

## Question 1:

### I. YourPlace Liability

#### A. Copyright Infringement

Under the DMCA 102(a), Mr. Law can allege two instances of copyright infringement by YourPlace: when YourPlace copied the photo from MySpace's site to compare it to its topo map database and the in-line linking. The statute provides copyright owners protection "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 USC 102(a). To prove a copyright infringement under 102(a), Mr. Law must prove that the material at issue, the photograph of his home, meets the following elements: (1) original work of authorship, (2) fixed in tangible medium that can be perceived, (3) legally protectable, (4) material at issue is a copy, which is identical, strikingly similar, and (5) it violates at least one of the exclusive rights in 17 USC 106 (reproduction, public display, public performance, distribution, or derivative work).

Mr. Law will be able to satisfy the first and third elements for both claims. First, his photograph fits specifically into the category of original works entitled "pictorial or graphic works" under 102(a)(5). I assume because he provided the work to MyPlace that it is his original photograph. Second, Mr. Law has placed a copyright symbol at the bottom of his photo (assume legally protectable). The other elements are examined with respect to each action.

When Yourplace is using Mr. Law's photo to compare to its topo database, it is using an identical photograph. Here, it is loading the entire Myspace page into its RAM, including the photo for a temporary amount of time and then deleting this copy after it has compared it to the topos. Therefore, the material at issue is sufficiently fixed in a tangible medium. The court in MAI decided that although loading information into RAM creates only temporary copy, it is sufficiently fixed in a tangible medium to receive permanent protection. It is also clear that information being copied is identical to Mr. Law's copyright protected work. Finally, the copy here violates only the reproduction right because it is not displayed to the public or distributed in this instance.

Although Yourplace could argue that MAI's holding was overruled by statutory exception, Yourplace doesn't service software/hardware. Similarly, while Yourplace could argue that its use of this information is fair use, it will fail. To prove fair use, the court would examine the purpose and character of its use, the nature of the copyrighted work, the amount of the work used in proportion to the the whole, and the effect on the potential market. Here, the purpose of Yourplace's use is commercial because it wants to attract customers; the nature of P's work is creative, but could be obtained by other non-infringing means (taking photo); Yourplace is using the whole photo without adding any transformative value (e.g. thumbnail) just facts added; but Mr. Law doesn't have an established market, he is using a free site and doesn't desire sell his home. Although two factors don't clearly favor P, a court would find that the copyright owner is entitled to protection because of policy. Finally, Yourplace could argue that by placing the photo

on the internet, Mr. Law granted an implied license to use it. However, the copyright on the photo contradicts this reasoning. Thus, a court will likely find copyright infringement.

The court may not rule in Mr. Law's favor regarding the other allegation of copyright infringement. YourPlace is also in-line linking to the same image located on Mr. Law's Myplace website. This appears to create a copy that is fixed in a tangible medium that is strikingly similar except for the missing copyright information. Thus, it appears to violate not only the reproduction, but also Mr. Law's public display rights and distribution because YourPlace allows paid users to access its userpages. However, this claim may fail because as the court in *Perfect 10 v. Google* reasoned, in-line linking does not create a copy; it directs a computer to a pre-existing copy.

D may be able to bring a claim under 17 USC 1202(b) for removal of copyright info. See last paragraph Q2 (P = Mr. Law).

## B. Defamation

Yourplace has taken info from the Myplace website along with various other sources and placed it on Mr. Law's user profile in a disparaging way (unemployment and poor credit). Copyrights owners are only able to obtain limited protection under copyright law for this behavior. To fall under copyright protection, the speech can be communicative and commercial. If the speech is non-commercial, DMCA provides no protection. Yourplace's message doesn't appear communicative, but even if it is, the purpose is commercial because it hopes to profit from selling the information to users. Therefore, federal or even state law could restrict its speech if no DCC violation occurred: reg affects interstate comm. and facially discriminatory or causes undue burden. A court would likely find that a state law that required truthful disclosure would not unduly burden commerce, like the law in *Heckel*.

However, Yourplace has several defenses. First, it can state that it believed the information it stated was truthful and it also posted a disclaimer that it could not verify the information. Courts have not given disclaimers or ignorance much value. Second, although the CDA provides protection against defamation under 17 USC 230, Yourplace would not qualify (See Q5).

## C. Consumer Protection

Mr. Law may be able to bring a claim against Yourplace for violation of state consumer protection laws. It appears to be selling Mr. Law's information to other realtors and business people without obeying any fair information practices. It is not providing Mr. Law of any notice that his info is sold. He has no choice in the matter by opting in or out. Yourplace has no TOUs, so it may be letting others access pass on the information and likely provides Mr. Law no ability to participate in the correction of the information. Because of its lack of TOU, it provides Mr. Law no clear form of redress. Federal laws like Fair Credit Reporting Act, The Electronic Communications Act, and the CAN-SPAM ACT (depending on received emails' contents) may apply.

## II. MyPlace Liability

## A. Contract

Mr. Law can allege that the TOU that MyPlace is providing is not a valid contract. In this case, MyPlace has browsewrap user agreement that is available from every page of its site, but the user has to click on it to see its terms. The facts don't indicate if the agreement is readily viewable on every page without scrolling down or not, which may invalidate the K.

Courts have generally found that TOUs and EULAs are valid in the shrinkwrap and clickwrap forms. Although, courts have debated how the K is formed and whether it falls under the UCC or not, they have found that these Ks are valid, unless they are unconscionable. In the case of browsewrap, the Netscape court examined whether a reasonable user would have been able to locate the K and been made aware of its existence. Because reasonable users wouldn't have found the K that was only located on a few places on the site, the court found the TOU invalid. Here, however, the TOU is located on every page. Additionally, the users are asked to "agree" to the terms of the K when they register, indicating that they have read the K. The courts hold that it doesn't matter whether the user actually reads the K. Therefore, the K here would likely be held valid, unless its terms are unconscionable.

Courts recognize that TOUs/EULAs are adhesion Ks and don't allow for the dickering of terms between the parties. Unconscionability is a hard standard to meet, requiring both procedural and substantive unfairness. Procedural unfairness can be proven by the inequality between the parties, e.g. if the P could not read or was of low intelligence when he agreed to the K. Substantive unfairness places great burden on the P e.g. Davidson where the P had to travel to another state for arbitration. Here, no evidence exists as to P's intelligence and we know that he "agreed" when registering and the listed terms appear fair, in fact, they seem to protect Mr. Law. However, the term of use that is not disclosed, the license to his works is problematic because Mr. Law has no notice of its existence. This seems like great procedural unconscionability. However, Myplace could argue that D knew of this term because all users grant websites compulsory implied licenses when they post their works knowing that it will be available to the public. This may succeed in court, however, it would be nice to know what the other undisclosed terms cover. For example, a term that allowed Myplace to hold onto the license of Mr. Law's information after he requested the info taken off the site or if it wouldn't take the info off the site could be unconscionable, thus invalid.

## B. Consumer Protection

Although MyPlace creates passwords, it does allow anonymous access so security may not be adequate. It is unclear whether Mr. Law has meaningful access to correct info. Additionally, Myspace runs ads on its site. If these involve spyware, adware, or similar mechanisms, this may also violate certain state or federal consumer protection laws.

## C. Secondary Liability

Finally, Mr. Law can bring a claim against Myspace for Secondary Liability. To do this, direct infringement must already exist; it does because of Yourplace's copyright infringement. Mr. Law can proceed under contributory liability and vicarious liability.

To prove that contributory liability, P must prove that (1) Myplace knew of the infringement and had (2) substantial participation in it by materially contributing to it or inducement through acts that were reasonably likely to lead other users to misuse the information. Here, Myplace likely did not know of the infringement until Mr. Law notified it, but then it was aware. It does not appear that Myplace contributed to Yourplace's copyright infringement, although P could argue that it took steps that were reasonably likely lead to infringement by failing to provide adequate security. Still, the case is really unlike Grokster's level of inducement. A court could still find contributory liability.

To defend, Myplace may be able couldn't argue substantial non-infringing use because it already got notice. However, it may be able to defend under the DMCA safe harbors 17 USC 512(b-d). To do so, however, it would have to prove that it had adopted policies to hold infringers accountable for their acts and that it doesn't interfere with standard technical measures. Although a policy is in place, it is questionable whether it is being reasonably implemented because the site only randomly checks for personal information if the employees feel like it. If it passed this bar, it may qualify under 17 USC 512(c) if it can prove that it had no knowledge of the infringement, it didn't benefit economically from infringement, and that it responded quickly. It had no knowledge under Mr. Law informed it and does not look to have benefitted from the infringement, but we don't yet know if it responded quickly enough.

To prove vicarious liability, P must prove that (1) Myplace had the right and ability to control an infringer's acts and (2) that it received a direct financial benefit. Although Mr. Law could prove that D had the ability to control Yourplace's acts by making all users register, instead of allowing free access to the userprofiles (anonymous users) or by implementing better digital locks, it may not be able to prove the Myplace derived a financial benefit. The site is free to the community and the only revenue that Myplace obtains is from the advertising. A court could go either way on finding this element.

Question 2:

## II. Trademark

Myplace can bring claims against Yourplace for trademark infringement under the Lanham Act, the Anti-Cybersquatting Protection Act, and the UDRP.

First, Myplace has a claim under the Lanham Act 15 USC 114, for traditional trademark infringement. Myplace must prove the following elements to succeed: (1) mark is distinctive, (2) mark is legally protectable, (3) mark is used in commerce w/o permission, (4) the use of the mark in connection with a sale creates customer confusion. Although it isn't completely clear if Myplace is distinctive, it is not a generic mark, which is not entitled to protection. It is not arbitrary or fanciful, but rather descriptive of the site. It has likely acquired a secondary meaning that is recognized among the public as its site has 100,000 users and is accessible on the internet. Therefore, a court would likely conclude that it is distinctive. Second, the facts don't indicate

whether Myplace has a valid trademark, but I will assume it has since 2000. If it didn't, it would not be entitled to any trademark protection. Third, it is very clear that Yourspace is using the mark in commerce to identify its very commercially-driven website. However, a question arises as to the commercial nature of the mark because Myplace created a free community site that derives revenue only from the ads it allows others to place on the site. Based on our exposure to caselaw, running these ads, which may link to other commercial sites could arguably make the site commercial in nature. A court was willing to find commercial nature in Panavision, Bihari (who didn't even have a site) and likely would have in Taubman, had D not removed his commercial links. As a policy matter, the courts have stretched commercial use or even wholly ignored it to provide the protection necessary to protect businesses from having others benefit from their goodwill.

Finally, the use of the mark is likely to create customer confusion both in the traditional sense and by initial interest confusion (though sponsorship). The test for both claims is essentially the same, found by evaluating several factors: degree of similarity, strength of the owner's mark, price of goods/amount of care in advertising, length of time D used without confusion, D's intent, evidence of actual confusion, same channels of trade, same targets of sales efforts, relationship in the public mind, and bridging the gap if not the same market. Here, the two site names are not identical, but extremely similar. The strength of the owner's mark is likely at least distinctive in a niche market among 100,000 users and has been around since 2000. Other factors favor Myplace including that the channels of commerce are the same, the target audience is the same, and D's intent is definitely to ride off the goodwill of Myplace. However, it Myplace just now got notice of actual confusion (none in the past). The court would likely find trademark infringement.

The court may also find dilution. To prove dilution, P has to prove that the mark is famous, that D is making commercial use of the mark after it became famous, and the mark is registered. Assuming the mark is registered and is being used in commerce, the obstacle is the famous requirement. Courts look to eight factors, including how distinctive it is, duration and use of goods, extent of advertising, geographic recognition, channels of trade, and how recognizable the mark is. Here, the mark has acquired secondary distinctiveness, has been used for 7 years online, and is at least recognized by 100,000 users. Thus, a court would likely find it is famous.

P can also sue under the ACPA. To prove a claim P must prove that the mark is famous or distinctive, D's mark is identical or confusingly similar, that D registers, traffics, or uses the domain name, and that D has bad faith intent to profit from such use. P's mark is likely distinctive, but not famous (above), D's mark is confusingly similar (above), and D is using the domain name for its website. D has bad faith intent to profit based on the following factors: D intends to harm Myplace by diverting its consumers, D knows that its domain name is confusingly similar, and D has no prior use of the name that is noncommercial. These factors weigh toward a finding of bad faith, thus ACPA violation.

Finally, P may be able to bring a claim under the UDRP (ICANN). P can prove D's use of a confusingly similar mark (above) and that the DN is registered (assume). P must show that D had no legitimate interest, e.g. commentary, comparison (not presented by facts), and that D was using the mark in bad faith (lower standard). To prove bad faith, P can show that D used

mark primarily for the purpose of selling, to disrupt the business of the competitor, and to ride on P's goodwill. Success on this claim will not bind fed courts and is limited to transfer of the domain name.

Three defenses are available to Yourplace: fair use, nominative use, and first amendment free speech. Under fair use, D must prove that it is using the mark in a descriptive sense and in good faith (not good intent, but not to mislead consumers). D is not comparing goods and is actually trying to mislead consumers, so fair use fails. Nominative use is only applicable where use of the mark was necessary to identify a product fairly, which it is not here. D could have named its site anything it wanted and doesn't need to use P's mark. Finally, D doesn't have a gripe/comment site, so no 1<sup>st</sup> amend.

### III. Unauthorized Use of Information

P may bring claims for unauthorized access for violations of trespass to chattels, the CFAA, and 17 USC 1201. Under TOC, P must prove three elements: intentional interference w/o authorization, interference w/ possessory interest, and proximate damage to P. First, D caused an intentional interference when it obtained the userprofile data from P's site without authorization from P. Although the site was open to anonymous non-members to view the information, D would not have permission to use it in a commercial way. It is likely that D's obtaining the information interfered with the efficiency of the website because it not only downloaded multiple profiles daily (for three hours at a time), it also in-line linked these later causing more burden on P's system. This slowdown likely caused D damage to its servers, certainly to implement new digital locks, and the courts have been willing to assume future damage if others were to engage in this practice (ebay + Verio). Thus, P will likely succeed on this claim.

Under the CFAA, 18 USC 1030, P can proceed under 1030(a)(1), a(2)(c) (requires interstate commerce – I assume exists being a website), a(4) (has a 5000 damages limit – easy to meet by showing burden on system), but likely has no grounds under (a)(5), which is associated with spreading viruses. The elements are the same for all three above: (1) knowingly access a computer to obtain info, (2) without authorization or exceeding authorized access. P can prove that D accessed its computers when it got the information to compare to its topo database. Second, the information it obtained was without/exceeding authorization because although P allowed users onto its site (anonymous), limited to posting comments on users sites not taking info. This case is like Ticketmaster and Explorica, where the info was available to the public, but not for the means to be implemented by D. D's only defense would be a non-commercial gripe like purpose, like Hamidi, which the facts don't support. P would likely prevail on this claim.

Finally, under 17 USC 1201(a)(1)(A), P may be able to prove that D circumvented its digital locks: its registration system. This involves proving that D circumvented a technological measure that effectively (in the ordinary course of business) controls access to a protected work. P had a registration system that granted privileges to registered users, like posting information, using the BBS, and privacy of personal identifying info, so this technological measure was effective in the ordinary course of business. P circumvented it by obtaining information posted on Mr. Law's profile, comments and photo, as an anonymous user. Not only can bring 1201(a) claim, but it may also bring a 1202(b) claim for anti-tampering. This claim involves proving that

D (1) intentionally (2) without the authorization of the copyright holder (3) removed or altered the copyright information. Here, D intentionally removed Mr. Law's copyright sign from the bottom of his photo when in-line-linking it to his page. The facts do not indicate that P or Mr. Law authorized this removal. In fact, the information was obtained without authorization. If P's TOU is found valid or it has an implied license from Mr. Law, then it is the beneficial owner and is able to sue in place of Mr. Law (as in Rosetta Books).

D does not have any strong defense for these claims other than negating the elements. The Court in Ebay found that fair use did not apply where Congress did not expressly place it in the statutes, as is the case CFAA and 1201/1202.

### Question 3:

Mr. Law can sue Yourplace in CA and VA. First, Yourplace has its servers in CA and is incorporated in CA. The degree of contact with this state and reliance on its laws would grant CA general jurisdiction over Yourplace. Thus, P could sue in CA. This may not be convenient, so P could check if either VA long-arm statute provides specific J over D. To determine whether either state could obtain specific J P must show: (1) D purposefully availed itself to protection of state, (2) action arises out of contacts with the state, (3) and that jurisdiction is reasonable. Purposeful availment can be shown by reaching out to the state through advertisement and something more (*Cybersell*); we have no such facts. It can also be shown by the effects test: intentional actions, expressly aimed at the forum state, causing "brunt" or harm in forum state. D acted intentionally by obtaining personally identifying info from people, which made it aware that of their connection with particular states. Unlike in *Revell*, D has knowledge of the forum. By knowing the users locations, D expressly aimed its actions at their residences, here VA. The brunt of the harm for P, the emails from his friends, damage to his reputation did in fact occur in VA. Thus, the action arose out of contact with this state and the J is reasonable. ILL would not have SJ over D in P's case because harm doesn't occur in ILL (but probably for Myplace).

### Question 4:

The test the court should apply to determine how to handle Myplace's refusal to reveal the identity of the anonymous poster is whether P can reasonably identify Yourplace. The court decided the Seecandy case by determining whether P had taken all the reasonable steps necessary to locate D. In that case, the court formulated a test with the following steps: (1) P identifies the missing party with sufficient specificity to determine whether it is a real person or entity that can be sued in fed court, (2) P identifies all steps it took to locate the D, (3) P establish that its suit can withstand MSJ. Here, P can likely ID that an anonymous poster is a person or entity called "YourSpace." P should next show that he emailed the poster back, did a google search of "YourSpace," and any other efforts P may have taken to locate D. Next, P should show that he can withstand a MSJ for the copyright claim against Yourspace (see analysis for Q1). P should write a report and submit to the court. The reason the court should do this is because P can get in rem J. Although, the remedies aren't as beneficial to P, it would still provide some relief.

### Question 5:

Under 17 USC 230, Yourplace would not qualify for immunity from defamation. It would need to take measures in good faith to screen/restrict access to material and the information would have to be provided by another content provider. We don't know who the anonymous poster is (Yourplace I assume). First, Yourplace arguably had technological measures in place to restrict access only to its paying users (registration system), although no TOU. Second, the information would have to be provided by another content provider. D would argue that none of the info was original, but available from other publicly sources (like experian, yellowpages, google). Courts in Zeran, Blumenthal, have extended the info content provider protection to even if D solicited the info. The court will not likely extend the immunity this far.

Question 6:

Myplace's TOU could have explicitly stated that it does not permit users to use its info in any commercial manner. It could also have provided users a process for reporting infringement and more regularly self-policed the site for infringement without becoming liable for defamation. Additionally, it could have made all users register, guaranteeing TOU, CFAA, and DMCA protection. It could have attached a prominent disclaimer warning users that they could not use info w/o permission. It could obtain a copyright or patent for the whole site and prominently post it.