

Digital Property
Spring 2024
Midterm Exam Memo

Your grades and some brief comments are available on Canvas. The bullet points in the following outline do not precisely correspond to my grading rubric, but they do reflect the overall weight I put on different parts of the analysis. I gave full credit for identifying an issue and analyzing it carefully even if you reached a different conclusion than I did. I gave partial credit for a wrong answer in the right ballpark; I gave extra credit for spotting an issue I missed, or for surprising me with an argument I had not thought of.

I will of course be happy to discuss your essays and your grades with you if you have any questions.

I am Become Death, Destroyer of Barbie Worlds

The best way to approach this question was to start by asking who bears responsibility for the failed payment. That drives analysis of the parties' rights under the contract, which settles many of the property issues.

The Payment

- The naive analysis is that Roberts is obligated under the contract to pay \$500,000 to Los Alamos. It has failed to do so, and so it is in breach. As a result, under standard contract remedies, Los Alamos could ask for expectation damages: the \$500,000 payment. In exchange, however, it would have to transfer all "assets created under this contract" to Roberts. (Los Alamos could also ask for recession, but it is much worse off if it does so, as the Instagram and Gmail accounts are of very little value to it.)
- The only way for Roberts to resist this conclusion is to show that it performed under the contract and made the \$500,000 payment at Los Alamos's instructions. (As with a check or a bank withdrawal, making a payment per another party's instructions is sufficient to constitute payment to that party in satisfaction of a contractual obligation, unless the contract provides otherwise.) If so, then Roberts is not in breach, she is not obligated to make a further payment to Los Alamos, and she can demand that Los Alamos continue to perform and transfer all "assets created under this contract" to her.
- Los Alamos has the stronger argument here. The party most at fault for the breach is Verizon, and it is not clear that either Carson or Oppenheimer should have discovered the breach. Perhaps Carson could have emailed Oppenheimer as well as called; Oppenheimer had no notice that Carson was even attempting to contact him. The strongest argument that Roberts could make is that Los Alamos could or should have discovered the breach as it affected Los Alamos's service more broadly, but there are no facts in the record to support such a conclusion. (The precise facts of what happened may need to be developed in discovery or at trial.)

- Whoever loses this initial dispute will have a claim (fraud or conversion) against the unknown hacker for return of the \$500,000 and potentially a claim (negligence) against Verizon allowing Los Alamos's telephone and Internet service to be diverted. It's not quite a *Kremen* claim, as Verizon never had possession of the money, but Verizon stands in a similar role to Network Solutions. Whether such a claim could succeed, and whether it could be blocked by Verizon's subscriber agreement or regulatory treatment, are issues beyond the scope of this course.
- It is unlikely that Roberts has a claim against the bank, as it followed Carson's actual and authorized instructions in making the transfer.

The @millicent Instagram Account

- The account is property under *Kremen*. It is capable of precise definition (the capacity to post and manage photos), it is capable of exclusive possession (through a password), and legitimate ownership is established via signing up for an account.
- At the start of the deal, Roberts owns the account (subject to Instagram's control and terms of service). As far as we know, she created it and uses it regularly. In addition, its handle uses her name and she posted personal content to it. Per *JLM Couture*, she is the initial owner.
- It is possible but unlikely that giving Los Alamos the password to the account constitutes a transfer of ownership. (*JLM Couture* again.) The contract does not provide that ownership of any assets would transfer to Los Alamos, and simply giving someone a password does not by itself typically show an intent to transfer ownership. The fact that Los Alamos is "to create a rich social-media presence for a period of two years" shows that this is a temporary arrangement. Los Alamos has permission (in property terms, a license) to use the account, subject to the terms of the contract, but no more.
- Even if Roberts has breached the contract, she remains the owner of the account. Oppenheimer may still be allowed to use it under the contract, but Oppenheimer does not have a *property* right that would

allow it to deny Roberts access. Nor does the contract give Oppenheimer a self-help right to collect the agreed-upon payment by seizing Roberts's digital property.

- When Oppenheimer changed the password, this was a conversion. It resulted in a complete denial of Roberts's ability to possess and use the account. (Any trespass to chattels claim is subsumed in the conversion.) It is probably not a CFAA violation, as Oppenheimer did not violate any technological limitations on its use of the account.
- Los Alamos must return control of the account to Roberts.
- In addition, Los Alamos is liable to Roberts from any damages she has suffered from being unable to post to the account herself.

The millicent.roberts@gmail.com Gmail Account

- The account is property under *Kremen*. It is capable of precise definition (the capacity to send and receive emails), it is capable of exclusive possession (through a password), and legitimate ownership is established via signing up for an account.
- Los Alamos created the Gmail account. This is not quite a *JLM Couture* situation, where Gutman created an account that might have been professional (and thus created on behalf of the company) and might have been personal (and thus created on behalf of herself). Here, the account was indisputably created pursuant to Los Alamos's duties under the contract, and it was used to post material related to Los Alamos's duties.
- The contract provides that "all assets created under this contract will become the property of Roberts" and the account is an "asset," so Roberts is the owner of the account.
- Los Alamos is an independent contractor, rather than an employee, so there is an argument that Los Alamos was the initial owner. But even if so, the contract transferred title to Roberts, and title is with her even if Los Alamos has not (yet) transferred control of the account to her.
- Roberts never had control of the account, so Los Alamos was a bailee for Roberts. It did not convert the account by failing to give her the

password (she never demanded it), but it did convert the account by using Gmail's controls to delete it. Destruction of another's property is a form of conversion. As above, a trespass to chattels claim is subsumed in the conversion claim, and there is no CFAA claim without breaching a code-based barrier to use.

- If the account can be recovered, Los Alamos is obligated to cooperate in asking Gmail to restore it. If not, Los Alamos is liable to Roberts for the value of the account (for its use going forward), as well as any damages resulting from her inability to use it up to now.

The millicentroberts.com Domain Name

- The account is property under *Kremen*. It is capable of precise definition (the capacity to point at an IP address), it is capable of exclusive possession (through a password and other security mechanisms), and legitimate ownership is established via registration.
- The same initial analysis applies to the domain name as for the Gmail account. It was created to carry out the contract, uses Roberts's name, and was actually used for these purposes. It is an "asset" created by Los Alamos under the contract, so Roberts is entitled to ownership.
- The first relevant difference is that the transfer to Roberts's control was completed. As a result, Roberts both owns and controls the domain name.
- As the owner of the domain name, Roberts is allowed to have her registrar, Skipper, point the domain name to any IP address she wants. Nothing in the contract restricts this right. She did not violate anyone's rights by redirecting it to her AWS site. Thus, there are no conversion, trespass to chattels, or CFAA claims.
- Nothing in the contract suggests that Los Alamos should be entitled to obtain the domain name for itself, even in the event of breach. Los Alamos may be able to claim the value of the domain name as a benefit it has conferred on Roberts, as part of the overall analysis of contract damages, but Roberts remains entitled to it.

- Roberts may have some trademark rights as against the domain name, but since she has possession and ownership of it, there is no need for her to bring a trademark claim or UDRP proceeding.

The @losalamos Handle

- The account is property under *Kremen*. It is capable of precise definition (the capacity to point to posts from a particular account), it is capable of exclusive possession (through a password), and legitimate ownership is established via signing up for an account.
- The handle is initially owned by Los Alamos. It was not created to carry out the contract (indeed, it appears to predate the contract), and it uses Los Alamos's name.
- Like all of the other digital assets in this problem, it is under the control of a platform (here, AEC). In this case, it is the platform itself that has reassigned the handle from Los Alamos to Roberts.
- *Kremen v. Cohen* would suggest that AEC can be liable for conversion for giving the handle to Los Alamos. Indeed, here the transfer was intentional, rather than merely negligent, as in *Kremen*. As above, any trespass to chattels or CFAA claims would fail.
- It is extremely likely, however, that AEC's terms of service give it the power to delete accounts and reassign handles at will. Either users' property rights are subordinated to Los Alamos's, or to the extent that AEC is a bailee the terms give it complete freedom to reassign the handle without liability.
- Because AEC retained Los Alamos's account (including its past content and the power to post new items), the handle is the only digital asset at stake on AEC.
- Roberts can retain the handle, and is not liable to Los Alamos in damages.
- Roberts is not guaranteed to be able to *use* the handle; there could be a risk of trademark infringement depending on what she does, but such questions go beyond what we discussed in class.