

Internet Law
TAKE HOME

Day Division
Professor Grimmelmann

Due by 5:00 PM
Tuesday, May 6

This examination consists of three equally weighted questions. There is a limit of four pages per question. It will be enforced strictly; extra space from one question may not be used on another.

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. Templates are provided for your convenience. Upload your answers as a single file.

This is an open-book examination. You may use any of the assigned readings for class and any of your own notes or outlines to answer the questions.

It is your responsibility to make sure that your answer does not contain any identifying personal information. Do not identify yourself in any way to me as the author of an answer until grades are published.

Your work on this examination is subject to the Student Honor Code. You may not discuss this examination or your answers with anyone under any circumstances until after the end of the examination period. **Your work must be exclusively your own.**

Please pay attention to the specific questions you are being asked to answer 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. Simple citations (e.g. "ProCD.") are appreciated but not required. Basic headers to organize the different parts of your answer are also a good idea. Spelling, grammar, clarity, organization, and good advice to your client are all parts of the grading.

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

The names in the problems are fictitious. Please disregard any resemblance to actual persons or institutions, living, dead, or nonexistent.

This examination has **FOUR pages total**, including this cover page..

GOOD LUCK!

Question 1: Rowboat

You have been approached for your legal advice by Charlotte Orr, a California resident and the programmer behind the open-source software application Rowboat. When installed on a user's computer, Rowboat makes it unbelievably simple to access files on the computer remotely from the user's smartphone or tablet. Orr makes Rowboat available for download for free from her website at orr.org (from a California server). The download page includes the text "NOTICE: The software you are about to download is subject to a license" immediately above the download link. The underlined word is a hyperlink to the full text of the MIT License. Since Orr created Rowboat in 2010, it has been downloaded nearly 200,000 times.

Rowboat includes an automatic update feature. Once a day, it connects to Orr's server to see whether there is a newer version available. If so, it downloads the newer version and installs it. Orr normally uses the feature to send out bug fixes. The automatic update feature is not mentioned anywhere on the Rowboat website or in its help menu, nor is the user prompted for permission to go ahead with the update.

In early March of 2014, Orr became concerned that Rowboat might be interfering with users' computers. Reports of odd behavior, including missing files, started appearing on online bulletin boards. In addition, a few users complained directly to Orr that they had lost data after using Rowboat for a few weeks. She investigated and discovered a bug in which Rowboat would delete a file rather than sending it to the user's phone. Based on some back-of-the-envelope math, she estimated that roughly 10,000 users lost some of their data as a result. Further investigation suggested that the bug had been introduced in a February 2014 automatic update.

Orr wrote a "patch" to Rowboat, which she pushed out to all users as part of an automatic update in April. The patch fixed the file-deleting bug. In addition, Orr (who is not a lawyer) added some features to "protect herself." First, the patch deleted Rowboat's log files on the user's computer, removing Rowboat's records of which files it had been working with. Second, the next time the user ran Rowboat, it created a pop-up window reading, "Please be aware that the Rowboat terms and conditions have changed. By continuing to use Rowboat, you agree to waive all legal claims of any sort, including but not limited to, claims for lost data. CLICK HERE to agree." The window could not be closed without clicking the link or rebooting the computer.

A disgruntled user, Donald Clevinger, who lives in New Jersey and commutes to work in New York, lost every draft of his novel-in-progress along with an extensive archive of rare jazz recordings from the laptop computer he uses both at home and at work. He has sued Orr in federal court in New York.¹ Orr estimates that Rowboat has been downloaded 3,000 times by users in New York; she has no other contacts with the state.

Counsel Orr on her potential liability and advise her on how to respond to Clevinger's suit.

¹ Recall that relevant portions of New York's long-arm statute are given at page 106-07 of the casebook.

Question 2: Aardvark

You are the long-time outside counsel for Aardvark.com, a bulletin board that uses extensive encryption to protect user privacy. Aardvark allows users to create “private” forums. *Everything* relating to a private forum is encrypted using a forum password: not just the contents of the posts themselves but even the titles of posts, the displayed names of users, and even the name of the forum itself. Someone without the forum password can’t even *find* the forum on the Aardvark website.

The way this works is that Aardvark users must first download a small browser plugin (named “Aarfy”) that handles the encryption and decryption and runs on the user’s computer rather than on the Aardvark server. So, for example, a user who wants to read a post will click on a link with the post title (e.g. “22 Examples of Military ‘Intelligence’”); Aarfy asks Aardvark.com for the appropriate post using an encrypted name (e.g. “bc0811ae912f401a”). Aardvark will reply with a long message of encrypted data (e.g. “275a90f18826b78a0f17539ff...”) which Aarfy then decrypts and shows to the user (e.g. “#1: U.S. Military Bombs Chinese Embassy in Yugoslavia. #2 ...”). Aardvark itself prominently tells users on its website that it is unable to read their posts because it does not have the forum password. The idea is that they will share the password with each other rather than with Aardvark.

Aardvark, which is located in Virginia and has its servers in California, has recently been served with a § 2703(d) order issued by a Virginia state court. The order is boilerplate except for the section describing the required information to be turned over to Assistant Attorney General Charles Cathcart, which requests:

- The contents of all previous posts to the Our Name Is Mudd forum.
- Immediate notification to AAG Cathcart if the user Yossarian22 creates any new posts, along with the text of the post.
- A complete listing of the dates, times, and sizes of all posts to Aardvark in the past two years, along with the IP addresses from which those posts were made, and a corresponding list of the dates, times, sizes, and IP addresses for all posts viewed by users.

You called AAG Cathcart to discuss the order, objecting to him both that protecting user privacy is crucial to Aardvark and that Aardvark does not have access to unencrypted versions of posts because it does not have access to forum passwords. AAG Cathcart responded that this was your problem, not his. He suggested that Aardvark create and distribute a new version of Aarfy so that when a user types in a forum password, the password is also sent to Aardvark. He also explained that this was an investigation into an organized crime ring trafficking in child pornography, pirated software and movies, stolen credit-card numbers, and extensive harassment and extortion. If Aardvark did not promptly comply, he added, Aardvark itself would face criminal and civil liability for its role in facilitating the crime ring’s plots and exchange of information.

Counsel Aardvark on its potential liability and advise it on how to respond to the court order.

Question 3: Minder Binder

You are general counsel for Minderbinder Industries, an office- and school-supplies company most famous for its Minder Binder™ and Holder Folder™. Minderbinder came late to the Web. By the time in 1998 that it tried to create a website, the domain minderbinder.com had already been claimed by Albert T. Tappman, a high-school student who created a “Tribute to the Amazing Minder Binder” site filled with hundreds of pictures of his and his friends’ Minder Binders, along with a form for other “major major major major Minder Binder fans” to upload their own pictures and comments. At the time, Minderbinder ignored Tappman’s website and created a corporate website at minder-binder.com instead.

Fast-forward to 2014. It has come to your attention that the user-uploaded material on the Tribute to Minder Binder at minderbinder.com has taken a sharp turn for the worse. Many of the photographs now consist of nothing but standard promotional images of a Minder Binder or Holder Folder with the cryptic phrase “FUMB” scrawled across them. (Further investigation of the comments and a little googling suggests that this is short for F— You Minder Binder.) Others show scenes from pornographic films with Minder Binders crudely Photoshopped in.

The comments are, if anything, worse. You have found stories about defective Minder Binders ranging from the worrying (“The metal ring snapped and cut my forefinger. I needed three stitches!”) to the extremely troubling, if admittedly unlikely (“It jumped off the table, chased my grandmother and knocked her over, and clamped on her ear. Now she has tetanus and it’s your fault. FUMB!”).

Also, at some point in the last few years, minderbinder.com added the ability to upload videos files. These seem to be primarily rap music videos—the rhyming names of your products have made them popular with hip-hop wordsmiths. You checked with a few record labels, and they deny uploading the videos or giving anyone permission to.

Based on this, you called Tappman to see what was going on. He replied that he has not been involved with minderbinder.com since September 2013. At that time, he was approached by someone who asked to buy out the domain for \$15,000, which Tappman gladly accepted. The new owner seems to have immediately reversed Tappman’s policy of deleting crude or anti-Minder Binder uploads—indeed, you cannot find any pro-Minder Binder content or even any bland and neutral content uploaded since the domain changed hands. Someone also appears to have registered holderfolder.com and used it to redirect to minderbinder.com, as well as to have purchased search engine ads on the keywords “minder binder” and “holder folder.” According to Tappman, the buyer was named Daniel Daneeka; a LinkedIn search reveals that someone by that name is Deputy Director of Marketing for Minderbinder’s biggest competitor, Snowden School Supply. There is no contact information available on either of the registrations—all of the names and addresses read simply, “FUMB.”

Counsel Minderbinder on its legal situation and advise it on how to proceed with respect to the Tribute to Minder Binder website.