

Internet Law

Professor Grimmelmann

Final Exam - Spring 2010

Take-Home and Open Book

This exam consists of TWO equally weighted questions. The exam counts for 50% of your grade in the course.

You have 24 hours to complete this exam; you can choose when to take it. You may download the exam from the Exam4 web site at any time *after* 9:00 AM on Friday, April 30. You must then return it via the Exam4 web site *within* 24 hours and *before* 5:00 PM on Friday, May 14.

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.**

There is a page limit of FOUR pages per question.

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. Simple citations (e.g. "Zeran.") are appreciated but not required. Feel free to shorten your answers by using an outline format, as 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 **THREE pages total**, including this cover sheet.

GOOD LUCK!

Common introduction:

Both questions on this exam are based on the following scenario:

Gagatron.com is an Internet startup with headquarters and servers located in San Jose, California. Its slogan is, “Grab your fifteen minutes or die trying!” It enables users to set up their own streaming video channels for other users to watch.

To use the service, users are required to download the Gagatron client software from Gagatron.com and to create an account with Gagatron. As part of the signup process, users must provide a full name and a credit card number, and click a checkbox marked “I agree to the Terms and Conditions,” where “Terms and Conditions” is a hyperlink in blue underlined text. Clicking on it opens a pop-up window that shows a user agreement that includes:

You agree not to assert any cause of action against Gagatron for any reason. If you file any lawsuit against Gagatron, your license to use this service automatically terminates. . . . We will keep all user information strictly confidential. . . . It is a violation of this agreement to do anything uncool. Gagatron can and will suspend the accounts of insufficiently awesome users.

Each Gagatron user can create up to five video “channels.” To illustrate the process, suppose that user LittleMonster decides to create a channel with the name “Just Dancing” that features videos of himself performing ballet on a pogo stick while wearing antlers and angel wings. He runs the Gagatron client program, drags the individual videos from his hard drive onto a playlist, types in the name of the channel and a description of up to 250 words, and then clicks a button labelled “Start Showing Off.”

As soon as LittleMonster clicks the button, Gagatron creates a “channel page” for him at <http://gagatron.com/littlemonster/justdancing>. The page displays the title and the full description he typed in. The page is indexed both by Google and by Gagatron’s own search engine, which runs on Gagatron servers. The page also displays a “Watch Now” button.

To continue the example, suppose that user EveningStar clicks on the Watch Now button for Just Dancing. When she does, her Gagatron client launches and connects directly to LittleMonster’s Gagatron client, which starts streaming video directly to EveningStar’s computer. The two clients, however, also communicate with the main Gagatron server, which makes a note of when EveningStar starts watching and when she stops. Each week, Gagatron charges EveningStar’s credit card \$1 per hour of viewing, which is split 50/50 between LittleMonster and Gagatron.

If multiple users also tune in to the same channel, they all see the same video at the same time. In addition to the channel pages and search engine, Gagatron also has a “Shock me!” button which immediately starts watching a random channel. None of the video from a stream is ever transmitted to Gagatron; neither are playlists. The site has become famous for outrageous behavior, in which users try to top each other in creativity, drama, and offensiveness.

Question 1: Poke in the Face

Joelle Van Dyne is a Gagatron user in New York City. She has been aiming a camcorder at her screen as she opens multiple random Gagatron channels simultaneously; she plans to use the recordings for a video-collage art project. One day, after clicking on the “Shock Me!” button, she was taken to the “Poke in the Face” channel of user LobsterHat. The video showed a man in a

gorilla suit holding up a sign saying, “I know where you live, and I’m coming to get you.” About three seconds later, her computer speakers played the sound of a scream at maximum volume and her entire screen (not just the Gagatron video window) was filled with the image of a demented clown holding a large knife. Van Dyne was startled and jumped backwards, falling off her chair, hitting her head on a table, and suffering a concussion. She required stitches to her scalp, prescription pain medication, and two days of bed rest away from work.

Van Dyne took her video recording and her computer to the FBI. A forensic examination of the computer indicated that someone had taken advantage of a programming mistake in the Gagatron client to install an additional program on her computer. That additional program played the sound and showed the clown picture.

FBI Special Agent Germanotta telephoned Gagatron headquarter and asked for all information available on LobsterHat. Gagatron provided LobsterHat’s IP address, name, and credit card information. Gagatron also explained that several dozen users had viewed the Poke in the Face channel. The name on the account was Rémy Marathe; the credit card billing address was in Ontario, Canada; the IP address was assigned to a customer of an ISP in Ontario.

For purposes of this question only, you work in the Computer Crimes and Intellectual Property Division of the Department of Justice. You have been asked to brief your superiors on the legal issues presented by the case to consider whether further investigation, or an attempt to arrest Marathe, would be warranted. They want to know what civil and criminal actions against Marathe you think would be likely to be successful, taking into account substantive, evidentiary, and jurisdictional concerns. **Write the memo.**

Question 2: Malibu Stacy

For purposes of this question only, you are general counsel to Gagatron. You have just received a letter from a law firm representing Stacy Lovell, a musician who performs under the stage name “Malibu Stacy.” The letter alleges that:

- MALIBU STACY is a registered trademark owned by Lovell. Many Gagatron users are using usernames confusingly similar to MALIBU STACY, including “MalibuTracy,” “AlibuStacy,” “StacyInMalibu,” and “MaliboobooStacy.”
- Many users’ channels include Lovell’s copyrighted music videos. The letter alleges that “over 500” users are streaming these videos. The only specific example it gives is user PapaRatso, whose “Videophone” channel (according to the letter) consists only of Malibu Stacy videos.
- One particular user, “StacyHatell,” has been streaming videos on a “Bad Romantic” channel that feature unfounded claims that Lovell is a white supremacist.

The letter demands that Gagatron “take appropriate action to correct the above.” It threatens suit for copyright and trademark infringement, violation of the Computer Fraud and Abuse Act, actions under ACPA and the UDRP, and unspecified common-law torts. The CEO has asked you to evaluate the legal risks facing Gagatron and recommend a course of action. **Write the memo.**