



Internet Law (Law 793)
Final Exam Sample Answer
Prof. Eric Goldman • Fall 2024

I based this question in part on *U.S. v. EZ Lynk Sezc*, 2024 WL 1349224 (S.D.N.Y. March 28, 2024). That ruling is on appeal to the Second Circuit.

Most of you addressed most of the main topics discussed below because: (1) some of the exam facts duplicated the in-class exercises and reflection papers we did throughout the semester, (2) I channeled your answers via four prompts, rather than asking a single more open-ended prompt, which significantly reduces the risk of students omitting major issues, and (3) at the last minute, I removed a fifth prompt (about 230/federal crimes and Taamneh aiding-and-abetting) because there was already too much to discuss. (If you expected more 230 on the exam, this is why). Nevertheless, you surely struggled with the word count cap.

Note: I am deemphasizing gendered language, so I used gender-neutral pronouns. For those of you who assumed the parties' genders, most assumed Kendall was female and Dylan was male.

1. Arbitrability of EZ's Disputes with Kendall and Dylan

Initial TOU Formation

To bind Kendall and Dylan to the arbitration clause, EZ has to show that (1) it initially bound subscribers to the TOU and then properly amended the TOU to add the arbitration clause, or (2) subscribers agreed to the amended TOU even if they didn't agree to the initial TOU.

Kendall and Dylan likely agreed to the TOU when they initially subscribed. EZ's formation page is a standard "scrollwrap" (eww) and has a high likelihood of enforceability. A number of you observed that the formation process did not include a second click like a clickwrap (also eww) would. Even without the second click, scrollwraps work because the consumers demonstrate a lot of intentionality when they take the required actions (scroll through the terms + click "accept"). Further, unlike clickwraps with hyperlinked terms, scrollwraps might confer actual notice (not inquiry notice) of the terms that the consumer nominally scrolled through.

I have two quibbles with EZ's implementation. First, the headline says "please read and accept Terms of Use." Saying "please" gives the impression that assent is optional. However, any such impression is eventually dispelled by the requirement to click "accept." Second, the bottom call-to-action says "I agree to and accept," but doesn't say what the subscriber is agreeing to or accepting. The TOU text does refer to formation via "clicking to accept or agree"—in bold language, even—but it's buried in the text. The fact that the two calls-to-action aren't identical adds further confusion.

Despite these quibbles, overall it's clear what subscribers are being asked to do and what it means when they click on the "accept" button. The second call-to-action is highly visible and, in

context, it could only be referring to the terms that visually dominate the screen and that the subscriber had to scroll through. This is a validly formed TOU.

Compliance with TOU Amendment Procedures

The TOU takes an old-school *Harris v. Blockbuster*-style approach to amendments: EZ will post amendments online, EZ doesn't promise any other notice to subscribers, and subscribers bear the burden of randomly checking back just-in-case the terms have changed. This kind of process, without more, should not constitute a valid TOU amendment because subscribers do not affirmatively consent to the changes or even get notice of them. However, per the Canteen decision, "the traditional modification analysis which requires mutual assent and consideration does not apply to changes stemming from a valid unilateral change-of-terms provision in an existing contract." In other words, in some courts, EZ will succeed if it simply follows its promised amendment procedure—which it did.

Note: *Harris v. Blockbuster* indicated that unilateral amendment terms make a contract illusory, but the Canteen case reached the opposite result. To add an arbitration clause, the Canteen case requires a forum selection clause in the original TOU. The displayed EZ TOU excerpts didn't contain a forum selection clause. If the EZ TOU contains the clause and a court follows the Canteen case, the arbitration amendment would succeed.

Did the Amendment Apply to Kendall and Dylan?

In contrast to the Canteen case, the Ninth Circuit requires consumers get notice of a TOS amendment. EZ could claim it provided notice to subscribers in two ways.

Notice via Website Posting. The website posting, without more, should not provide subscribers with adequate notice of the amended terms or form a new contract with them. The web posting doesn't force consumers to see the changes, and subscribers' subsequent actions don't necessarily manifest their assent to the amendments. If subscribers continue to use the service after EZ's posting, we don't know if they did so in assent with the amendments or completely ignorant of them.

The posting also doesn't work as a brand-new contract formation process. It's an unenforceable "browsewrap" (ugh).

Notice via Email. Though EZ's TOU didn't require this step, EZ provided notice to consumers via email. Some problems with EZ's email notices [note: I modeled the facts on emails I received regarding PayPal's purported TOS amendments in September 2023]:

- The email went only to current subscribers, leaving past subscribers in the dark. Because Kendall and Dylan are current subscribers, this issue doesn't affect the exam answer.
- What happened to emails that bounced due to changed email addresses, full in-boxes, temporary email server issues, spam-filtering, etc.? And what about the emails that never got opened, got deleted unread, etc.? For these reasons, some courts have required services to prove that subscribers actually received and opened the amendment

notification email, not just that the service sent it. The facts didn't indicate that EZ could make this showing with respect to Kendall and Dylan.

- The email text says subscribers don't need to take any action, which is misleading because subscribers must act to preserve the status quo. (This language came from PayPal's email—I didn't make it up).
- The notification email doesn't provide all of the information subscribers need about the amendments. Instead, subscribers must click to investigate. You might argue that EZ's email to subscribers was clearer about the amendment process than the confusing CMCU email that Canteen upheld. However, the EZ email doesn't highlight the added arbitration amendment, which the CMCU email did.
- The text doesn't give subscribers a meaningful choice to exit because they have prepaid for an annual subscription.

Some of you noted a timing inconsistency: the amended TOU was posted December 1 and says it's effective immediately, while the email says the amendment won't take effect until January 1. I don't see a conflict here; the TOU can take effect immediately for new subscribers after December 1, while existing subscribers won't be bound by the new terms until January 1.

EZ's email notification is similar to the Coursera notification that succeeded, though EZ should have followed better amendment procedures. Overall, I think Kendall and Dylan agreed to the initial TOU, and EZ (barely) properly amended the TOU to add the arbitration clause. As a result, I think Kendall and Dylan will have to arbitrate disputes with EZ.

Kendall's Reregistration. After EZ suspends Kendall's account, Kendall creates a second account that required Kendall to go through the account formation process. If Kendall created this second account after December 1, 2023, then Kendall also agreed to the arbitration clause via the second registration.

2. Dylan's Claims Against Kendall and EZ

Dylan v. Kendall: Copyright Infringement

Prima Facie Case

- Copyrightability. The facts indicate that Dylan registered their app. By doing so before Kendall's infringement, Dylan is eligible for statutory damages and attorneys' fees.
- Violation of 106 Rights. Kendall downloaded the app (a reproduction), and slightly modified and reuploaded the app (a reproduction/derivative work and a distribution).

Defense—Permission

By making the app freely available for EZ subscribers to download, Dylan expressly or impliedly permitted Kendall to download Dylan's app and upload the app to Kendall's car. However, the TOU terms don't indicate that the TOU permits Kendall's upload of the app to EZ; and Kendall's warning from the copyright filter should have removed any doubt about Kendall's lack of permission to reupload the app.

Defense—Fair Use

- Nature of Use. Kendall reuploaded the work to compete with Dylan’s app for profit (even if it wasn’t realized). This is clearly commercial. The app’s name change was a trivial transformation at most. Favors Dylan.
- Nature of Work. Software is sometimes characterized like a fictional work, but a highly functional app like Dylan’s could go either way.
- Amount Taken. 100% of the work (other than the rename). Favors Dylan.
- Market Effect. Dylan’s app and Kendall’s copy are direct substitutes for each other, which weighs heavily against fair use. However, if disseminating the work is illegal, then the app has no legitimate market at all. Still, as between the two parties, Kendall is less entitled to any revenues from the app. Favors Dylan.

Dylan won’t sue Kendall because Dylan would essentially admit to committing a crime in the process. But if Dylan risks going to court, I think Dylan wins the lawsuit easily.

Dylan v. Kendall: Defamation

Prima Facie Case

- False statement of fact?
 - Kendall made three fact claims: “[1] I installed this app but [2] my car failed its smog check and [3] I spent \$3,000 repairing the car to get my registration!”
 - Per *Bauer v. Brinkman*, I think all three claims are fact statements, not opinions.
 - Definite/unambiguous meaning. I think the statements are clear and unambiguous: Kendall installed the app, it failed the smog test, and the resulting repairs cost \$3k.
 - Objectively capable of proof. All three statements can be verified or disproven. Did Kendall install the app or not? Did Kendall fail a smog test or not? Did Kendall spend \$3k on repairs or not?
 - Context around the statement. Consumer reviews are often hyperbolic and filled with rhetorical excesses, but I don’t think that’s the case here. Kendall provided a (fake) first-hand testimonial about their experience, and readers might reasonably assume could they could have similar experiences.
- Of and concerning. The reference to “this app” is open-ended, but in context it’s clear the review refers to the reviewed product. However, is the review “of and concerning” Dylan? I think so because the review is critiquing Dylan’s work, as if Dylan was a sole proprietor.
- Publication. The review was communicated to EZ’s readers.
- Reputation Injury. Kendall’s claims relates to Dylan’s business and are probably per se defamatory. Otherwise, Kendall injured Dylan’s reputation by disparaging Dylan’s work and trying to dissuade consumers from downloading the app.

I think Dylan has a prima facie case of defamation against Kendall.

First Amendment Defense

- Matter of Public Concern? Normally, the efficacy of marketplace goods/services should be a matter of public concern. Here, the devices aren't legal to buy or sell, which may make their efficacy less of a public concern.
- Scienter? Whatever scienter applies, Kendall made up the claims without regard of the facts' veracity, so Kendall's statements were made with actual malice.

As discussed above, Dylan can't sue Kendall without confessing to illegal actions; and the lawsuit would face a potent unclean hands defense (the facts said not to discuss it). However, in the exam's hypothetical universe, Dylan's defamation claim is strong.

Dylan v. EZ: Copyright Infringement

Prima Facie Case—Direct Infringement. EZ's servers copied and distributed Kendall's infringing app in connection with Kendall's upload and any subsequent downloads. However, direct infringement claims against EZ should fail because EZ didn't take a volitional action (Cablevision). EZ's servers responded to Kendall's instructions, so Kendall proximately caused the infringing activities (i.e., Kendall "pushed the button").

Prima Facie Case—Contributory Infringement

- Direct infringer: Kendall's uploads.
- Knowledge of infringing activity: EZ deployed the copyright filter in response to frequent infringements, but EZ's generalized knowledge about infringement doesn't satisfy the scienter standard. Plus, the filter didn't detect Kendall's upload of Dylan's app, so arguably EZ didn't "know" of the infringement when uploaded. Dylan's email to EZ's GC may have created scienter (even if it doesn't satisfy 512(c)(3)).
- Material contribution. EZ's continued hosting of Kendall's app after achieving scienter.
- EZ didn't induce infringement. EZ deployed a copyright filter to prevent infringement, while the Supreme Court imposed liability in part because Grokster didn't deploy a filter.

If Dylan's email conferred knowledge on EZ about Kendall's infringing upload, then EZ might be liable for contributory copyright infringement for the period of time the app was publicly available after that.

Prima Facie Case—Vicarious Infringement

- Direct infringer: Kendall's uploads.
- Right/Ability to Supervise Infringing Acts: Like all online services, EZ has the technical capacity to manage and remove users' uploads.
- Direct Financial Interest in Infringement: EZ didn't profit from infringement. It charged a fixed annual fee for unlimited subscriber downloads, infringing or not. Dylan could argue that the availability of infringing downloads motivated subscribers to subscribe, but that seems implausible given EZ's deployment of the filter.

I don't think EZ is vicariously liable for Kendall's copyright infringement.

Section 512 Defense

- 1. "Service provider." EZ provides online services. ☹
- 2. Store material at user's direction. EZ hosted the infringing app at Kendall's direction.
- 3 & 5. Adopt repeat infringer policy and communicate it to users. The TOU tells users that EZ's policy is "to terminate the user accounts of repeat infringers." That's a policy, I guess.
- 4. Reasonably implement repeat infringer policy. EZ sends warnings to uploaders caught by its copyright filter, but the safe harbor requires terminations, not just warnings. Thus, the filter's notifications don't demonstrate EZ's reasonable implementation of the policy; if anything, the warnings suggest that EZ "knows" of the uploader's infringements but didn't take strong enough action. But could EZ claim Kendall wasn't a "repeat infringer" because EZ never got a 512(c)(3) notice against Kendall?
- 6. Accommodate standard technical measures. A null set.
- 7. File Copyright Office designation of agent to receive §512(c)(3) notices. Stipulated by the facts.
- 8. Post agent's contact info on website. The facts indicate that the TOU displays this information.
- 9. No actual knowledge or red flags of infringement.
 - Usually, a 512(c)(3) notice confers actual knowledge of infringement on the recipient, but EZ never received a 512(c)(3) notice for Kendall (Dylan's email didn't qualify per the facts). A copyright owner's failed 512(c)(3) notice doesn't create "red flags" of infringement (Veoh).
 - The filter didn't catch Kendall's upload this time, so EZ didn't ignore any warnings about this app "known" by its filter.
 - Dylan could argue that EZ was willfully blind about Kendall's recidivism because the filter kept issuing warnings without taking action. The YYGM case says "willful blindness requires the defendant to be aware of specific instances of infringement *or specific infringers*." Given Kendall's recidivism, perhaps Kendall qualifies as a "specific infringer" for the YYGM test?
 - Some of you argued that 512(m) meant that EZ couldn't be liable for filtering Kendall's uploads. 512(m) only says services can't be compelled to filter or proactively look for infringement. It doesn't address the scienter consequences of any voluntarily undertaken efforts.
 - Some of you argued that EZ had "red flags" because its filter had previously bounced Kendall's uploads. EZ's response to past uploads is governed by the repeat infringer provisions or possibly willful blindness. "Red flags" applies to the uploaded item at issue.
 - I don't think EZ had disqualifying scienter but I understood if you reached a different conclusion.
- 10. No right/ability to control infringement. EZ didn't appear to direct Kendall or any other users to upload specific content items (what courts have defined as "substantial influence").

- 11. No direct financial interest in infringement. As discussed in the prima facie case.
- 12. Expeditiously respond to §512(c)(3) notices. Dylan’s email wasn’t a 512(c)(3) notice, so arguably this requirement never got triggered. If EZ’s removal speed is in question, is a 15 day turnaround fast enough? The book cites a case saying that 5-14 days is expeditious. Does that extra day make it no longer expeditious? (Who knows—this is a law professor’s slippery slope).

Overall, EZ probably qualifies for a 512(c) defense.

Dylan v. EZ: Defamation

Prima Facie Case/First Amendment Defense. The prima facie defamation case against EZ resembles the prima facie claim against Kendall, but EZ can argue that it lacked actual malice (or any scienter) regarding the veracity of Kendall’s claims—at least until it got Dylan’s email.

Section 230 Defense. Section 230 will preempt Dylan’s defamation claim against EZ based on Kendall’s review:

- ICS Provider. EZ’s website qualifies.
- Publisher/Speaker Claim. My position is that all claims are publisher/speaker claims except when they fit into a statutory exception. Even if not, defamation is the quintessential publisher/speaker claim.
- Third-Party Content. Kendall provided the review of Dylan’s app.

This is an easy Section 230 prima facie case.

Exceptions to Section 230 Defense.

I don’t think any statutory exclusions apply:

- Federal criminal prosecution. The plaintiff here is Dylan, not the USDOJ.
- IP claims. Dylan’s copyright and trademark claims fit into this exception, but defamation does not.
- FOSTA. Not applicable.
- ECPA/state law equivalents. I argued this was a null set.

As for the common law exceptions:

- Roommates.com/Encourage Illegal Content or Require the Input of Illegal Content. Dylan is suing for defamation, so the allegedly “illegal content” is Kendall’s defamatory review. The facts don’t suggest that EZ encourages defamatory reviews or required Kendall or any other users to input defamatory reviews.
- Roommates.com/Materially Contribute to the Alleged Unlawfulness. The facts don’t specify that EZ modified Kendall’s review to add any defamatory material.
- Processing transactions. The defamation claim is based on Kendall’s review, and EZ is not selling the review.

- Anti-competitive animus. EZ and Dylan are not direct competitors. For example, the facts don't indicate that EZ offers its own rival app. (In the distribution chain, EZ acts as Dylan's distributor).
- Failure to warn. Such a claim would get around 230 per Internet Brands, but it's unclear what warning EZ could have provided Dylan about the risk of defamatory reviews that would have mattered to Dylan.
- Promise-based claims. Per Calise and YOLO, a promise-based claim probably gets around Section 230. However, that claim will fail here because EZ didn't make an actionable promise to Dylan. The GC's responses didn't make any promises directly to Dylan. Dylan could point to the TOU's language, which impose a negative covenant on users not to upload defamatory content. Per Noah, Dylan isn't a third-party beneficiary of the EZ-Kendall TOU; and the excerpted TOU language doesn't promise Dylan that defamatory content won't be found on the site.
- Negligent design. Dylan could claim that EZ should have designed its site to make it harder or impossible to post defamatory reviews. Per Lemmon v. Snap, that claim would be based on Kendall's third-party content, so it should be preempted by 230.

3. Car Manufacturer v. EZ

Trademark Infringement.

Likelihood of Consumer Confusion

- Ownership of a valid trademark. Car manufacturers usually have valid and strong trademarks. Even car companies with descriptive names (e.g., "General Motors") typically achieved secondary meaning long ago and are very recognizable marks.
- Priority. The advertisers are referring to the existing trademarks.
- Defendant's use in commerce. Buying and selling keyword ads appear to be uses in commerce per Network Automation and Lerner & Rowe.
- Likelihood of consumer confusion (advertiser as defendant). As Lerner & Rowe indicated, buying keyword ads isn't infringing.
 - When the trademark appears in the ad copy, the LOCC analysis depends on the specific ads. The example ads feature the advertiser's brand prominently and make it clear that the car manufacturer isn't the advertiser, which reduces the risk of consumer confusion.
 - Network Automation and Lerner & Rowe provided an expedited four-factor analysis for keyword ads instead of the standard Sleekcraft test (some of you weirdly applied the Sleekcraft test instead of the keyword ad-specific test we covered in class).
 - Mark strength: most car manufacturers have very strong brands. They are heavily advertised to, and widely recognized by, consumers. This is the only plus factor for the trademark owners.
 - Actual confusion: If a court uses quantitative proxies for actual confusion like clickthrough rates or number of users asking for the trademark owner, the trademark owner almost certainly cannot demonstrate the required percentages.

- Consumer care: Lerner & Rowe said consumers are careful when they search for a TM. This should apply to car nerds who care a lot about what modifications they make to their cars and need to ensure compatibility with their car.
 - Ad labeling: Lerner & Rowe said Google’s ad labeling was effective, and the exam screenshot is taken from Google.
 - I think the example advertisers aren’t committing trademark infringement.
- The initial interest confusion doctrine adds nothing to this analysis. Per Network Automation (a keyword advertising case), the IIC doctrine merges back into the standard likelihood of consumer confusion factors.
- Likelihood of consumer confusion (EZ as defendant). EZ is the keyword ad seller, and the Lerner & Rowe majority didn’t address this trademark analysis. I don’t see how any advertiser buying a third party trademark as a keyword would do so confused about what EZ is selling or EZ’s independence from the trademark owner, but this is legally unresolved.

Nominative Use Defense. Applying the 3-factor Ninth Circuit test:

- Advertisers can’t indicate compatibility without using the manufacturer’s trademark.
- In the second depicted example, the advertisers only used the manufacturer’s name once. The first example used it several times, including in the brand name and domain name, but still only as necessary to identify what the advertiser does. (The advertiser could also be authorized by Tesla). The example ads didn’t display the manufacturer’s logos.
- Per Lerner & Rowe, consumers don’t presume sponsorship or endorsement from keyword ads.

The nominative use defense seems highly likely for advertisers who sell compatible parts or service a manufacturer’s cars.

EZ Ad Policy. Per the policy, car manufacturers can request that their trademarks be removed from the ad copy, except for “advertisers selling the product, components, replacement parts, or compatible items.” The example ads are from advertisers selling these items, so EZ’s policy will permit continued display of the ads. Also, EZ’s policy removes trademark displays in scenarios where it’s most likely to face infringement claims, which should partially abate its contributory TM infringement exposure.

ACPA and UDRP only apply to domain names, not keyword ads.

Contributory Trademark Infringement.

- Direct infringer. The advertisers probably aren’t infringing, but I’ll assume they are.
- Inducement. EZ sells keyword ads to advertisers but, based on the given facts, we don’t have any evidence that EZ goads or encourages advertisers to buy third-party trademarks.
- Control. EZ sells ads for the car manufacturers’ trademarks and then hosts the ads, so EZ likely controls/monitors the instrumentality used to infringe. EZ would get the requisite scienter from trademark owner notices claiming infringement, but EZ’s trademark policy

may remove the trademark references in some of those circumstance sand thereby negate that liability. In general, the contributory analysis for keyword ad sales remains untested.

Trademark Dilution.

- Ownership of a valid trademark. Car manufacturers usually qualify.
- Famous mark. Many car manufacturers have famous trademarks because they heavily advertise to consumers. Recall the “Mercedes” example in class. “Tesla” surely qualifies as a famous mark.
- Use in commerce. As discussed above, referencing the trademark in the ad copy qualifies.
- Use after fame. This will typically be the case because most car manufacturer trademarks have been famous for a while.
- Likelihood of dilution.
 - EZ selling trademarks as keywords doesn’t blur the trademarks because it doesn’t create any new meanings for the trademarks.
 - EZ selling trademarks as keywords also doesn’t cause any tarnishment of the trademarks when the ad sales don’t associate the mark with pornography.
 - In each case, advertisers buying the trademarks for their ad displays could add a new meaning to the trademark or tarnish the mark (either through porn associations or maybe by offering terrible compatible products that sour consumers on the whole brand). Ad sales don’t cause these effects, so imputing their actions to EZ would be contributory dilution, which isn’t a thing.

Also, EZ’s ad sales may often qualify for the nominative use doctrine when the advertisers offer compatible products or otherwise refer to the TM owner.

4. EZ v. Kendall.

Breach of Contract. Per Part 1, I think EZ properly formed the TOU with Kendall. Kendall breached multiple provisions of the TOU and could be liable for the contract breaches:

- No legal violations: Kendall disseminated an illegal defeat device.
- No impairing the site or other parties’ usage: Kendall’s upload of emojis broke the filter, impairing usage for 3 hours.
- No manual copying: Kendall manually downloaded and uploaded Dylan’s app.
- No copyright infringement: The app download and upload was infringing (see part 2 above).
- No objectionable content: Kendall posted a defamatory review (see part 2 above).

Trespass to Chattels Doctrines.

What is the Chattel? EZ’s web servers are the chattel at issue.

Did Kendall Use EZ’s Chattel? Kendall used EZ’s web servers/chattel to engage with their EZ account, including uploading apps and posting the review.

Did Kendall Have Authorization for the Chattel Use? Although not enumerated in the TOU excerpts, Kendall's annual subscription surely gave Kendall some express or implicit rights to use EZ's chattel, including uploading and posting privileges for subscribers. Nevertheless, EZ restricted Kendall's authorization several ways:

- If TOUs delimit access (unsettled after *Van Buren*, at least for the CFAA), then Kendall repeatedly exceeded access by breaching numerous TOU restrictions.
- The copyright filter's notification of Kendall's infringing uploads.
- The GC's instruction to stop using the service.
- The fraud team's suspension of the account, which is a technological "gates down" (portcullis metaphor) for the account.
- The fraud team's blocking of the IP address, another technological "gates down." However, when IP addresses are dynamically assigned, Kendall would likely have no idea of the block unless the fraud team expressly told Kendall.

Did Kendall Cause Legally Cognizable Harm to the Chattel?

Not all of Kendall's shenanigans count as TTC harms.

- CA Common law TTC. Per *Hamidi*, a claim requires a measurable loss to computer system resources. The filter outage was a quantifiable system outage (3 hours of no uploads). Kendall "caused" this outage by uploading the offending file after Kendall lost authorization to upload anything. I think this harm is recognizable.
- CFAA.
 - The filter outage might count as a CFAA harm because it blocked new uploads, but it didn't prevent ongoing downloads of existing uploads.
 - The CFAA will count remediation costs for activities after EZ withdrew authorization. Because Kendall completely lost authorization to use the servers via the GC letter, remediation harms should include EZ's costs of reuploading the filter. Remediation might also include the costs of imposing the IP address block and other remedial efforts against Kendall's account (such as removing Kendall's app upload and the review of Dylan's app). These depend on whether Kendall lost authorization for the associated activities when EZ performed them.
 - All of these costs must add up to \$5,000 per year. We don't have enough data to tell if it does.
- 502. In addition to any losses recognized by the CFAA, 502 counts EZ's verification expenses, including the fraud team's research into Kendall's unauthorized infringement and defamatory review. EZ probably can establish a *prima facie* 502 violation.

Overall, I think EZ has a good claim for all three TTC doctrines due to the filter outage and other recognizable costs.

ChatGPT's Answer

[Note: I instructed ChatGPT to write a 3,000 word response to the exam facts (ChatGPT's answer was only about 1,100 words). This answer has obvious problems and inaccuracies. At the same time, it might not have been the lowest-scoring answer I received this semester.]

This analysis addresses the legal questions surrounding EZ Lynk's terms of use (TOU), user activities, and related issues under four key topics:

1. **Whether EZ can compel Kendall and Dylan to arbitrate any matters related to the EZ service**
 2. **Dylan's potential claims against Kendall and EZ**
 3. **EZ's risks if a car manufacturer claims that advertisers' keyword ads on EZ violate the manufacturer's IP rights**
 4. **EZ's potential claims against Kendall**
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1. Whether EZ Can Compel Kendall and Dylan to Arbitrate Any Matters Related to the EZ Service

A. Dylan's Arbitration Obligation

Dylan created their EZ account prior to December 1, 2023, and accepted the initial TOU, which did not include an arbitration clause. On December 1, 2023, EZ updated its TOU to include a mandatory arbitration clause and sent notice via email. The email and linked update page explicitly informed subscribers that continuing to use EZ services after January 1, 2024, constituted acceptance of the updated terms. Dylan did not close their account, implying their agreement.

Key considerations:

- **Acceptance of Modified TOU:** The language of the TOU ("continued use...means that you accept") coupled with the email notification creates a strong case that Dylan consented to the arbitration clause by using EZ services after January 1, 2024. Courts have generally upheld such "browsewrap" or "modified contract by use" agreements if users are given clear notice and an opportunity to opt-out (e.g., by account closure).
- **Enforceability of Arbitration Clause:** Arbitration clauses are presumptively valid under the Federal Arbitration Act (FAA), provided that they are not unconscionable or overly burdensome. Dylan's apparent acceptance and EZ's clear disclosure suggest the clause is enforceable.

B. Kendall's Arbitration Obligation

Kendall also created their account before December 1, 2023, and thus initially agreed to the TOU without an arbitration clause. Similar to Dylan, Kendall would be bound by the new TOU if they continued using the service after January 1, 2024. However, there are additional nuances:

- **Re-Registration with a New Account:** After Kendall's original account was suspended, they created a new account. If Kendall registered this account after January 1, 2024, they explicitly agreed to the TOU that included arbitration. Thus, Kendall would be bound to arbitrate disputes arising from their new account activities.

2. Dylan's Potential Claims Against Kendall and EZ

A. Claims Against Kendall

1. Copyright Infringement

Kendall's reupload of Dylan's defeat device app, with only the name changed, constitutes copyright infringement under 17 U.S.C. § 106. Copyright protects original works of authorship, including software, and the exclusive rights include reproduction and distribution.

- **Direct Infringement:** Kendall reproduced Dylan's app and made it available to EZ users. The minor modification (renaming) does not avoid infringement, as courts evaluate substantial similarity in protected elements of the work.
- **Willfulness:** Kendall's history of reuploading others' apps, coupled with EZ's prior warnings, may establish willfulness, increasing potential damages under 17 U.S.C. § 504(c)(2).

2. Defamation

Kendall's review falsely claimed that Dylan's app caused their car to fail a smog check and incur \$3,000 in repairs.

- **Elements of Defamation:** The statement was (i) false, (ii) unprivileged, (iii) published to third parties (EZ users), and (iv) caused reputational harm.
- **Actual Malice or Negligence:** As Kendall did not test Dylan's app, they either knowingly made a false statement or acted with reckless disregard for the truth. Dylan could seek compensatory damages for harm to their reputation and potentially punitive damages for Kendall's malicious intent.

B. Claims Against EZ

1. Indirect Copyright Infringement

Dylan may argue that EZ contributed to or induced Kendall's infringement by hosting and distributing the renamed app.

- **Contributory Infringement:** Requires knowledge of infringement and substantial participation. EZ's failure to detect Kendall's renamed app does not

establish actual knowledge, but the prior warnings to Kendall could show constructive knowledge.

- **Safe Harbor Defense (17 U.S.C. § 512(c)):** EZ may invoke the DMCA safe harbor by demonstrating (i) lack of actual knowledge, (ii) prompt removal of infringing material upon notice, and (iii) adherence to a repeat infringer policy. Although Dylan's email lacked formal § 512(c)(3) elements, EZ acted promptly to remove the app and suspend Kendall's account.

2. **Negligence in Content Moderation**

Dylan might claim that EZ's inadequate filtering allowed Kendall's app to be uploaded, causing harm. However, courts are reluctant to impose liability on platforms for user-generated content under Section 230 of the Communications Decency Act (CDA).

3. **EZ's Risks if a Car Manufacturer Claims Advertisers' Keyword Ads on EZ Violate the Manufacturer's IP Rights**

Car manufacturers might allege that EZ's keyword advertising program infringes their trademarks, particularly where advertisers use the trademarks inappropriately.

A. **Trademark Infringement and Liability**

1. **Direct Infringement by Advertisers**

Advertisers may misuse trademarks in ways that create confusion about affiliation or endorsement, violating the Lanham Act (15 U.S.C. § 1114). For example, ads explicitly stating, "Genuine Tesla Parts," if untrue, would mislead consumers.

2. **Indirect Liability for EZ**

EZ could face contributory liability if it knowingly facilitates trademark infringement by advertisers. In *Inwood Labs. v. Ives Labs.*, contributory liability arises when a service provider induces infringement or continues to supply services to known infringers.

- EZ's policy mimicking Google's likely addresses such risks by defining permissible uses of trademarks in ads (e.g., comparative advertising). If adhered to, this policy mitigates liability.

B. **Defenses for EZ**

1. **Nominative Fair Use**

Advertisers can lawfully use trademarks to identify compatible products if such use does not imply sponsorship. Ads like "Compatible with Tesla Models" are likely permissible.

2. **Safe Harbor Under CDA Section 230**

While Section 230 does not protect IP claims, EZ might argue its role in ad placement is passive, limiting its culpability.

4. **EZ's Potential Claims Against Kendall**

A. Breach of TOU

Kendall's actions—reuploading infringing apps, disregarding suspension instructions, and using emojis to bypass filters—violate the TOU's prohibited uses, including intellectual property infringement and interference with site functionality. EZ could seek damages for costs incurred (e.g., engineering time) and injunctive relief to prevent further violations.

B. Fraud

By reuploading Dylan's app under a different name, Kendall misrepresented authorship with the intent to benefit financially (via the top 100 compensation program). EZ could assert common law fraud, seeking restitution for expenses caused by Kendall's misconduct.

C. Disruption of Business Operations

Kendall's emoji-laden app title caused a filter failure, temporarily halting site uploads and disrupting EZ's operations. EZ may claim damages for business interruption and costs to repair its filter system.

Conclusion

EZ's ability to compel arbitration depends on the TOU acceptance framework and timing of Kendall's re-registration. Dylan has strong claims for copyright infringement and defamation against Kendall, with a potential but weaker claim of contributory infringement against EZ. Trademark risks for EZ hinge on advertisers' proper use of car manufacturer trademarks, but its existing policies reduce exposure. Finally, EZ has robust claims against Kendall for TOU violations, fraud, and operational disruption.