

Internet Law

Professor Grimmelmann

Final Exam - Spring 2010

This was a generally straightforward exam. If you were methodical about organizing your answers, it was possible to do quite well. Question one required more imagination and careful reading; question two put more of a premium on organization and precision. Your exams were good; most of what we did this semester appears to have stuck.

I graded the two problems by creating a twenty-five-item checklist for each. You got a point for each item (e.g. “Gagatron is not a direct copyright infringer.”) you dealt with appropriately. I gave out frequent bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts. Organization and writing style counted for about 10% of each question.

Model answers to both questions are below. They’re not perfect; nothing in law ever is. In many places, I would have given just as much credit for reaching exactly the opposite conclusion. The key, as always, is to back up each legal claim with good factual analysis.

If you’d like to discuss your exam, the course, or anything else, please email me and we’ll set up an appointment. If you have exam questions, please read through this memo before getting in touch. It’s been a pleasure and a privilege to teach you and learn from you.

James

	Paper	Poke in the Face	Malibu Stacy
Median	19.0	12.5	14.0
Mean	18.7	12.2	14.5
Std. Dev.	2.8	2.9	4.1

## (1) **Poke in the Face**

### **Model Answer:**

#### *Criminal charges*

Marathe has likely violated the Computer Fraud and Abuse Act (and its New York equivalent) in his use of Van Dyne's computer. By causing it to display the clown picture and play the loud scream, he "accessed" the computer. Although Van Dyne probably "authorized" his use of the computer to display the gorilla video by downloading the Gagatron client and pressing "Shock me," her authorization did not extend beyond playing the video in the Gagatron window. As in *Morris*, by taking advantage of a programming mistake to use the Gagatron client in a way not connected to its "intended function," Marathe acted without authorization.

The most difficult element of a CFAA violation to prove will be that Marathe caused "damage." He impaired the "integrity" of her system by installing what is in essence a piece of malware. The cost of a damage assessment of the computer, to determine whether other functions were compromised, would constitute "damage" of the sort that qualifies. Perhaps more importantly, Van Dyne's injuries were directly caused by Marathe's ability to manipulate her computer to frighten her. The issue is not free from doubt, but I believe we would be able to prove sufficient "damage" if we were to prosecute Marathe for a CFAA violation.

We are less likely to prevail if we prosecute Marathe for unauthorized access to Gagatron's computer systems. Although he arguably acted in violation of Gagatron's Terms of Service by doing something "uncool," Gagatron's terms of service are too vague to make this theory constitutional. *See Drew*.

We could also prosecute Marathe under 18 U.S.C. § 875 for transmitting a threat to kidnap or injure in interstate communications. "I'm coming to get you" would be the threat. Marathe would raise a *Baker* defense, arguing that this expression was not a "true threat," as it was too vague and non-specific to create a reasonable fear that he would carry out the threat. Working in his favor, the gorilla video was on a publicly viewable Gagatron channel viewed by dozens of users; it would seem unreasonable to believe that the threat was directed at any of them individually. In this context, "I know where you live" would not be credible, standing alone. The takeover of the screen and speakers that followed, however, makes the threat more real—it suggests to the viewer that Marathe really does have the power to reach out specifically at them. The intense fear might only last for a few seconds, until the viewer calms down and realizes the clown is only on their screen. That, however, should be enough to overcome the constitutional objection.

#### *Tort liability*

Van Dyne is likely to be able to recover for her injuries under one or more tort theories. Assault is the simplest: the clown put her in sufficient fear for her physical safety that she jumped backwards. Trespass to chattels is also a viable theory. Marathe's use of her computer was unauthorized (by the reasoning above). While he probably did not cause harm to the computer

(under the reasoning of *Intel v. Hamidi*), he caused “bodily harm” under § 218(d) of the Restatement and can thus be held liable. Other potential tort theories include negligent infliction of bodily harm and intentional infliction of emotional distress. She could also sue civilly under the CFAA. Trespass to land is not a viable theory; neither Marathe nor any tangible object ever entered onto any land owned or occupied by Van Dyne.

Marathe could argue as a defense that Van Dyne consented to all of his actions when she clicked the “Shock me!” button, but this defense will likely fail. Van Dyne definitely did not consent to have her entire screen taken over. Nor is it contributorily negligent to react suddenly when startled by a scary image on one’s computer screen.

Gagatron could raise a theory of civil liability under the CFAA, but it would fail for reasons discussed above. Nor has Gagatron, as distinct from its users, suffered “damage” within the meaning of the statute.

### *Jurisdiction*

Marathe, presumably, is a Canadian resident and citizen, and was physically present in Canada when these events took place. Based on precedents such as the Internet hunting problem and the Antiguan offshore gambling example, the United States will have jurisdiction to prosecute Marathe based on the physical harm he caused in the United States to one of its residents. Cases like *Gutnick* support this principle of “effects jurisdiction”; a state may act against conduct that causes significant harm within its borders. The hard part here would be physically getting hold of Marathe; we would need either to lure him to the United States or to obtain the cooperation of the Canadian authorities in extraditing him.

In a civil suit by Van Dyne or Gagatron, a court would need to establish personal jurisdiction. Marathe would claim that he lacks minimum contacts with New York or California because he didn’t “target” his online activities to either of those jurisdictions. He put his video online where it was visible to everyone, no matter where they were located, like the newspaper in *Young*. The best reply, however, is that Marathe knew—indeed intended—that his malware would cause harm to computers and people in many locations, and shouldn’t be able to avoid the consequences by claiming that he intended to cause harm everywhere. He deliberately damaged a computer and injured a person in New York, and that should suffice for targeting under the *ALS Scan* test. As for California, Marathe entered into a contract with a California company under which he made \$1 per hour of viewing; these commercial contacts argue in favor of the exercise of jurisdiction.

### *Evidence*

We should note that it is not certain that LobsterHat is actually Marathe. We will need to gather additional evidence to make sure that someone didn’t steal Marathe’s identity, and to establish that the person who installed the malware on Van Dyne’s computer was the same as the person who showed the gorilla video. In proving this, it may help to ask Gagatron to identify the other users who watched the video; we can interview them. Some of them may be additional victims

who have suffered harm; others' computers may provide useful corroboration of the link between the video and the malware.

Gagatron violated the Stored Communications Act when it disclosed Marathe's subscriber information to Agent Germanotta. Gagatron is probably an "electronic communications service" as defined in the statute; his credit-card and other information are "information pertaining to a subscriber" as used in 18 U.S.C. § 2702(a)(3). As such, Gagatron was not legally allowed to disclose this information to the FBI, a "governmental entity," without a valid search warrant or court order, which we did not obtain. This raises the risk that the information will be considered inadmissible in court.<sup>1</sup>

The "consent" exception in § 2703(c)(2) does not apply, because Gagatron's Terms of Service specifically promise confidentiality. Nor is disclosure necessary to protect Gagatron's rights or property (§ 2703(c)(3)); nothing indicates that their computers are at risk. Nor is the disclosure likely allowable under § 2703(c)(4); while injuries have resulted from LobsterHat's actions, there is no "emergency" presenting a risk of "serious physical injury," as the clown cannot directly touch anyone.

Marathe might argue, unsuccessfully, that Van Dyne violated the Wiretap Act by videotaping his channel. Although his video is likely an "electronic communication" as defined in the Act, and Van Dyne did "intercept" it under the reasoning of *O'Brien*, she was a party to the communication. Thus, as long as the videotaping was legal under New York law—which it was—it was also legal under § 2511(2)(d).

### **Comments:**

The better answers here recited less doctrine. It was temptingly easy to get bogged down in an extended discussion of jurisdictional tests, or to spend a long time comparing *Intel* with *Bidder's Edge*. The better approach was to move quickly to application of law to the facts of the problem. I gave you a substantial nudge by mentioning "substantive, evidentiary, and jurisdictional concerns"—the best answers gave at least a page to each of these three.

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<sup>1</sup> [JG: Actually, this won't be a problem. The SCA does not have a statutory suppression remedy. And under the reasoning of *Miller*, as discussed in *Warshak*, it's probably not a direct Fourth Amendment violation, as one's subscriber information is not something in which one has a reasonable expectation of privacy in the first place. But this goes beyond what we discussed in class, and I didn't expect you to work through this part.]

## (2) **Malibu Stacy**

### **Model Answer**

#### *Trademark*

Some users have names very similar to “Malibu Stacy” on their accounts; these names show up also in the URLs of the channel pages. All of the users are in the business of showing videos for money, which raises a substantial concern that they may be infringing on the MALIBU STACY trademark by using it to attract viewers to their channels. Some users—such as “StacyInMalibu”—may be less likely to infringe than others—such as “MalibuTracy.” We will not be able to determine which actually infringe without further investigation, and perhaps even then. Especially in new media, it is hard to say in the abstract precisely how users will think about various uses of names and trademarks. We should assume for now that at least some usernames are likely to infringe.

If so, then under *Tiffany v. eBay*, Gagatron will not be considered a contributory trademark infringer unless it has specific notice of infringing users. We are under no obligation to proactively seek out infringing usernames, but must respond reasonably when given notice of infringement. Lovell’s letter puts us on notice about the four users it specifically mentions in the trademark context. We should probably ask those users to change their usernames, and suspend their accounts until they do. Otherwise, we risk being held liable for contributory trademark infringement. Going forward, we should develop an eBay-style trademark dispute resolution policy.

#### *ACPA*

We do not face any potential ACPA liability. The ACPA applies only to domain names; the infringing portion of our channel page URLs, if any, appears in the filename, not in the domain name itself. gagatron.com itself does not infringe on any trademarks, so we are safe on this count.

#### *UDRP*

We do not face any potential UDRP liability. The UDRP applies only to domain names, so we are safe for reasons discussed above in connection with the ACPA.

#### *CFAA*

We do not face any potential CFAA liability. Gagatron has not used any computers belonging to Lovell, let alone in a potentially authorized fashion.

#### *Copyright*

Users streaming Lovell’s videos are engaged in direct infringement.<sup>2</sup> Since the videos never pass through Gagatron servers, Gagatron is not a direct infringer. *Perfect 10*. Users who are streaming complete videos are probably not protected by fair use. *Napster*.

Assuming that some users are engaged in direct infringement, Gagatron might be a vicarious infringer. It has a direct financial benefit from each act of infringement (\$.50/hour). We probably also have the right and ability to control the infringement. Our terms of service give us the right to suspend accounts at will (for being “insufficiently awesome”). We also have the ability, since users need an account (which we could suspend) to use the service. The counterargument might be that we have no way of knowing the actual contents of a user’s video stream, making policing for infringement impossible in practice, but I would not count on this argument by itself.

On contributory infringement, Gagatron undoubtedly makes a material contribution to the infringement, by providing the software and service that allow the infringing streams to happen. Under *Napster* and *Sony*, we will not be held to have knowledge of the infringement just because the client software could be used to infringe. The software has substantial noninfringing uses that include highly expressive and outrageous videos made by users of themselves showing off. However, per *Napster*, this defense will not shield us for our operations in running the Gagatron service, as opposed to merely distributing the client software. We will also need to act promptly against PapaRatso, now that we have specific knowledge of his alleged infringements. I recommend we suspend his account while we investigate.

Gagatron is probably not an inducing infringer. There is no evidence of deliberate encouragement of infringement. Quite the opposite: our slogan indicates a desire to encourage original expression, and our users have shown great imagination (ballet on a pogo stick?), rather than merely just reproducing existing works. Even Rémy Marathe appears to have created his own content.

We can claim the protection of 17 U.S.C. § 512(d) for our search engine. As long as we respond promptly to notices of infringement—which the letter from Lovell’s lawyer doesn’t appear to be—we are not liable if our search engine returns links to infringing channels. I am concerned, however, that our lackadaisical terms of service may not provide us with a suitable “repeat infringer” policy under § 512(i). I recommend that we revise them to be clearer about our copyright policies, particularly in response to DMCA notices, lest we put our immunity at risk.

### *Defamation*

Even if StacyHatell’s channel constitutes actionable defamation, Gagatron is immune under § 230. Even now that we are on notice of this channel’s content, and even though we make money every time it is viewed, we are immune from liability whether we leave it up or block access.

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<sup>2</sup> [JG: Specifically, the streams infringe the public performance right, and may infringe on the distribution and reproduction rights. You were not expected to know the details; this isn’t the Copyright course.]

That said, I recommend that we view Hatell's videos and decide as a company whether we wish to allow them to remain. Removing them could cause us to suffer bad PR for being hostile to free speech. Leaving them up could cause us to suffer bad PR for promoting personal attacks. This will be a difficult decision.

### *Anonymity*

We should expect that Lovell's lawyers will ask us to reveal the identities of many of our users. We are safe from legal liability under the Stored Communications Act whether we do or don't, as Lovell is not a governmental entity. Given our Terms of Service, which promise confidentiality, I recommend that we require Lovell to obtain a subpoena, and that we give our users a chance to contest it anonymously before we comply and turn over their identities.

### *Terms of Service*

We could, in theory, attempt to defend ourselves using the no-lawsuit clause. Indeed, if Lovell were to sue us, we could argue that since her license to the service has terminated, she is acting in violation of the Computer Fraud and Abuse Act if she continues to use it. I doubt that we would be successful. Even though our signup process calls sufficient attention to the terms to make them enforceable under *Specht*, a unilateral no-lawsuit clause is almost certainly unconscionable under *Bragg*.

## **Comments**

Being methodical was the best way to tackle this problem. The copyright issues touch on almost everything we discussed, and if you went in without a plan of attack, it was easy to miss something. This problem also tested your confidence in your judgments. The correct answer to the ACPA, UDRP, and CFAA issues was, "There are no ACPA, UDRP, or CFAA issues." Demand letters often include weak or baseless claims, and if you receive one, you need to be willing to stand up and say so. Note also that you only got full credit on the § 230 issue if your answer was unequivocal.