

Spring 2023 Internet Law Final Exam Student Sample Answer

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

Word Count: 2979

CatchMoreFish's 230 Defense

- CatchMoreFish can raise a 230 defense against some claims against it.
 - **Provider:** CatchMoreFish is a provider of an online interactive computer service due to providing its website.
 - **Publisher/speaker claims:** Claims based on CatchMoreFish publishing others content will qualify for 230. However, as discussed below, 230 won't apply to Federal IP claims, criminal prosecutions by the DOJ, or FOSTA claims. Trade Secret claims are not considered IP so 230 will apply to those. For state IP, if we're in the 9th Circuit 230 will protect CatchMoreFish but it is uncertain in other jurisdictions. There may be common law exceptions plaintiffs may raise.
 - **Based on another's content:** 230 won't protect CatchMoreFish for its own content it provides. However, it will preempt claims based on other 3rd party content CatchMoreFish publishes.

SecretReef's Claims

Copyright Infringement

- **User's Direct Infringement**
 - **Original Work:** SecretReef's 3-D maps are created by them and fixed in a tangible medium with some degree of creativity. Ownership was created on fixation but individual maps aren't registered so SecretReef needs to register them in order to sue.
 - **Exclusive right:** Users violate SecretReef's exclusive right to redistribute/reproduce by uploading maps to CatchMoreFish. Users might've been granted a license to use the maps for fishing but this didn't include publishing them online as stated in SecretReef's TOS.
 - **Volition:** Users' affirmatively upload the maps to CatchMoreFish.

- **Conclusion:** If SecretReef registers its maps, they can prove direct copyright infringement against CatchMoreFish's users.
- **User's Fair Use**
 - **Purpose:** Use isn't commercial which supports being fair. Users aren't paid for uploading the maps and are simply sharing them to inform fellow fishers of good spots which is primarily an educational purpose. However, it isn't transformative since users did nothing to change the maps or purpose of finding spots which could cut against fair use.
 - **Nature:** Maps are fact-based which supports fair use. However, 3-D maps are personally created by SecretReef which took some creativity. This adds an artistic component and cuts against fair use.
 - **Amount taken:** If each user uploads their entire map, this cuts against fair use. User's are also uploading maps to what are considered the "best" fishing spots. This could be the "best part" of the works which cuts against fair use. It'd be helpful to know if users uploaded multiple maps which would cut against fair use.
 - **Effect on market:** There's a ready market for SecretReef's maps as many fishers are buying them. However, the uploaded proprietary maps are never sold or marketed again so use may not have an effect on the market for specific maps uploaded. SecretReef may claim they would've extended user's licenses to redistribute the maps which could support use having a detrimental effect on SecretReef's market.
 - **Conclusion:** We need more facts to be certain but user's likely qualify for fair use.
- **CatchMoreFish's Infringement:** Federal Copyright is excluded from 230.
 - **Direct:** For user maps, CatchMoreFish lacks volition like *Cablevision*. It merely offered the outlet for users to upload infringing maps. However, if any maps CatchMoreFish personally orders from SecretReef and posts are registered, CatchMoreFish committed direct infringement by posting those maps.
 - **Contributory:** User's of CatchMoreFish are direct infringers however like *Veoh* CatchMoreFish may lack requisite knowledge. It has general knowledge some maps uploaded are infringing but nothing indicates they have actual knowledge of specific instances of user's infringing. If CatchMoreFish does get this notice and continues hosting the maps, then they'd be materially contributing to infringement by continuing to host them.
 - **Vicarious:** CatchMoreFish only has a general ability to control user's infringement by uploading and removing their maps. However, they don't have a specific ability or control over user's infringement. They also don't have a direct financial interest in the infringement. CatchMoreFish makes money off its site's advertisements and not the infringing maps themselves.

- **Inducement:** SecretReef may argue by “encouraging” users to upload proprietary maps, CatchMoreFish intentionally induces users to infringe. However, this likely doesn’t rise to inducement like *Grokster*. CatchMoreFish’s service wasn’t designed for the purpose of promoting infringement and can be used in various ways that aren’t for infringing. CatchMoreFish also hasn’t taken any steps to foster infringement beyond “encouraging” users to upload SecretReef’s maps.
- **Conclusion:** SecretReef likely could prove direct infringement for maps CatchMoreFish personally downloads and posts on the site if registered. If CatchMoreFish continues to host maps submitted by users that are infringing after receiving notice they are, it’ll be liable for contributory infringement.
- **CatchMoreFish’s Fair Use:** Use is more commercial than users since maps are used to entice consumers to CatchMoreFish’s site to see advertisements it profits from. This makes use not fair.
- **CatchMoreFish 512 Defense**
 - CatchMoreFish is a qualified service provider since it provides a website online. It stores maps at users’ direction when they upload them. However, maps CatchMoreFish personally downloads and uploads from SecretReef’s site are stored at CatchMoreFish’s direction. They may be protected for user-uploaded infringing maps but not maps CatchMoreFish themselves download and put on the site.
 - CatchMoreFish has adopted a policy to terminate repeat infringers and reasonably implemented it based on the facts. SecretReef may argue it isn’t reasonable since it only terminates users after 5 or more complaints and CatchMoreFish hasn’t terminated anyone yet.
 - Assuming CatchMoreFish accommodates copyright owners’ “standard technical measures”, this is met.
 - CatchMoreFish has made all proper agent designations to the Copyright Office to receive 512 notices.
 - Until CatchMoreFish receives a proper 512 notice from SecretReef, they likely don’t have actual knowledge of infringement. Additionally, CatchMoreFish likely lacks “red flag” knowledge. Similar to *Veoh*, they generally know some user-uploaded maps uploaded are from SecretReef, but don’t specifically know whether they’re infringing. “Dozens or hundreds” of SecretReef’s maps uploaded by users might not rise to the level of infringement so apparently CatchMoreFish should’ve known about it.
 - CatchMoreFish likely doesn’t have the right/ability to control user infringement. CatchMoreFish “encourages” users to upload SecretReef maps, however it doesn’t have “substantial influence” such as specifically requiring only uploading SecretReef’s maps. CatchMoreFish merely has a general ability to delete and upload maps by user but we need more facts to be certain. It does have the

right/ability to control its own acts of uploading infringing maps it personally uploads.

- CatchMoreFish likely doesn't have a direct financial interest in infringement. They primarily generate revenue from advertising, not SecretReef's maps, so revenue isn't directly tied to the infringing maps. SecretReef may argue CatchMoreFish's marketing directly points at the infringing material to generate advertising revenue. However, this is a weak connection.
- Nothing suggests CatchMoreFish has engaged in inducement or willful blindness. It only "encourages" users to upload potentially infringing maps and any infringement on the site doesn't appear to rise to the level of making CatchMoreFish subjectively aware of it and attempting to avoid learning about it.
- **Conclusion:** CatchMoreFish likely qualifies for 512 for maps its users upload so long as they promptly respond to SecretReef's 512 notice and remove the maps. 512 won't protect CatchMoreFish for maps it personally downloads and uploads.

Trademark Infringement: Federal Trademark is excluded from 230.

- **Ownership:** SecretReef has a validly registered Trademark in its name and website which is prima facie proof of ownership. It's also a descriptive mark with secondary recognition in the fishing market.
- **Priority:** SecretReef made use of its mark in commerce first in their fishing services.
- **CatchMoreFish's Use:** CatchMoreFish made use of the mark under both definitions. They included it in their marketing ad copy, purchased keyword advertisements, and in keyword meta tags.
- **Likelihood of Confusion:** SecretReef's mark may be strong in the fishing market but registration alone supports it being strong. CatchMoreFish is using it in the same fishing market and online advertising channel as SecretReef which supports consumer confusion. It'd be helpful to know if there's been actual instances of confusion such as consumer's clicking CatchMoreFish's advertisement believing it to be linked to SecretReef. It'd also help knowing if CatchMoreFish was intending to benefit off SecretReef's mark in the fishing industry. If they were, this'd support confusion. However, SecretReef's maps are expensive and its service is directed at fishers who're looking for unique maps to spots others haven't been. A consumer would likely be extremely careful when deciding on the product. Also, like *Network Automation*, the context of CatchMoreFish's ad copy includes "CatchMoreFish.com." This makes use of "secret reefs" rather than "SecretReefs" not in a way that's likely to confuse a consumer. SecretReef likely can't prove reasonable consumers would likely be confused about its product source from CatchMoreFish's use.
 - **Initial interest:** SecretReef may argue there's initial interest confusion. This requires "likely confusion; not mere diversion." Given the keyword advertising context, if a court follows *Contacts* and click-through rate of CatchMoreFish's ad

is less than 10%, there's likely no confusion. Also, like *Lamparello*, CatchMoreFish isn't trying to profit off SecretReef's consumers because it offers maps for free. Use likely has no effect on SecretReef's market and suggests no initial interest confusion.

- **Conclusion:** SecretReef likely can't prove CatchMoreFish committed trademark infringement.
- **Descriptive Use:** CatchMoreFish is using the mark to describe its own mapping service. SecretReef is a descriptive mark itself which supports CatchMoreFish being able to use the defense.
- **Nominative Use:** CatchMoreFish uses the mark to refer to SecretReef's map service. Its service can't be identified without using SecretReef and only uses as much as necessary in the ad copy. Use also doesn't suggest SecretReef sponsors it since the end of the ad includes "CatchMoreFish.com."

Trademark Dilution

1. **Famous:** Nothing suggests SecretReef is known worldwide to be famous. If it is then SecretReef can bring a dilution claim.
2. **Likely dilution:** There's likely no blurring. SecretReef may argue using the mark for a service that displays its maps along with others on CatchMoreFish's site is impairing the mark's distinctiveness, however we need more facts to be certain. There's no tarnishment since CatchMoreFish isn't associating the mark with something that'd harm SecretReef's reputation.
3. **Conclusion:** SecretReef likely can't prove a dilution claim.
4. **Fair Use:** CatchMoreFish's use of the mark is noncommercial since it doesn't profit off of the mark's use but rather its site's advertisements. CatchMoreFish likely qualifies for fair use.

Breach of Contract

- **Formation:** SecretReef has a breach of contract claim against CatchMoreFish based on its use of automated scripts on the site. Formation happens when CatchMoreFish's employees place an order on SecretReef. SecretReef will argue CatchMoreFish manifests objective intent to be bound by its employee's clicking the "place order" button.
 - **Placement:** The call to action is directly below the link to the TOS's terms. The TOS is hyperlinked to the page in bright blue which supports reasonably conspicuous notice of terms. It's a "2-click" where users must check they've read the terms in order to process the order. However, if a user clicks the link, they must scroll down to see the actual terms but aren't required to actually scroll through it to make an order. This might defeat reasonably conspicuous notice of the terms.

- **Wording:** It's not an "if-then" statement indicating consequences of checking the box and placing an order. However, "I have read and agree" would lead a reasonable consumer to know they're agreeing to be bound to the TOS.
- **No leaks:** There's no other way to place an order other than checking the TOS box at checkout.
- **Conclusion:** The formation process could be better but is likely enforceable against CatchMoreFish. SecretReef may also argue, like *Register.com*, CatchMoreFish has continued to order maps from them on multiple occasions while on notice of the terms. However, employees may not be on notice since terms aren't otherwise posted on the site other than the checkout screen and even if they do click the TOS link, it doesn't show any terms.
- **Breach:** Assuming a contract was formed, CatchMoreFish breached by using automated scripts on the site.

Trespass of Chattels

- **Chattel:** The chattel is SecretReef's website.
- **Unauthorized use:** CatchMoreFish's use was unauthorized by using automated scripts to order public coordinate maps as prohibited in SecretReef's TOS. However, this alone is likely insufficient to make use unauthorized. Like *VanBuren*, use of SecretReef's site to buy maps wasn't off limits to CatchMoreFish and they may not have been on notice of the TOS's limit. CatchMoreFish's script was slowed down by SecretReef's self-help "throttling" which could've made CatchMoreFish know use was unauthorized. However the scripts otherwise worked and might not be enough to create knowledge. The robot exclusion headers also may have signified use was unauthorized. However, no one at CatchMoreFish reviewed them so they may still lack knowledge.
- **Harm:** CatchMoreFish's use caused SecretReef's email server to slow down and delayed delivery to other customers by one minute.
 - **Common law**
 - Under *Hamidi*, this may be insufficient to be a "measurable loss" to SecretReef's server since it was such a short period and otherwise caused no harm to the site. It could be "de minimis" and not actionable. There's also a causation issue because the delay could be from other orders, not CatchMoreFish's script used to place the order. SecretReef could point to *Verio* and show CatchMoreFish plans to continue this practice in future years and "threatens to cause" a measurable loss if replicated. However, it'd only be for a handful of new coordinates and not rise to the level of threatening to cause a measurable loss.
 - Under majority rule, CatchMoreFish's use impaired the server's operating condition. Harm is likely met if we aren't in California.

- **CFAA:** SecretReef may have a hard time showing \$5,000 in damages. If it can show it had to take remedial actions due to CatchMoreFish’s use that amounts to \$5,000, then harm will be met.
- **502:** Any harm is enough. Any steps SecretReef had to take to verify its servers were slowed would be sufficient to satisfy this.
- **Conclusion:** A CFAA and a common law *Hamidi* claim would likely fail. However, SecretReef could likely succeed with a 502 or majority common law claim.

Trade Secret: Any trade secret claims based on users’ uploading proprietary maps to CatchMoreFish will be preempted by 230. Maps personally collected by CatchMoreFish are public, not proprietary, so it won’t be liable for publishing them. SecretReef may raise common law exceptions to 230.

- **Roommates.com:** None of the holdings seem to apply.
 - CatchMoreFish doesn’t encourage or require users to only upload proprietary maps or trade secrets. It has various completely legal uses.
 - They didn’t “materially contribute” to trade secret violation by users. It only provides a neutral tool for users to upload maps which treats all content equally whether illegal or not.
 - SecretReef may argue CatchMoreFish is “sufficiently involved” in the violations based on encouraging users to upload proprietary maps and designing its site to display them. However, CatchMoreFish doesn’t require users to submit these specific maps. Merely deciding how to structure its site and what to publish alone is insufficient to defeat 230.
- **Negligent Design:** CatchMoreFish was negligent in designing its site by not instituting reasonable measures to prevent users uploading trade secrets. However this argument is weak and CatchMoreFish’s current filtering efforts are likely sufficient.

Claims for User Comments

“Product Liability”: Abner could be liable for encouraging snorkeling at reefs when he knows they’re dangerous due to sharks. 230 should protect CatchMoreFish for any offline injuries that arise out of Abner’s comment even if it doesn’t remove the post.

Defamation

- **Statement of fact:** Billy stated Luke engaged in illegal poaching at a reef. Applying *Bauer*, this could be an actionable statement.
 - **Definite/unambiguous:** “Illegal Poaching” is ambiguous. A reader may not understand what Billy is asserting. He could be referring to poaching eggs. However, “reefs” clarifies the statement to make it more definite.

- **Capable of proof:** Whether Luke “poached” reefs can be objectively proven true by showing Luke fished without a license. However any evidence of the poaching is in Luke’s possession which he likely didn’t retain. This makes Bill’s statement hard to prove true unless there’s footage of the poaching.
- **Context:** The statement is on a fishing site and could be interpreted as one fisher making fun of the other. Nothing surrounding the statement is used to make it look more factual. It’d be helpful to know if Billy and Luke had a prior relationship or similar correspondence on the site. This’d suggest the statement is hyperbolic, not factual.
- **Social context:** “Poaching” could be used for various purposes in the fishing community and not only engaging in illegal activity. It could be understood as a rhetorical hyperbole to say Luke is a bad fisherman and must use unorthodox means to be able to catch a fish.
- **Of/concerning:** Statement is of and concerning Luke as it includes his name.
- **Published:** Statement was published to others on CatchMoreFish’s site.
- **Injurious:** “Poaching” could be per se injurious to Luke if he is a commercial fisherman since it’d harm his business reputation.
- **Conclusion:** Billy’s statement likely isn’t factual. If it is, Luke can prove a defamation claim against Billy.
- **1st Amendment Defense**
 - **Public Concern:** The public has an interest in knowing who’s illegally poaching fish. It deteriorates ocean wildlife which is a matter of public concern. Luke may argue the statement only concerns his private, individual fishing so it’s not a matter of public concern.
 - **Private/Public:** Unless Luke is a world-known fisherman, he’s likely a private figure and must show Billy was negligent in making the statement.
 - **Conclusion:** If Luke can show Billy should’ve known his statement about Luke was false, Billy’s 1st Amendment defense would likely fail.
- **CatchMoreFish’s Defamation liability:** Luke’s defamation claim against CatchMoreFish’s is preempted by 230. Luke may argue 230 shouldn’t apply.
 - **Promissory estoppel:** Luke demanded CatchMoreFish remove the post and they told him they’d investigate it but took no action. Based on this promise, 230 shouldn’t apply. However, CatchMoreFish never promised anything to Luke and only said they’d “investigate.” This likely isn’t sufficient to defeat 230.

Criminal Prosecution: A federal prosecution by the DOJ against CatchMoreFish for fishing on federal reserves due to Caleb’s comment won’t be preempted by 230.