

Fall 2017 Internet Law Final Exam Student Sample Answer

[Eric's introduction: this is an actual exam submitted by a student from the Fall 2017 course. It provides an example of what one of your peers 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: 2748

Copyright Issues

Member's own copyrights

MakeADare members may have interests in their own copyrights. Therefore, MakeADare should include a license in its uploading agreement. But this may not be a major risk, since even if MakeADare doesn't include the license, its republication should be covered by an implied license.

Third-party copyrights

MakeADare members may infringe third-party copyrights in a number of ways. We know some members would upload third-party photos and videos found on the Internet. Some may include third-party music or other copyrightable work in their own videos without permission. Third-party copyright owners will have to register their work before they can sue, and to get statutory damages or attorney's fees, but they could get actual damages and an injunction.

(1) Members' direct infringement

Members' unpermitted use of third-party photos, videos and music could qualify as infringement of the reproduction, distribution, and performance rights. Since the third-party photo/video/music is presumably published online, MakeADare members could argue they have an implied license to download the copyrighted work, but that implied permission wouldn't allow republication. Members may also have a fair use defense. The members' actions probably couldn't be characterized as "commercial." Members may also argue their use of the third-party music is transformative, especially if the music relates to their comments somehow. We don't know how much of the original work members would take, or if there are available licensing options. These things will all affect this defense.

(2) MakeADare's liability

Direct infringement: MakeADare can argue that it just operates the servers that members use to publish their content. Thus, it lacks the requisite volition to be directly infringing (Cablevision). However, even if MakeADare is not directly liable, if members are found to be direct infringers, it may have secondary liabilities.

Contributory infringement/Inducement: Even if MakeADare hosts content infringing third-party copyrights, it probably lacks sufficient scienter for contributory infringement. MakeADare asks members to submit their own creations. Even if MakeADare has some generalized knowledge that members may infringe third-party copyrights, such generalized knowledge is not enough per Veoh. MakeADare does not pre-screen or make individual publication decisions, and thus, can claim that it lacks requisite knowledge of any specific infringing activity of any particular work. I don't think MakeADare is "inducing" infringement.

It induces photo/video uploads, but nothing indicates its desire for infringing uploads. This is different from Grokster.

Vicarious infringement: MakeADare arguably has a direct financial interest. It monetizes the infringing content by placing third-party ads at the beginning and end of the infringing videos. Its merchandise sales also increase proportionately if members spend more time on the website uploading/watching/commenting on infringing content. It wouldn't be easy to restructure MakeADare's business model to reduce its direct financial interest in infringing content, and it's uncertain if this could actually resolve the legal issue. Indeed, the infringing content may act as a "draw" for more users (in which case the business model change would not solve the legal problem), and MakeADare's merchandise sales increase with increases in its member base

Notwithstanding the above, MakeADare may not have the requisite "right/ability to supervise." Veoh indicates that just hosting the content isn't enough. MakeADare doesn't make individual publication decisions. It may take down user content as a remedial action after investigating member complaints. But post-hoc removal of members' uploads does not automatically satisfy this element (Veoh).

Fair use: Similar to its members' fair use defense, we cannot easily assess this defense in the abstract. But MakeADare has a stronger commercial interests than its members because it is a for-profit company and the member uploads with infringing content contribute to its profit scheme.

512(c) safe harbor: MakeADare qualifies as a "service provider," and likely qualifies for 512(c) safe harbor. MakeADare should make sure that it satisfies all 512(c)'s formalities (e.g., registering an agent with the Copyright Office). This defense applies even if MakeADare's arguments against the prima facie case of contributory or vicarious infringement fail (Veoh).

There are a few reservations:

- * "Stored at direction of a user." MakeADare does not pre-screen, but it places third party video ads at the beginning and end of each video. One may argue that this breaks the chain between the user's uploading and the actual publication online. We should get more information on how and when the video ads are included before publication to be able to assess this.
- * As for scienter, MakeADare didn't get a 512(c)(3) notice, but it does get user complaints about content and its employees would investigate. We need to know

more about what exactly the complaints are for. To the extent any of the complaints claims copyright violations, it could trigger a “red flag” (Veoh), which can potentially disqualify MakeADare from 512(c). MakeADare could hire independent contractors, instead of using its own employees, to investigate member complaints. If done properly, the website may not be liable for the independent contractors’ monitoring or knowledge of user content.

* As for the right/ability to control, it requires more than the mere ability to delete and block access to infringing material. MakeADare is similar to Veoh in its design to collect and republish user-generated content. So MakeADare may also lack a “substantial influence” (Veoh).

MakeADare could investigate if there are automated copyright detection filters, and create a library of free music for members’ use. MakeADare should also ensure its video ads placement (and other internal) procedures do not contribute to publication decisions.

Section 230 protection and limitations

47 USC 230. MakeADare.com can assert Section 230 immunity for user content. MakeADare is a typical user-generated content website and qualifies as a provider of an interactive computer service. Section 230 covers everything other than IP claims, federal criminal prosecutions and ECPA. MakeADare’s ability to investigate and take remedial action to user content and to add third-party ads to the user videos does not affect the Section 230 analysis (Zeran).

Defamation and privacy claims

MakeADare members may make defamatory statements in their videos or post photos evidencing false facts. Members’ uploads may also violate third parties’ privacy interests, for example, as a public disclosure of private acts (e.g., private facts about employers) or an intrusion into seclusion (e.g., if members’ photo/video is captured in a “private” place). Because of Section 230, MakeADare is generally not liable for these defamation and privacy claims.

Obscenity/child pornography

MakeADare calls for “sexual” dares, which is not automatically actionable. However, as evidenced by one of the exemplary member dares, this may lead to obscenity (Miller test) or even child pornography (Ferber test). MakeADare, if faced with state obscenity/child pornography charges, may argue that such claims qualify for Section 230 protection. However, the immunity expressly excludes federal criminal obscenity and child pornography laws. Thus, MakeADare could be liable in certain circumstances. MakeADare could investigate if there are any anti-pornography automated filters.

Intellectual property claims

Section 230 does not preempt intellectual property claims. Thus, one can bring federal copyright (supra) or trademark (infra) claims against MakeADare without running into Section 230. Any possible publicity rights claims against MakeADare are state IP claims. If the lawsuit is in the

Ninth Circuit, it is also preempted. If the lawsuit isn't in the Ninth Circuit, then Section 230 won't apply.

Roommates.com

MakeADare could be vulnerable to a Roommates.com attack. MakeADare might satisfy the narrow holding of Roommates.com that Section 230 applies unless the website encourages illegal content, or designs its website to require users to input illegal content. The "illegal" content could be members' privacy invasion, defamatory, obscene/pornographic or even criminal content, and MakeADare arguably encourages these outcomes by calling for dares associated with "humiliation," "pain," "sexual," and places people should be in.

Nevertheless, MakeADare never explicitly requires or encourages illegal content. Those dare categories are not automatically illegal. Unlike the Roommates.com web pages where users had to answer questions that presumptively violated the law, members' photos/videos don't have to lie, invade privacy, or be obscene/pornographic or otherwise illegal to get published on MakeADare. Moreover, MakeADare does not pre-screen and there is no facts indicating that MakeADare is partially responsible for development of the offending content.

Untrue marketing/promissory estoppel

One may argue that the member agreement provisions constitute a promise that no one will commit anything harmful/dangerous/illegal. However, MakeADare makes clear that it is their intention but they can't monitor. So the provisions are at best negative behavioral covenants, not guarantees against such activities occurring on the website. A plaintiff will also have to show detrimental reliance in claiming promissory estoppel.

Trademark Issues

Infringement

MakeADare references "YouTube" and "Jackass" in its tagline, which is included in all of its advertisements. MakeADare also bought Google ads triggered by the keywords "YouTube" and "Jackass" to display: "Where YouTube Meets Jackass/We Dare You To Join Us/makeadare.com."

"YouTube" is a registered trademark of Google Inc. "Jackass" is a descriptive word but may have achieved secondary meaning. For the analysis below, I'll assume "Jackass" is a protectable trademark.

MakeADare's use of "YouTube" and "Jackass" began after their use in commerce by trademark owners. MakeADare uses both marks in its tagline, advertisements and Google ads to promote its service. This should meet the broad Commerce Clause analysis. Also, putting a third-party trademark in ad copy usually qualifies as a use in commerce. Moreover, MakeADare bought Google ads triggered by the keywords "YouTube" and "Jackass." Per Network Automation, buying keyword ads constitutes a use in commerce.

YouTube is a well-known mark. MakeADare and YouTube both are user-generated content websites, but MakeADare is a social media network that caters to a more particular market segment. Both use the Internet for marketing, but MakeADare is marketing a specialized service: it calls for users to dare friends and upload photos/videos as proof. I'd expect that MakeADare members would give a fair amount of thought before selecting and participating in the dares. Nothing suggests YouTube would develop directly competing services. We don't know the strength of Jackass as a trademark, which depends on consumer recognition. Other than the 2000-2002 TV show and perhaps some follow-up TV/movies (which are different from MakeADare's service), we don't know what other products/services the mark owner is marketing, and by what channels. MakeADare uses both "YouTube" and "Jackass" to market its service, but it doesn't seem to carry any bad faith. On balance, MakeADare might win the Sleekcraft multi-factor test.

However, there is probably still actionable confusion if users are likely to believe YouTube and Jackass endorse MakeADare. Alternatively, there could be initial interest confusion. MakeADare used both trademarks to call attention to its service. Since MakeADare bought Google ads triggered by the keywords "YouTube" and "Jackass," MakeADare would appear in customer's search for the trademarks. Thus, a judge could find MakeADare uses the trademarks in a manner calculated to capture initial consumer attention even if no actual sale is concluded (Brookfield). Nevertheless, Network Automation requires that the owner of the marks must still demonstrate likely confusion, not mere diversion.

MakeADare may try a nominative use defense because its taglines/ads actually refer to YouTube and Jackass (presumably the TV show). The question is whether MakeADare has taken the minimum amount necessary to make the references, and this defense could fail if there is implied endorsement by YouTube or Jackass. Perhaps MakeADare can consider getting a license from the trademark owners.

Dilution

YouTube could be a famous mark but we don't know how well-recognized Jackass is, so we don't have facts to definitively resolve fame. MakeADare began use of the two marks in commerce (supra) and presumably after fame.

It's unlikely that MakeADare caused blurring because it refers to YouTube and Jackass instead of trying to add a new meaning to the trademarks. It is also unlikely YouTube or Jackass would be tarnished. Although Jackass may be known for dangerous/crude stunts and pranks, by stating MakeADare is a service where YouTube meets Jackass, it is saying that YouTube is distinguished from Jackass. MakeADare can further assert a fair use (comparative advertising) defense to the dilution claim.

CAN-SPAM

MakeADare can argue that some members may have spammed MakeADare in trying to gain more Karma/followers/member responses. CAN-SPAM normally doesn't provide private

remedies, but it does allow limited claims by Internet access services. Even though a MakeADare internal message may lack a clear local or domain part, MakeADare should still qualify as an Internet access service because it enables email-like private messaging and the members' direct messages are still electronic mail messages (TheGlobe.com). It is questionable whether member messages here constitute "commercial advertisement or promotion of a commercial product or service," since the members are not trying to monetize their dares. We should ask if there is any other way the members may benefit economically. MakeADare also has to show its damages but at least it can try to get CAN-SPAM's statutory damages. Moreover, the falsity and the misleading nature of the "fake" accounts used to send the "spamming" messages might trigger a CAN-SPAM violation.

MakeADare might also have a state anti-spam claim and a breach of contract claim (discussed below).

Although it is an option, it might not be a good business decision for MakeADare to sue its own customers. As an alternative, MakeADare could try to thwart "spamming" and "fake" accounts by doing more to authenticate its members' identities (and can couple this with screening out convicted sex offenders and criminals to supplement its Section 230 protection, *supra*).

Breach of contract

In order to post/communicate, everyone needs to create a MakeADare membership account. The membership registration page generally looks like a mandatory non-leaky clickthrough. All members navigate through this page. We should investigate if there are other ways members can create an account (e.g., by mobile devices). The registration page has a "SUBMIT" button and above it the text "I agree to the Terms and Conditions." The placement of the text is good but MakeADare can strengthen its call-to-action by including the "by clicking..." language.

We need to know whether "Don't send private messages to members you don't know" and prohibition of "fake" accounts are part of the linked terms (MakeADare should make sure they are). If not, one may argue that the requirements are not part of the terms members agree to by clicking the "SUBMIT" button, because they would not have the Specht knowledge of the provisions. MakeADare might be able to argue that contract still forms when the members take the benefit knowing the terms, and have a reasonable opportunity to reject but don't (Register.com). Given the admonishment is added to the private message page, members couldn't deny knowledge if they are messaging >50 members/day.

That said, the contract could be attacked due to its amendment provision. Like Blockbuster, the language says that MakeADare can unilaterally amend the contract without notifying members. This clause puts the onus on members and says members are bound if they keep using the site after a change. This may very well create the same kind of failure-of-consideration problem that could undermine the entire agreement (Blockbuster). MakeADare should change this unilateral clause, or at a minimum, should affirmatively "push" notice to its members of any changes, e.g., by a popup on the website or send emails to give notice of the changes to the users and get their assent.

Assuming the contract is properly formed with appropriate provisions, members “spamming” MakeADare would arguably have breached the contract.

Trespass to Chattel (TTC)

MakeADare may have a TTC claim against the misbehaving members since their use of the MakeADare servers may be unauthorized, e.g., either by clearly breaching the membership contract or by using the servers in ways that contravene the contract/website provisions.

For the common law doctrine, Hamidi would require MakeADare to show that members’ unauthorized activities (e.g., spamming) would cause a “measurable loss to computer system resources.” We should ask for evidence of server failure or data loss. Moreover, both Hamidi and Register.com courts might conclude that there’s a legitimate fear that other members may copy the unauthorized activities (e.g., spamming) to gain popularity on the website, and eventually incapacitate the servers. MakeADare did implement technical self-help against spamming, which could help it gain court’s sympathy.

With respect to the CFAA and Penal Code 502 claims, MakeADare should be able to count its time/effort spent researching the unauthorized activities as well as preparing and implementing technological remediation. This should be sufficient to satisfy 502, and if aggregate expenses exceed \$5000, MakeADare would have a CFAA claim as well.

Copyrights of MakeADare

If the members lack authorization to access MakeADare, then arguably they are also browsing MakeADare’s pages (which presumably contain some copyrightable material) without authorization (Ticketmaster).