Internet Law

Professor Grimmelmann

Final Exam - Spring 2015

I graded each essay question using a checklist, giving a point for each item (e.g., "Elzar violated the Wiretap Act.") you dealt with appropriately. Ten percent of the credit in each each question was reserved for organization and writing style. I gave bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts.

Model answers to the three questions are below. I recommend that you compare your essays with them. The model answers aren't perfect; no answer in law ever is. They stick to what we discussed in the course, even where a better answer would have been possible with outside research. It was frequently possible to get full credit while reaching different results, as long as you identified relevant issues, structured your analysis well, and supported your conclusions. (TL;DR – *This is not legal advice!*)

If you would like to know your scores on the individual essays, have further questions after reviewing your exam, or would like to discuss the course or anything else, please email me and we'll set up a time to talk.

It has been my pleasure to share the past semester with you, your enthusiasm, and your insights.

James

(1) CLAMPS Plays Grand Theft Auto

Amy (1:00)

Merely insulting speech is not actionable in light of the First Amendment. *Cf. Marquan M.* But when Amy accused Linda von Schoonhoven of tax fraud and child abuse – both serious crimes – that was defamation. Unless Amy had a basis for the accusation (unlikely since von Schoonhoven was a random passer-by who "stopped to argue"), she spoke with actual malice and can be held liable.

But Rodriguez probably cannot be held liable for Amy's speech. Under Section 230 she is an information content provider. In his role offering the givemetheclamps.com website, Rodriguez is a provider of an interactive computer service. The hard question is whether by providing CLAMPS as well as the website, Rodriguez crosses out of this role. As to a defamation cause of action, probably not; 230 will protect him against secondary liability for the speech tort of defamation.

Brannigan (1:30) and Conrad (3:00)

By copying the magazines, Brannigan and Conrad infringe MomCorp's reproduction right. By handing them out to people on the street, they infringe MomCorp's public distribution right. First sale does not apply because the copies were not "lawfully made."

Rodriguez probably is not secondarily liable for their infringements. First, he is not a contributory infringer. He materially contributed to the infringement by providing CLAMPS and allowing users to control him. But he probably lacked knowledge of the infringement. At least until MomCorp's DMCA notice at 1:59 PM, Rodriguez had no specific knowledge of any infringing acts. *See Napster* (making general/specific knowledge distinction). Second, he is not a vicarious infringer. He has the right and ability to control the use of CLAMPS and could easily

turn off the Internet connection or watch it more closely. But he lacks a direct financial benefit attributable to the infringement. His advertising on the website may make it "commercial," but that does not mean he has a financial interest *in the infringement*: handing out copies of the magazines does not bring more visitors to the site. And finally, he is not an inducing infringer: he has not taken any steps telling users to infringe or causing them to make infringing rather than non-infringing uses in person.

MomCorp's DMCA notice is probably irrelevant. Rodriguez is not providing "storage at the direction of a user of material that resides on a system or network," so section 512 does not apply. But if it did apply, the notice would not be effective. To be sure, "CLAMPS" probably does reasonably identify the location of the infringement, given the circumstances. But the notice arrives *after* Brannigan's infringement of *Astounding Tales*. Conrad's later infringement involves *Nosy Inquirer*, a different copyrighted work not covered by the first notice.

Brannigan and Conrad also engaged in larceny (criminal) and conversion (civil) by stealing the magazines. Rodriguez may enjoy section 230 protection from being held responsible, but this is a harder question. Neither larceny nor conversion turns on speech as such. Instead, Rodriguez would make a version of the *MySpace* defense: the theft would not have taken place but for his role in providing a conduit for speech through the website. This argument might fail, because Rodriguez doesn't just provide the website; he also provides a robot capable of stealing items in the physical world. On the merits, Rodriguez probably lacks the mens rea to be treated as an accomplice to the larceny, but he could be held civilly liable for the conversion.

Conrad (2:00 PM)

Conrad violated section 1201(a)(1) of the DMCA by using DeCSS to decrypt *Deadly Aroma*. *See Corley*. Rodriguez violated section 1201(a)(2)(A) and (B) by distributing DeCSS. *Id*.

There may be an underlying copyright violation, on the assumption that *Deadly Aroma* is copyrighted and was streamed without permission. After *Aereo*, it is not clear whether this constitutes a public performance, but the similarity to broadcasting – in which one person transmits a program that many others can tune in to – suggests that the answer is yes. If so, then Rodriguez is probably not secondarily liable, using the same analysis as above. Two possible distinctions might be that Rodriguez could more closely monitor the online streams from the DVD player and that he specifically enabled the online streaming function. The former goes to his degree of knowledge of the infringement; the latter could be used to argue that he may have induced the infringement.

Dwight (3:00 PM)

Dwight is guilty of grand theft auto, or its equivalent in the jurisdiction. The same analysis as above would apply to Rodriguez's secondary liability.

Dwight probably also violated sections 1030(a)(4) and 1030(a)(5)(B) of the CFAA. He obtained the car (a "thing of value") and he caused damage. The on-board computer is a computer (since it displays the maps) and it is used in interstate commerce (it is hard to imagine a drivable car that is not). His mimicking of the car's digital key is access without authorization in violation of the *Morris* account test. He might also have violated § 1201(a)(1) if the computer can be used to show copyrighted works. But there might not be a nexus with copyright infringement, as in the Ali Baba garage-door-opener problem.

Elzar

Elzar violated the Wiretap Act. Hattie and Petunia were engaged in an oral communication, which Elzar obtained by means of the "device" CLAMPS. The fact that CLAMPS was hidden means that Hattie and Petunia were not expecting their conversation to be intercepted and shows

that neither of them consented to the interception. Rodriguez, however, is not liable under § 2512(1)(a), because CLAMPS is not "primarily useful for . . . surreptitious interception."

(2) There's Something About Crowdfunding

Bitcoin

GrossOut may be a money transmitter under the FinCEN guidance. The argument for is that GrossOut receives money and Bitcoins from gawkers, which it then transmits to grossers. The counterargument is that GrossOut is more like "a user who obtains convertible virtual currency and uses it to purchase real or virtual goods"—it receives money and Bitcoins for its own account, rather than as a service to users. The latter argument is stronger, because GrossOut is allowing gawkers to collectively purchase the services of grossers. As such, it does not need to register as a money services bureau and comply with the related regulatory requirements. On the other hand, it also means that GrossOut is more likely to have to take responsibility for Creosote's failure to go through with her stunt.

Terry Creosote

There is nothing to be done about Creosote's refusal to go through with the stunt; it's illegal where she is. All that GrossOut can do is clean up the damage.

Fortunately, GrossOut does not face direct legal risk from the Thai government. Creosote may be in Thailand but GrossOut isn't. It has no assets or employees there, and does not need to worry about any Thai enforcement actions. There is a good argument that Thailand would not have personal jurisdiction over GrossOut under United States Due Process standards. While it helped raise funds for a violation of Thai law, it did so on behalf of its users, who can raise funds for a wide variety of activities in a wide variety of places. So any judgment in Thailand might fail under the personal-jurisdiction prong of the SPEECH Act.

More importantly, Creosote's stunt would be protected under the First Amendment in the United States: it is a form of symbolic speech like flag-burning. *Texas v. Johnson*. As such, any

judgment against GrossOut in Thailand would be unenforceable in the United States under the First Amendment prong of the SPEECH Act.

GrossOut's bigger problem is that gawkers raised funds for a stunt that Creosote will not carry out. If GrossOut had terms of service, they could provide that GrossOut is not liable if grossers fail to carry out their stunts. But it does not. (Note to self: draft terms of service providing that GrossOut is not liable if grossers fail to carry out their stunts.) Since the stunt was illegal in Thailand, any contract was void from the start. If GrossOut had the money, it would have to give it back.

But GrossOut doesn't have the money now; the Python Fund has 90% of it. GrossOut can refund its 10%, but it doesn't have an easy way to recover the 90%. It could ask the Python Fund, which might be eager to avoid being associated with this disreputable cause. But if that fails, GrossOut may be best off simply refunding the 90% out of its own funds to avoid the reputational damage from a high-profile case of a grosser backing out.

Skunk Spraying

Ainsworth would have violated section 48A(a), if he had been a real grosser and not a federal agent. The users who contributed to his fundraiser violated section 48A(b): even though Ainsworth was a fake, they stilled "offer[ed] to furnish any thing of value." Money is a thing of value, and so are Bitcoins. The IRS, for example, treats them as property. GrossOut itself falls under section 48A(c) for "materially contributing" to the violations of section 48A(b) by its users. (It does not materially contribute to Ainsworth's violation of 48A(a), because there was none.) GrossOut's better defense is that it did not "intentionally" contribute to the self-skunk-spraying. It probably knew that Ainsworth would engage in self-skunk-spraying, because it reviews all stunts, but that might not be enough to make its violation "intentional[]."

GrossOut could raise a venue objection. Without Ainsworth's participation in the offense, GrossOut could argue that the crime it is charged with under § 48A(c) does not include any offense elements in Wyoming, and neither do the crimes of users it is charged with contributing under § 48A(b). *Auernheimer*. The problem with this argument is that the focus of the entire section is on skunk-spraying, and the purported spraying would have taken place in Wyoming. A counter to that argument is that GrossOut did not know the spraying would take place there, as it does not collect user location information for grossers.

These facts inform how GrossOut should respond to the AUSA's request for the list of gawkers. A letter demand does not obligate anything; GrossOut can at the very least insist on a court order or search warrant before it needs to turn over any information or object. But such an order is likely to be forthcoming in short order. If GrossOut is an electronic communications service (one ambiguity here is whether it offers grossers the ability to transfer "intelligence of any nature" as opposed to just money), this order would probably be a § 2703(d) order. Such an order would not violate grossers' Fourth Amendment rights; they have no expectation of privacy in the financial information they shared with GrossOut to enable it to carry out their pledge transactions. *U.S. v. Miller*. But GrossOut could argue that complying would violate Packenham's Fifth Amendment rights: it would be compelled, incriminating, and testimonial insofar as she would be admitting her control over the database of pledges.

Network Neutrality

The Texas and Arizona ISPs are engaged in a clear violation of § 8.5 of the network neutrality rules against blocking. GrossOut can bring a complaint to the FCC. GrossOut probably does not have a case against its own ISP in Maryland; it is a user, rather than an edge provider,

with respect to that ISP. Then again, now that ISPs are regulated under Title II, GrossOut might have a stronger argument that its ISP cannot simply refuse service.

Packenham's Statement

Packenham's bluster is a threat, but it is so hyperbolic that it is not a threat anyone would take seriously. *Petrovic*.

Terms of Service

GrossOut needs terms of service now. Seriously.

(3) Carpe Momentum

Network Neutrality

The ISPs' offer is probably not a network neutrality violation. The ISPs would not be blocking, throttling, or prioritizing any traffic. Whether or not 1Moment accepts their offer, it is protected from retaliation in these forms. Apps like 1Moment are differently situated than ISPs; if users dislike 1Moment, they can switch video-chat apps more easily than they can switch ISPs. [The bigger issue here may be the risk of an antitrust violation; there is a possibility that the coordinated conduct of the ISPs in making this offer might be an agreement in restraint of trade. But 1Moment itself might just be engaging in a product design, as in *LiveUniverse*.] 1Moment should evaluate whether the risks of degrading user video quality in Ordinary mode justify the $5 million. Perhaps: after all, people seem to care more about the quality of Extraordinary mode.

John Keating

The first thing to worry about is 1Moment's own potential liability. Section 230 is not a defense to federal child pornography laws (or any other federal criminal laws). 47 U.S.C. § 230(e)(1). For the moment, this is an LAPD investigation. And on the merits, 1Moment may not have the mental state to have knowingly possessed child pornography. But it should approach these issues with caution, reporting any child pornography it discovers on its service immediately to authorities.

The (d) order presented by the LAPD complies with the requirements of the Stored Communications Act as to electronic communications in storage for more than 180 days, *see* 18 U.S.C. § 2703(b), and as to and subscriber information, *see id*. § 2703(c). But the application of (d) orders to obtain the contents of private electronic communications is unconstitutional under the Fourth Amendment. *Warshak*. Here, stored Moments are only accessible to the participants in

a conversation, showing that participants have a reasonable expectation of privacy in them. This means the LAPD can only validly obtain subscriber information. 1Moment should comply to the extent of turning over the relevant information about 1Moment users, but it should cite *Warshak* to the LAPD. On these facts, the LAPD should easily be able to obtain a search warrant for the KeatingsBoys account.

Gail Nolan

The Stored Communications Act applies to the stored Moments from Welton employees. The Moments are "communications"; they are in "electronic storage" (for backup purposes) when they are on the 1Moment servers; and 1Moment provides "electronic communications service" to users. Finally, Moments are not "publicly accessible" (only the users in a conversation can access stored Moments from that conversation), so 1Moment would violate the Stored Communications Act if it disclosed the Moments to Nolan's attorney. *See* 18 U.S.C. § 2702(a)(1). None of the exceptions in the statute apply: Nolan is not an addressee, Welton has not consented, disclosure is not necessary to rendition of the service, the contents were "inadvertently obtained," and there is no danger of death or serious physical injury. Nolan's proper response is to serve a discovery request on Welton, requiring it either to turn over the stored Moments or to have its employees give consent for the disclosures.

One Moment

1Moment is using the 1moment.com domain name in good faith and it has legitimate rights in the name. 1Moment is its name, that name is connected to the services it offers, and there is no evidence whatsoever that the name was selected to trade on the goodwill of the band One Moment. 1Moment should submit a response to the UDRP arbitrator raising these point, and should prevail. In the unlikely event that it loses, 1Moment should be prepared to bring suit

promptly against One Moment to resolve the parties' rights in the name. Unless One Moment is famous, 1Moment might also consider simply buying out the band's trademark rights. Finally, I will want to research the history of the parties' respective uses to see how long they have had their names. 1Moment should be safe from an ACPA action for the same reasons that it should be safe from a UDRP action, but there is a possible risk of a trademark suit if indeed One Moment used the name first.

GPL

The first thing to check is whether Perry's allegations are actually true. If 1Moment does not use code from the Poetry project, 1Moment can safely ignore his demand. On the other hand, if Perry is right (and if Perry is the right person to complain on behalf of the copyright owner, or the copyright owner agrees with him, as is likely), then 1Moment's only serious options are to release the source code under the GPL to the app or to purge the infringing code from it and be prepared to pay damages for the past infringement. Per *Jacobsen v. Katzer*, courts will enforce open-source licenses with copyright law. Fortunately, 1Moment probably does not need to release the actual Moments under the GPL: a Moment is not a "work based on the Program" because it does not include any of the copyrighted expression from the Poetry software.