

Internet Law

Professor Grimmelmann

Final Exam - Fall 2008

Take-Home and Open Book

This exam consists of THREE (3) questions. Each question is worth 33 points, for a total of 99 points. (Everyone gets the final point for free.) The exam counts for 80% of your grade in the course.

You have 24 hours to complete this exam; you can choose when to take it. You must pick this exam up *in person* from the Registrar's office *after* the start of exam period on Wednesday, December 10, at 9:00 AM. You must then return it either in person or via email (to [submitexam@nyls.edu](mailto:submitexam@nyls.edu)) *within* 24 hours and *before* the end of exam period, on Friday, December 19, at 5:00 PM.

Please type your answers in 12 point Times or Times New Roman, double-spaced, using 8.5"x11" paper, with one-inch margins and numbered pages. Put your exam number on each page. **DO NOT PUT YOUR NAME ANYWHERE ON THE EXAM.**

Maximum page counts are indicated for each question (using the formatting given above). These are maximum lengths, not target lengths; you do not need to make your answer that long to receive full credit. I will strictly enforce the page limits.

This is an open-book exam. You may use any materials that you wish to answer the questions, though you need not consult any sources other than those we used for class. You may not discuss this exam or your answers with anyone under any circumstances until after the end of exam period. **Your work must be exclusively your own.**

**I will not be available to answer questions about the course** after the start of exam period, since at that point I won't know who has picked up the exam and who hasn't.

Please pay attention to the specific questions being asked and to the roles the questions place you in. Support your answers with detailed analysis, reference to specific statutes and cases as appropriate, and explanations of how you applied the law to the facts. Keep your citations simple; bluebook/ALWD format is not required. Feel free to shorten your answers by using an outline format and stating your arguments in bullet point format, so long as the substance of your analysis is clear.

If anything about a question is ambiguous, say what you think it means, and answer it accordingly. If you need to assume additional facts to answer a question, say what those facts are and how they affected your answer. No reasonable resolution of an ambiguity will be penalized.

This exam has **FOUR pages total**, including this cover sheet.

**GOOD LUCK!**

(1) **Little Photoshop of Horrors** (33 points, maximum of **5 pages**)

The law firm where you are an associate is on retainer to Exploitr.com. Its business model is to bring the power of offensive Photoshopping to the masses. It works as follows:

1. A user visits the exploitr.com homepage and enters the name of a person into a search box.
2. Exploitr passes the search term to Google Image Search; when the Google search completes, Exploitr shows the user the top four search results from Google.
3. The user drags to circle the face of the person in one of the resulting photos.
4. Exploitr conducts a Google Image search on “flawless 8” and chooses, at random, one of the first 100 photos that Google returns (usually, but not always, of a naked or nearly-naked model).
5. Exploitr clips the face from the photo the user selected, pastes it onto the model photo, and shows the resulting composite photo to the user. The photo itself is purged from Exploitr’s servers within half an hour.
6. The user copies the URL of the results page. This URL, called a “permalink,” contains enough information to tell Exploitr how the composite photo was assembled from its constituent parts, and emails it to other users.
7. When other users visit Exploitr using the permalink, Exploitr figures out which two photos were used, requests them from the web sites where it found them originally, and combines them again to make the same composite photo the original user saw. (Each time it does, the photo is purged within half an hour, as before.)

The partner handling the Exploitr account has requested that you review the following issues:

- A party or parties unknown have entered the name “Frank Matasar” on Exploitr, then posted the resulting URLs of stitched-together photos to the “Shameless Suburbanites” bulletin board. The real Frank Matasar, a New York resident, is known to have been deeply offended.
- FLAWLESS 8 is a registered trademark of the Flawless 8 corporation.
- Flawless 8 has recently launched a wave of lawsuits against web sites it alleges are distributing its copyrighted images without permission.
- Exploitr currently has no source of revenue. It’s considering switching to a model in which the initial user pays \$1.00 in order to obtain the permalink.
- A recently-passed state law in New York punishes as a misdemeanor the “commercial display of any image which bears the recognizable likeness of any individual without said individual’s consent and which, taken as a whole, is indecent according to community standards.”

Exploitr is concerned about the its potential liability in light of these issues. **Prepare a memorandum for the partner on the legal risks Exploitr faces and on any steps it could take to mitigate those risks.**

(2) **Ping Ping Ping Bananaphone** (33 points, maximum of 5 pages)

You are law clerk to Judge Harlan, of the Southern District of New York, who is presiding over litigation between BananaPhone (web-based, ad-supported videoconferencing system), and Metro Cable (a cable-based ISP with approximately 3 million broadband customers in New York, New Jersey, Connecticut, and Pennsylvania).

Any number of users with webcams can point their browsers at BananaPhone.com and follow a simple set of instructions to start a video conference. BananaPhone achieves high video and audio quality for its users by sending redundant packets from multiple servers, which reduces noise and cut-outs, but significantly increases the amount of traffic it generates. Some users apparently take advantage of BananaPhone's anonymous accounts and interconnection with the traditional phone network to place fake pizza orders and other harassing prank calls.

BananaPhone now consumes over 25% of Metro Cable's bandwidth during peak calling times in the evening. Metro Cable has terms of service that purport to apply to any "use" of its network "to transmit information to or from a subscriber of its Residential Hi-Speed Service." One provision prohibits any "use not expressly authorized by Metro Cable." Another prohibits the "use" of the network "for any criminal or tortious purpose." Metro Cable requires all subscribers to indicate their consent to the terms of service by clicking on an "I agree" box on a web form while activating their cable modems.

Three months ago, Metro Cable sent a letter to BananaPhone stating that "Metro Cable does not authorize BananaPhone's use of the Metro Cable network" and asking BananaPhone to agree to a compensation schedule whereby BananaPhone would pay Metro Cable based on the amount of traffic it caused on Metro Cable's network. BananaPhone flatly refused to negotiate, claiming it was under no obligation to do so. Metro Cable responded by blocking all IP traffic between its subscribers and BananaPhone's IP address at the time. BananaPhone then began rotating its servers among multiple IP addresses and increasing the degree of redundancy in its transmissions to Metro Cable's subscribers.

Metro Cable sued BananaPhone for trespass to chattels, breach of contract, violation of the Computer Fraud and Abuse Act, and tortious interference with contract. BananaPhone counter-claimed, alleging tortious interference with contract, violation of the Wiretap Act, and breach of network neutrality. Metro Cable has moved for a preliminary injunction to prevent BananaPhone from sending any further traffic to Metro Cable's customers; BananaPhone has cross-moved for a preliminary injunction to force Metro Cable to stop its blocking.

**Write a bench memorandum to the Judge, explaining to her how she should rule on these motions.** If there are questions she needs to ask the parties at oral argument tomorrow, indicate what those questions are and how the answers would affect her ruling.

(3) **Pirates of the Domain Name System** (33 points, maximum of **5 pages**)

You represent the Ultrimpex corporation, a restaurant supplies manufacturer, which, until yesterday, had its web site at Ultrimpex.com. Until yesterday. That's when you got a panicked phone call from its vice-president for legal affairs. As best you can reconstruct after talking to him, the following events have taken place:

For the past few years, Ultrimpex has maintained a web site that consists of an online catalog, emailable links to its various divisions, a customer-service FAQ, and a small e-commerce storefront where customers can place orders. Orders average about \$2,000 a day, and they get about half a dozen emails from first-time emailers a day. The site doesn't have user accounts or any user-generated content.

Eight days ago, some entity by the name of "Gazblom" emailed Ultrimpex's domain-name registrar, DomainWheel, a scanned document purporting to be a have been issued by the "Sixth Oblast General Court of Ruritania" (Ruritania is one of the smaller former Soviet republics). The email explained that the document was a judgment against Ultrimpex for trademark infringement and an order that DomainWheel immediately transfer control of the Ultrimpex.com domain to Gazblom.

No one at DomainWheel, Ultrimpex, or your firm speaks Ruritanian, but a Russian native who works at Ultrimpex is willing to say that the document does use close variants of the Russian words for "trademark," "domain name," "default," and "transfer." The letterhead of the document is official-looking and is in the Ruritanian variant of Cyrillic characters. Beyond that, it's hard to tell much about it from the third-generation copy you now hold in your hands.

DomainWheel complied with the Ruritanian order and transferred control of the Ultrimpex.com domain to Gazblom seven days ago. The transfer was executed entirely online; DomainWheel emailed Gazblom the necessary password. Gazblom waited until yesterday, and then put through an online order to switch the domain from pointing at Ultrimpex's server to pointing at an IP address that appears to be in Ruritania. The domain is currently being used to show ads placed there by the TripleClick advertising network. The first that anyone at Ultrimpex was aware of any of this came when the domain switched over to pointing at the Ruritanian server.

Ultrimpex is a New York corporation; its (sole) office is in Brooklyn. DomainWheel is incorporated in Virginia and headquartered in New York. TripleClick is a Delaware corporation with offices in all fifty states. The phone number in the email Gazblom sent to DomainWheel is a 212 number that's currently out of service. The address is on 23rd street, but the street number would place it somewhere in the East River. You've checked, and Gazblom is not the name of any New York corporation.

The Ultrimpex management team is confused and afraid. They're not Internet people. You need to lay out what's going on for them, clearly and directly. **What are Ultrimpex's legal options to recover from this disaster and to be made whole if possible? Are there practical steps Ultrimpex should take, in addition to legal ones?**