Internet Law

Professor Grimmelmann

Final Exam - Spring 2012

I graded each essay question using a checklist, giving a point for each item (e.g., "Bodine is not a direct infringer.") 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. Indeed, 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.

If you would like to know your scores on the individual essays, please ask the IILP administrator, Naomi Allen, in the IILP offices on the 9th floor of 40 Worth St. If you 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 an appointment.

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

James

	Block Party	Bad Bromance	Streaming	Total
Median	15.0	17.0	15.0	49.0
Mean	16.1	17.0	15.2	48.3
Std. Dev.	3.8	3.9	4.4	9.9

(1) Block Party

Brady's blocking policies are worrisome from a free speech perspective. We can best challenge them at the FCC, although a lawsuit against the Knoxville Public Library might also be effective.

Network Neutrality

Brady is a "fixed provider" of broadband Internet service as defined in the FCC's Open Internet Order § 8.11. As such, it its violating the "no blocking" provisions in § 8.5 of the Order., because it its IP blacklist blocks subscriber access to the Planned Parenthood and the New Jersey Devils websites, among other lawful content. Although Brady could argue that it is attempting to prevent access to unlawful obscene content, the methods it is using are highly overinclusive, and therefore are not "reasonable efforts" under § 8.9's exception for attempts to address unlawful activity. Nor is this blocklist "network management": it is targeted at content's effects on people, rather than its effects on Brady's network.

In addition, Brady's use of deep packet inspection and forged RST packets results in the blocking of of other websites. Here, however, the case is more difficult, both because we do not have evidence of sites other than Drummond Enterprises being blocked via this mechanism, and because Brady might argue that the subscriber's option to unblock specific websites might mean that the service is not actually "blocking" these websites. The FCC should still be sympathetic to an argument that the use of forged RST packets is problematic, as indicated by the *Comcast* decision.

Wiretap Act

Brady may be violating the Wiretap Act. When it uses deep packet inspection to examine the contents of webpages requested by its subscribers, this may or may not be an "interception," because this is just an automated analysis by its routers. When a Brady employee examines the page, however, that is definitely the "acquisition" of the "contents" of an "electronic communication." Brady is not protected by the provider exception because examination of the contents of pages is not a "necessary incident to the rendition" of broadband Internet service.

First Amendment

In order to identify a violation of the First Amendment, we must first find a relevant state actor. Brady Networks is a private company, not a government, and so is not engaged in state action. *Estavillo*. Thus, even though Brady's blocking is not narrowly tailored, this is immaterial: private refusals to carry speech are not regulated by the First Amendment. The closest we could come to arguing that Brady is a state actor is in Hillsboro, where it has no broadband competition. The availability of dial-up service, however, immediately distinguishes this case from *Marsh*, where there was no other way to reach Chickasaw at all.

We may have a stronger case against the Knoxville Public Library. In addition to receiving federal funding, it appears itself to be a local governmental agency. Thus, it is subject to the First Amendment and so we could potentially challenge its use of Brady's service, on behalf of patrons who wish to view blocked sites and on behalf of the blocked sites. We would need to bring an as-applied challenge, as the Supreme Court rejected a facial challenge to CIPA's requirement that libraries receiving federal funding install Internet filters. The head librarian's requirement that patrons explain their research purposes in person exerts a strong chilling effect; her apparently

uniform policy against unblocking might make for a strong as-applied challenge if we can find an appropriately sympathetic website.

Drummond Prosecution

I will need more facts about Drummond's products to determine whether they can be categorized as obscene. Pornography by itself is not a category of speech which the government can restrict. Instead, it may be banned only when it fails the *Miller* test. I assume that as pornography it appeals to the prurient interest and that it depicts sexual conduct, but I will need to know more to determine whether it is "patently offensive" and whether it has any redeeming value.

It is possible that part of the controversy here may center on the fact that some people in Tennessee may consider Drummond's depictions of gay interracial sex to be offensive without regard to its pornographic content. If so, it would benefit Drummond to be tried elsewhere or under a national rather than local community standard. Unfortunately for Drummond, however, because the content here consisted of physical DVDs rather than an Internet transmission, *Kilbride* does not apply and it will be tried under local community standards.*

Jeremiah Hornbeck

Hornbeck could potentially sue Brady and Brown on a theory of intentional interference with contractual relations (for preventing him from reaching customers in and around Knoxville). He could also sue Brady for defamation, on the theory that by blocking his website Brady has implicitly and falsely claimed that it is "obscene, indecent, improper, or contrary to Christian morals." Hornbeck would face two obstacles. First, Section 230(c)(2)'s protection for good faith actions to restrict access to objectionable materials would immunize Brady as long as its actions were taken in good faith. The coincidence of Brown's friendship with Brady's CEO is suspicious, but may not be enough to demonstrate lack of good faith. Second, *Search King* might immunize Brady on a theory that its blocking decisions constitute First Amendment-protected speech.

Notice

Cutting across all of these issues is the problem that Brady's subscribers may well have chosen it *because* of its blocking policies and may actively desire them. (This certainly seems consistent with the actions of the Knoxville librarian, the 15-year-old user, and the AUSA.) Even if they were not the motivating reasons to purchase Brady subscription, it may be the case that Brady fully discloses its polices to users. If so, this would satisfy § 8.3's transparency requirement in the *Open Internet* order and constitute the "prior consent" of a party to the communication with respect to the Wiretap Act. It would also suggest that Brady's users would not want us to challenge its policies and complicate the problem of finding willing plaintiffs.

Brady's daily Subscriber Notice may or may not be proper under *Specht* and *ProCD*. On the one hand, 800 words in 10 seconds is far more than an average user can read, and there is no requirement that users click to indicate their agreement. On the other, the notice is displayed daily, and subscribers might also be aware of Brady's family-friendly blocking from its advertising

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* [Ed: There is no substantial jurisdictional obstacle to a federal criminal prosecution of Drummond in Tennessee. The state minimum contacts analysis does not apply because the interstate transportation of obscene material is a federal criminal charge brought by a federal officer, the Assistant U.S. Attorney. Venue appears to be proper because the place where material is delivered is the place where a crime involving interstate transportation is committed.]

or other channels. As for the fact that the daughter of a subscriber had never seen the notice, this could potentially cut against its prominence—or her parent might be deemed to have consented on her behalf.

Strategy

Our best move is to file a complaint with the FCC on behalf of blocked websites, asking it to enforce the *Open Internet* order against Brady. This will be the easiest challenge to bring and the least reliant on finding individual plaintiffs. If Hornbeck chooses to sue, we should file an amicus brief on his behalf. Suing the Knoxville public library could be an important blow for free speech, but the procedural issues may make this suit more difficult than would be justified. We should wait for the outcome in the CIPA as-applied challenge in Washington State before taking action here.

(2) **Bad Bromance**

Dear Ms. Meyer,

Your attempt to divert users from the Dot Ro site to the Dot Com site so that you can read their messages and impersonate them is legally problematic. Before you read further, TAKE YOUR SITE DOWN immediately to avoid increasing your potential liability.

Trademark

You are likely infringing on the Dot Ro site's trademark rights. The name of your site is almost identical to the Dot Ro site's name. Users will type in NotCoolBro.com by mistake, some browsers will autocomplete "notcoolbro" to "notcoolbro.com," and users who search on "not cool bro" will be led to your site. A court could easily find that you are deliberately attempting to confuse users into thinking that your site is in fact the Dot Ro site. For similar reasons, you could be vulnerable to a suit under the ACPA or to a UDRP arbitration.

Although you could attempt to argue that your use is strictly noncommercial, given the strong bad faith of your site, a court could follow *Doughney* and find that your use is commercial because it interferes with the Dot Ro site's provision of services to its customers. A parody defense would fail because there is no parodic message in your site, just straightforward imitation.

Copyright

The Dot Ro site's text and design are copyrightable. You are infringing its owners' reproduction, distribution, and public display rights by copying them wholesale and displaying them to your users. You do not have a license from the Dot Ro site—any implied license based on the fact that it is online would not extend to imitation of it. Nor do you have a fair use defense, since your use is wholly nontransformative and competes directly with the original. You are potentially also open to suit by the users who posted content to the Dot Ro site; it is unlikely that whatever license they gave to the Dot Ro site extends to you.

Wiretap Act

When a user types a message on the Dot Com site intended to be posted on the Dot Ro site, this may be an "interception" of an electronic communication under the Wiretap Act. You are indisputably acquiring the contents of those messages. You could attempt to argue that you are one of the parties to the communication, but in this context, the users thought they were communicating with the Dot Ro site. Indeed, in a sense they were, because you relayed the communication onwards to the Dot Ro site once you observed it. You have a plausible textual argument that you are a "party," but your actions are so contrary to the spirit of the Wiretap Act that I do not like your chances before a judge.

Stored Communications Act

When you used Do Ro users' passwords to log in to the Dot Ro site and read their bro-backs and callouts, you violated the Stored Communications Act. You intentionally accessed a facility (the Dot Ro site's servers) through which an electronic communications service is proved. You did so without authorization, since you knew that the logins were not provided for your use.

Computer Fraud and Abuse Act

Your use of Dot Ro user's passwords also violated the Computer Fraud and Abuse Act. You "accessed" the site even under *Allen* because you were able to interact with it to post and read messages. Your access was unauthorized under the *Morris* "account" test because you did not have an account on the Dot Ro site and an account is required to take the actions you did. Your best argument is that you did not cause "damage" because the system is still usable. Unfortunately, by changing passwords you impaired the availability of the site for other users.

Slackosaur

You must not provide the state police with Slackosaur's bro-backs and callouts. Doing so would be a violation of § 2702(a)(1) of the Stored Communications Act. Those messages are "communications" that are "in electronic storage." You should demand that the state police obtain a warrant (for communications 180 days or less old) or a (d) order (for communications more than 180 days old) requiring you to turn over Slackosaur's communications.

In addition, I would note that while the Fourth Amendment does not directly apply to you (as you are a private individual), the private callouts and bro-backs sent and received by Slackosaur are akin to email in that this user has manifested an expectation of privacy in them by using this private communications function. Thus, under *Warshak*, the government would be violating the Fourth Amendment if it obtained them without a warrant, a fact you should point out to the police if they object to your refusal to disclose Slackosaur's communications.

Jayson Faust - Defamation

Whether or not the two messages to which Faust objects are defamatory, you do not need to worry about them. Under Section 230, you are absolutely immune from liability for them. They are "information" provided by two users, who are "information content providers," and you are a "provider" of an "interactive computer service" (the Dot Com site). As such, you cannot be treated as the publisher or speaker of these messages. This immunity will apply even if you continue to leave the messages online. *Zeran*. Faust might attempt to argue that because you deliberately reposted content from the Dot Ro site to the Dot Com site you are outside the scope of the immunity. Your best response would be that your role was akin to that of AOL in *Blumenthal v. Drudge*, which reposted content from the Drudge Report to AOL.

Jayson Faust - Identifications

The Stored Communications Act does not prevent you from disclosing the identities of the anonymous posters. It is your call whether to do so or not. If you choose not to, Faust might be able to obtain a subpoena to require disclosure in order to advance his John Doe lawsuit. (He will need to come to you rather than to the Dot Ro site because by intercepting messages between users and the Dot Ro site, you were the one who observed users' IP addresses.)

(3) A Streaming Comes Across the Sky

We have a strong copyright infringement case against Slothrop, but there will be significant practical obstacles to suing her. We have a good DMCA § 1201(a) case against Bodine. Slothrop is a good lawsuit target. Bodine might be a more sympathetic defendant because his program could be described as enhancing the usefulness of Yoyodyne Blu-Ray players.

Direct Infringement

Individual LaunchPad users are directly infringing our members' rights of public performance by streaming copyrighted movies to each other. Bodine is not a direct infringer; he did not do anything other than make Y-Rocket available. Slothrop is also not a direct infringer on the facts available to us; she supplied the LaunchPad service, but LaunchPad itself does not stream the videos, which are transmitted peer-to-peer from one user to another.

The users do not have good fair use cases. Home viewing of movies is completely nontransformative, our works are highly expressive, users are watching complete movies, and when used to view recent Hollywood releases these streams appear to substitute for purchasing or renting those movies.

Bodine

Bodine is not a vicarious infringer. Once a user downloads Y-Rocket, Bodine has no further right and ability to control how she uses the program. In addition, he has no direct financial benefit from the downloads, as he makes it available for free.

Bodine is not a contributory infringer. Although Y-Rocket materially contributes to infringement by making streaming possible, he has only generalized knowledge that Y-Rocket will be used to infringe. He does not have specific knowledge of acts of infringement at the time of download, and *Sony* precludes imputing such knowledge to him. He has a strong *Sony* defense because of the non-infringing use of streaming school play recordings to relatives.

Bodine is not an inducing infringer. There is nothing to indicate that he encouraged users of Y-Rocket to use it specifically to infringe.

Bodine is liable under DMCA § 1201(a)(2) for distributing to the public a program that is "primarily designed" to circumvent the encryption on Blu-Ray discs. Indeed, that is its only function. Bodine might argue that Y-Rocket does not "circumvent" Blu-Ray encryption because it intercepts the signal at a point at which it has already been decrypted. Still, I think we will prevail on this argument because in the ordinary course of operation, Blu-Ray video is only sent to a TV output for immediate viewing.

Slothrop

Slothrop is potentially a vicarious infringer. She has the right and ability to control how LaunchPad is used. Like Napster, she could shut the system down and stop the infringement; she could also police searches on her site for recent Hollywood titles and prevent those connections from being made. Direct financial benefit is harder to find. She doesn't charge for the use of LaunchPad, but she is building a userbase for her service, and *Napster* found that this kind of "draw" counts as a financial benefit. In addition, the link to Inherent Vice, while inconspicuous, might be a financial benefit in the form of advertising.

Our best argument is that Slothrop is a contributory infringer. LaunchPad materially contributes to the infringement by pairing Blu-Ray owners and viewers. As in *Napster*, Slothrop will be deemed to have specific knowledge of infringement because she can observe the searches made by users and their posts of what discs they have available. The *Sony* defense is unavailable to her because she is running a service rather than distributing a device. *Napster*.

Slothrop might be, but probably is not inducing infringer. She provides LaunchPad, and the best evidence of intent to foster infringement might be found from the disingenuous disclaimer posted on each page. We could argue that the exclusion of copyright owners is a sign to other users that the space will be "safe" for infringement. While Slothrop has a persona reminiscent of a pirate, it does not appear that she has appealed to that image in connection with LaunchPad.

Slothrop could potentially claim immunity under the Section 512(d) safe harbor for information location tools. I would need further information on whether she has appointed a DMCA agent to determine whether this defense would be viable.

Disclaimer

Slothrop could argue that our use of the site is prohibited by her 24-point disclaimer and try to sue us under the Computer Fraud and Abuse Act or for breach of contract. I would not worry about it. For one thing, if she does, she will sacrifice her jurisdictional advantages. For another, we have a good argument that the disclaimer is not enforceable as a contract, per *Specht* (although, to be fair, it is more prominent than the buried browsewrap there). More to the point, the purpose of this exclusion is so manifestly illegal that I am not concerned that a court would hold it against us.

Jurisdiction

We can easily sue Bodine in Massachusetts where he lives. Slothrop is harder. We could attempt to serve her while she changes planes in the United States and thereby acquire personal jurisdiction based on presence, but that would require guessing correctly what airport she will be at and when. We could also acquire jurisdiction based on the effects of copyright infringement, since many of the infringing streams are to or from the United States, and our copyright owner members are located here.

Practically, however, Slothrop will be in a good position simply to ignore our suit and avoid the United States in the future. Collecting on her assets will be difficult. We could attempt to sue her in Indonesia, but I would need to research Indonesian copyright law.