not evidenced here), but TS’ presumed use in commerce is enough.

*THOR’s Use in Commerce* – THOR references “Tesouro Sagrado” in multiple ways:

- URL path
- Sticky topic title
- Logo display (assuming logo is creative display of “Tesouro Sagrado”)
- Keyword Advertisements

All uses probably qualify as “in commerce” because Congress per Commerce Clause can regulate most activities. At a minimum, *Network Automation* specified buying keyword ads of trademarked terms constitutes use in commerce.

*Likelihood of Consumer Confusion* –

- URL Path – Google labels its ads. Ad copy surrounding the URL expressly discloses THOR as the source. Ordinary consumer should recognize this and not be confused.
- Sticky title/logo display – *Per Lamparello*, there’s no likelihood of confusion because when consumers reach the page, the relationship between TS and THOR

quickly becomes clear. THOR's page merely provides a forum to comment on TS's activities with no apparent intent to profit.

- Keyword ads – Many courts have held using trademarks to trigger keyword ads alone does not create consumer confusion. Per *Network Automation* four factors are prioritized:

- o Mark strength: Descriptive marks are weaker, but “Tesouro Sagrado” is recognized among some treasure-hunters.
- o Actual confusion: No evidence.
- o Consumer care: Nothing is being purchased here. Still, treasure-hunters are probably sophisticated and likely to exercise high degree of care.
- o User-screen context: Google labels its ads and THOR is disclosed as the source in the ad copy.

Factors demonstrate consumer confusion is unlikely.

- Initial interest confusion – TS would need to demonstrate likely confusion, not mere diversion. Adds nothing to the analysis.

*Conclusion:* Overall THOR's legal risk is low for trademark infringement. And, suing over keyword advertising is a bad business decision, so THOR can hope TS wouldn't be so foolish as to pursue this claim.

Plus, THOR could defend via nominative use. THOR references “Tesouro Sagrado” because it's the most effective way to describe TS's business. But, since THOR also used the logo, it may have taken more than necessary to make its point.

### Trademark Dilution

A dilution claim is unlikely because “Tesouro Sagrado” isn't widely recognized by the general consuming U.S. public as a source designator. And THOR can statutorily defend because company discussions are criticism/commentary.

### **Account Registration Process**

#### Contract Formation

Some long-time THOR users registered their accounts before THOR had TOS. There's no indication THOR contacted or gave notice to these users regarding its TOS. These users haven't manifested assent to TOS and THOR cannot enforce its terms against them. For users who went through THOR's current account registration process, THOR hasn't followed best practices for contract formation:

- Call-to-Action Wording: The sentence doesn't use if/then grammar because it states that when users check the box they have “read and agreed” (past tense) to the TOS. There's no indication that by completing signup they are agreeing to the terms. A judge reviewing this contract formation process might note clicking on terms and rules takes users to a page beginning with a “policy” which later refers to an “I agree”

checkbox. Failing to match terms might further persuade a judge to find TOS formation ineffectual.

- Call-to-Action Visibility: The font size is smaller than several others. It's only comparable to the font providing username guidance and password tips. The font is black with "terms and rules" set in green; this color is sub-optimal because per *Meyers*, blue colored fonts signal to a link to additional terms.

- Call-to-Action Placement: The location is sub-optimal because it's at the end of the page, and on the opposite side of the screen as the "Complete Signup" (user action) button.

- Checkbox: It's unclear whether the checkbox is mandatory, but THOR having one is a step in the right direction.

- Leaks: Only registered accounts can post content to THOR. There's an open question regarding whether un-registered accounts can still "bump" or comment on content. If they can, THOR's contract formation process is leaky because there's a way around assent that grants users access to THOR.

*Conclusion:* The account registration process puts THOR's terms and rules (TOS) at risk of unenforceability against all users.