

Internet Law
Professor Grimmelmann
Final Exam - Fall 2012
Take-Home and Open Book

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

You must upload your answer by **5:00 PM on Friday, December 14**

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 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.**

Please pay attention to the specific questions you are 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. "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 exam has **FOUR pages total**, including this cover sheet.

GOOD LUCK!

Question 1: Major Crimes*

You work for the State's Attorney's Office for Baltimore County, MD. Detective William Moreland of the Baltimore Police Department has been investigating JayLBait, a members-only bulletin board dedicated to trading child pornography. Last year, the BPD arrested its operator, Jay Landsman, who pleaded guilty to a variety of charges and agreed to cooperate with the BPD's investigations. He turned over a list of email addresses that JayLBait members had provided when signing up.

One of the addresses was "deputy@ops.com". Ops.com is a free webmail service like Gmail or Hotmail. As part of the initial signup process, Ops.com requires users to click "I agree to the terms and conditions"—the underlined text is a hyperlink to a page that includes terms such as:

8. Account Security: You agree that you will not share your password with anyone else or allow anyone else to access your account. You are solely responsible for all use of your account. ...

10. Legal Compliance. You agree that you will not use your account to infringe copyright, violate state or federal gambling laws, compromise national security, or otherwise act contrary to law.

A link to the terms and conditions also appears at the bottom of every page on Ops.com.

Detective Moreland obtained a § 2703(d) order for "the contents of the deputy@ops.com account." Ops.com disclosed that the account had never sent any emails and that the only emails it had received were promotional emails from JayLBait. The account did, however, have an email stored in the "drafts" folder. The email consisted of an incomplete 14,000-word story describing in stomach-churning detail the repeated rape, mutilation, and eventual murder of a fourteen-year-old boy described as "J.M."

Detective Moreland asked Ops.com to provide him with information on the account's continued use. Ops.com complied by emailing him a report once a day at midnight that detailed all activity that day. Within a few weeks, it became clear that the "deputy" account was being accessed exclusively from two distinct IP addresses. It appeared that two separate users were taking turns to log in to the account, using emails saved as drafts to communicate with each other. Each time one of the users would log in, he or she would examine and delete the email drafts from the other, edit and extend the story, then save as a draft his or her own message to the other.

Detective Moreland tracked one of the IP addresses to an ISP in Towson, MD; a § 2703(d) order to the ISP revealed that the associated account is registered to one "Ervin Burrell." The other IP address appears to be located in Florida; Detective Moreland has not yet followed up on it. Further investigation has enabled Detective Moreland to discover that a twelve-year-old boy named James McNulty lives with his parents three houses down from Burrell.

You have been asked to decide whether the investigation of Burrell and the unknown user in Florida is worth continuing. ***Describe the potential charges against them and any potential legal or practical challenges obstacles to bringing those charges.***

* [Ed: Assume, for this question only, that Maryland has a statute criminalizing the "distribution" of obscene materials that tracks the definition in *Miller v. California* and refers to "the contemporary community standards of the state of Maryland," and that Maryland has child pornography and computer misuse statutes that are identical to the federal statutes we have studied this semester.]

Question 2: The Barksdale Organization

You represent The Barksdale Organization, a five-piece jazz fusion combo. It plays most of its shows in jazz clubs in and around Philadelphia, Pennsylvania, but also has a small but devoted worldwide following. Its leader, the saxophonist Avon Barksdale, has asked for your help in dealing a series of recent events.

Two years ago, The Barksdale Organization lost its recording contract. In response, the Organization created a subscription service called The Pit. Its bassist, Brianna Barksdale, now makes high-quality recordings of all of its live sets available online. Subscribers to the Pit pay \$25 a year for unlimited access to the recordings. The service now brings in about \$50,000 a year—hardly a fortune, but enough to make a significant difference in the Organization’s ability to keep performing. As a promotion for the Pit, the Organization always makes its most recent show available for free to everyone.

Two months ago, Avon was reading a thread on Hamsterdam.com, a community website for jazz fans operated by the New York-based Colvin Media Group. He discovered a thread named “Barksdale Downloads,” which contained links to MP3 versions of many of the live sets. While the links were scattered across a wide range of websites, Avon noticed that two in particular appeared with some regularity. One—CornerBoys.dj—had posted a wide range of live jazz MP3s. Based on its IP address, it appears to be hosted in Arizona; its domain registration gives a California address. The other—barksdaleorganization.com—appears to be hosted on a server in the Philippines; its domain registration contact gives the the obviously fake name Snot Boogie and a nonexistent address in Wellington, New Zealand.

Avon also discovered that Hamsterdam has a ticket section, where users can advertise tickets to jazz shows for sale. Recently, fans have been showing up at Organization concerts with forged tickets—either duplicates of tickets that have already been used or ones with invalid bar codes. But they don’t act like forgers; they’re shocked and disappointed when they’re told the tickets are no good. Now Avon now thinks he knows what’s going on. There are hundreds of Barksdale Organization tickets listed for sale on Hamsterdam, sometimes for shows that haven’t officially gone on sale yet. Avon suspects that ticket forgers are selling fake tickets, and that some owners of genuine tickets are selling the same bar code multiple times.

Avon posted in the Barksdale Downloads thread, asking the users please to stop trading Organization MP3s. Numerous users posted angry replies. One, CheezIt, wrote that the Organization’s music “sucks.” Another, da_snoop, wrote of her intention to come to Avon’s next show and “hunt him down.” SuperMarloBros said that because the Organization had put its music online for free streaming, it was now “in the public domain” and available for noncommercial sharing among music lovers, concluding, “You should be thanking us for introducing more people to your music and promoting your concerts.” And PartLowPartHigh explained that he lived in Oregon and was wheelchair-bound, and so was completely unable to attend the concerts in person—thus justifying his need to obtain the concert MP3s online.

Avon Barksdale would like your advice on how to respond. ***Write a memorandum discussing the Organization’s rights and recommending how it should proceed.***

Question 3: BubblesDepot

You are general counsel for Prezbo.com, a social network with approximately ten million members in the United States. Prezbo is interested in making its network available on the BubblePhone, one of the three leading smartphone platforms in the U.S. (The others are iPhone and Android.)

Prezbo has a “social music” feature: two users who are chatting using Prezbo’s instant messaging feature can stream each other music files from their collections. In a twist that Prezbo’s chief of development is especially proud of, the Prezbo apps are able to auto-detect when a chat user types in the name of a song in her collection and to suggest that she might want to stream it to the friend she is currently chatting with. (Prezbo does not allow users to save the files their friends stream.)

BubblePhones are locked: they can only install applications that have been approved by Bubble, (maker of the BubblePhone), and downloaded from the BubblesDepot app store. Bubbles has published a long list of “guidelines” for app developers to “promote a consistent and positive user experience,” including “24: No fart apps. We have enough of those already. 25: No apps that duplicate core BubblePhone functionality. 26: No apps that aren’t up to our standards of polish and quality.” The guidelines finish with, “All decisions are in the sole discretion of Bubble; by submitting an app you agree not to challenge our decisions, for any reason, in any court or other forum.”

Prezbo developed a BubblePhone version of the app. Fuzzy took three months to review the submission, then rejected it in an email that said, “We have concluded that your app violates guidelines 24, 25, and 26.” The email was also posted on Bubble’s website, in a section of the site that lists the status of all pending and completed app submissions. Two days after the rejection, Bubble released a new version of its BubsOS operating system, which was automatically installed on all BubblePhones. One of the major new features of BubsOS 3.0 was Bubbles’ own social network, BubbleSocial. Within weeks, BubbleSocial had a hundred million active users.

Desperate to get on the BubblePhone, Prezbo had its engineers look long and hard at the new BubsOS. They discovered that it could be switched over to “developer mode” by attaching it to a computer and sending it a “developer reset” command. According to the engineers, the developer reset command is not publicly described in the BubblePhone’s technical documentation. It’s used by technicians in Fuzzy Stores to troubleshoot customers’ BubblePhones. Once a BubblePhone is in developer mode, the app signing check is disabled, allowing the user to add any app.

Prezbo quickly created a program that users could run on their computers with a BubblePhone attached: the program causes the BubblePhone to switch to developer mode, installs Prezbo, and then returns the BubblePhone to its normal user mode. Prezbo released the program online as “Prezbify,” telling users, “Use Prezbify to install Prezbo on any brand of smartphone and start showing off your taste in music to all your Prezbo friends!”

Bubbles has just sent a strongly-worded cease-and-desist letter to Prezbo, claiming that Prezbo is violating the Computer Fraud and Abuse Act, Section 1201 of the DMCA, and the Copyright Act. Prezbo’s CEO, Marcia Donnelly, has asked you for your analysis. ***Write a memorandum assessing the merits of Bubbles’ claims, describing any possible counterclaims Prezbo could assert, and how you recommend that she proceed.***