

**Fall 2024 Internet Law Final Exam**  
**Student Sample Answer**

[Eric's introduction: this is an actual final exam answer submitted by a student in the Fall 2024 Internet Law course. It provides an example of what one of your peers actually accomplished within the exam's time and word count limitations. I have not attempted to correct any errors or identify any omissions in the exam. Please refer to my sample answer for a more comprehensive and possibly more accurate answer to the exam.]

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Word Count: 2,984

**Arbitration Agreement**

Dylan and Kendall made their EZ accounts before the arbitration clause was added. In order for EZ to compel arbitration, there need have been a valid amendment to an existing agreement.

**Contract Formation**

In order for a contract to be formed, there must be a mutual manifestation of assent. To create an EZ account, users must first scroll through the entire Terms of Use (TOU) and click "accept" at the bottom of the page. This weighs in favor of enforceability because it requires the user to "read" the TOU by scrolling through them. However, the call-to-action ("I agree to and accept") is grammatically confusing, and doesn't include a clear "if-then" statement. The call-to-action placement is suboptimal, as it should be next to the "accept" button, rather than the "back" button. However, as long as users cannot proceed to EZ without clicking the "accept" button, there are no apparent leaks. EZ's contract formation process has clear deficiencies, but they're likely outweighed by the general enforceability of TOU'S that require users to scroll through.

**Contract Amendment**

The initial TOU also included a provision claiming that any future changes to EZ's terms would be effective immediately upon posting. The question is whether that statement is true with regards to existing users like Dylan and Kendall. When EZ changed its terms on December 1st, 2023, they took two measures to notify subscribers: posting on their website (not very effective unless displayed prominently on the main page) and emailing current subscribers (potentially effective).

The email states that changes “will apply to you,” and includes a hyperlink to the update page. Inclusion of a blue link is good, because it’s noticeable and gives users the ability to access the new terms, but the initial email is vague and doesn’t enumerate any of the changes. There is also no call to action in the initial email, which could impair the amendment’s enforceability by adding an extra step users must take in order to know the terms. The inclusion of the “redline” showing the differences between the TOUs is great, but there are too many steps/barriers to get there. There was also no meaningful opt-out option for users, other than to stop using the service altogether, which doesn’t give users a meaningful choice.

An arbitration clause is a material term, which EZ attempted to introduce unilaterally by posting online and sending a generalized email. These measures were likely insufficient to create meaningful notice required to obtain assent from existing customers. Had EZ been more explicit or required a mandatory click-through before users were to be bound, the arbitration clause would likely be enforceable. As it stands, EZ likely cannot compel Dylan and Kendall to arbitration because they never properly assented to the amendment.

### **Dylan v. Kendall**

#### Copyright: Direct Infringement

Kendall committed direct copyright infringement by uploading Dylan’s app and passing it off as her own. The app is copyrightable as an original work of authorship fixed in a tangible medium. Dylan owns a valid copyright to the app, which he registered before the infringement occurred. Kendall violated Dylan’s 106 exclusive rights to reproduce, distribute, display etc., by uploading the app onto EZ from her account. Kendall could argue she has implied license to reproduce the app, but this is unlikely to prevail as the nature of Kendall’s use undercuts Dylan’s app.

#### Fair Use Defense:

- Character of the use – Kendall’s use wasn’t strictly commercial, insofar as the app didn’t generate revenue directly, because EZ members download them for free. However, Kendall aimed to financially benefit from the app through EZ’s compensation plan. This could mean the use was commercial in nature, weighing against fair use. Further, the use

was not transformative, as she copied Dylan’s app verbatim. Changing the name does not transform the work. Therefore, this factor weighs against Kendall.

- Nature of the work – the work was uploaded onto EZ for all members to use and download, which likely qualifies as publication. The app is considered “fact” over “fiction,” because it contains instructions for how to cheat on a smog test. Both of these factors weigh in favor of fair use.
- Amount taken – Kendall took the entire work when she copied the app, weighing heavily against fair use.
- Market effect – Unrestricted and widespread conduct like Kendall’s would likely impact the market for Dylan’s app in a substantial and adverse way. Although the app isn’t for sale, if Kendall’s app was used widely by EZ members, it would eliminate the need for Dylan’s app, making him unlikely to qualify for the compensation program. This weighs against a finding of fair use.

Defamation:

Dylan can bring a defamation claim based on the review Kendall posted for Dylan’s app. The post contained several express or implied [false] statements of fact, stating that:

- Kendall installed the app;
- The app caused her to fail a smog check; and
- She had to spend \$3,000 repairing the car to get her registration (impliedly as a direct result of the faulty app).

These allegations are definite, unambiguous, and capable of proof. A cursory inspection of Kendall’s download history could likely show that she never actually installed the app, which makes her first statement capable of being proven false. The truthfulness of the remaining statements necessarily relies on the veracity of the first – because Kendall never downloaded the app, it could not have possibly caused her to fail the smog test or spend \$3,000 on repairs. Contextually, the statement was posted as a review, where hyperbole is commonplace, but users also expect to find relatively true statements in reviews, as they’re intended to inform others about the quality of a product. Accordingly, the statements likely qualify as factual in nature.

The statements were “of and concerning” Dylan because they were posted as a review of an app he created. Kendall published the statements to a third party (users of EZ) when she posted the review for all subscribers to see. Finally, the statements are likely injurious to Dylan’s reputation because they undermine the utility of his app. The statements could be per se defamatory, if a court were to view Dylan’s app as business dealings – say, if his career was based on developing app software. At minimum, the review is likely to harm his standing in EZ’s compensation program.

The First Amendment defense does not apply here. While the efficacy of Dylan’s app *could* be seen as a matter of public concern in the EZ community, Kendall uploaded the review believing its statements to be false, so she has the requisite malice to invalidate this defense.

### **Dylan v. EZ**

#### Section 230 Preempted Claims

As a provider of an interactive computer service, EZ can defend against claims for third party content, such as Kendall’s review, via Section 230. A defamation claim against EZ, treating EZ as the publisher/speaker based on “information provided by another information content provider,” would generally be barred by §230(c)(1). The defamatory statements were made by Kendall, so §230 presumptively applies.

*Federal Criminal Prosecution:* §230 does not protect EZ against federal criminal prosecution. Federal criminal law prohibits the dissemination of defeat devices, but Dylan himself cannot initiate a prosecution.

*IP Law:* Dylan’s federal copyright claim will be excluded from §230. State-law IP claims aren’t excluded in the Ninth circuit, but this won’t apply to Dylan’s copyright claim.

*Common Law – Promissory Estoppel:* 230 won’t apply to claims related to promises EZ made to Dylan. EZ’s terms forbid defamatory content, but restrictions on user behavior are not promises that this behavior won’t occur.

*Common Law – Roomates.com*: Dylan could argue that EZ encourages illegal content because of the company's business model. EZ's model is based on downloadable software applications for user's vehicles, and the majority of app downloads are for illegal defeat devices. EZ knew this, but a defendant's scienter is irrelevant in a 230 claim. There is also no evidence that EZ contributed to the unlawfulness of the content. Nevertheless, Dylan could try to argue that the site is designed to advance an illegal objective, due to the overwhelming volume of illicit apps, which means EZ loses protection under 230 for any claims related to defeat devices.

#### Copyright: Direct Infringement

Dylan may argue that EZ directly infringed his copyright by publishing Kendall's infringing app. However, EZ did not volitionally violate one of Dylan's 106 rights. EZ deploys a copyright detection filter and knew that Kendall had committed past violations, but these measures do not equate to volition with regards to Kendall's recent upload.

#### Contributory Infringement

If Kendall directly infringed Dylan's copyright, EZ could be liable for contributory infringement, but it is unlikely. It's unclear whether EZ knew about the infringing activity at first. The presence of a copyright detection filter is generally not sufficient to prove a defendant knew of infringing activity. It's true that the filter had prevented Kendall from uploading infringing content in the past, but she avoided detection this time by changing the name of the app.

However, Dylan's email to the General Counsel was likely sufficient to confer knowledge of the infringing activity. EZ continued to publish Kendall's app for 15 days following the notice, which could constitute a material contribution to the infringement. If a court finds that 15 days is a reasonable time to investigate and remove infringing content, EZ may not be liable. Generally, EZ does not induce infringement on its site. On the contrary, they take measures to discourage infringing activity with the automated copyright detection filter (even if those measures aren't always effective). However, it's also likely that a 15-day turnaround is just too long, and EZ may be held liable for hosting the infringing content during that period.

#### Vicarious Infringement

To show vicarious infringement, Dylan must prove that EZ had (1) the right or ability to supervise Kendall's infringement, and (2) a direct financial interest in the infringement. EZ has the power to remove user's posts, but this may not be enough to constitute an ability to supervise specific content. Further, there's no evidence that EZ had a direct financial interest in Kendall's infringement. It's unlikely that EZ profits from users like Kendall duplicating existing apps, so a vicarious copyright infringement claim would likely fail.

#### DMCA Safe Harbor 512(c)

EZ is a service provider that stores material at a user's direction. Appendix A states that it is EZ's policy to terminate accounts of repeat copyright infringers. However, it is uncertain whether this policy is reasonably implemented because it's somewhat ineffective. Users who attempt to infringe are (usually) stopped by the filter, but merely receive an automated warning that their account may be terminated if they commit future violations. It's unclear whether this process has human oversight, or some mechanism to track how many times each user attempts to infringe – perhaps they do, in which case their policy may be reasonable. However, there is no statutory requirement for how many chances an infringer gets before they should be removed by a service provider. Kendall was removed after her fourth “strike,” which is only slightly higher than industry standard.

EZ made the appropriate 512 filings with the Copyright Office, and their TOU designates an agent to contact in the event of copyright infringement.

Before receiving Dylan's takedown notice, it's unlikely that EZ had actual knowledge of the infringement, and there are no facts to indicate circumstances that made infringement apparent. EZ did not have the ability to control specific known incidents of infringement, nor did they exert substantial influence over users. The facts also do not support a finding that EZ had a direct financial interest in the infringement.

Finally, EZ must expeditiously respond to 512(c)(3) notices. After receiving the email from Dylan, 15 days elapsed before EZ removed Kendall's app. However, Dylan's email to the General Counsel did not include all the elements of a proper 512(c)(3) takedown notice, so EZ still may be eligible for §512 protection, given they meet all the other requirements.

## EZ/Advertisers v. Car Manufacturers

### Trademarks: Direct Infringement

Generally, national car brands/manufacturers own valid trademarks, have priority over EZ's advertisers, and use their marks in commerce. In order to establish direct infringement, manufacturers would also have to prove a likelihood of consumer confusion about the product source, meaning users are likely to think the ad belongs to the manufacturer rather than a 3rd party advertiser. Tesla, for example, is a highly recognizable mark, which increases likelihood of consumer confusion. The mark's use (to market car accessories) also weighs in favor of confusion because it's likely Tesla sells accessories as well.

Another factor is initial interest confusion. In the 9th Circuit, the *Brookefield* and *Network Automation* cases hold that a defendant's use of the mark must be "reasonably calculated to capture initial consumer attention," and "demonstrate likely confusion," respectively. Under *Brookefield*, initial interest confusion occurs even if consumer confusion doesn't actually lead to a sale. However, *Network Automation* holds that mere diversion is not enough. Analytics may be able to offer insight on user clickthrough to gauge consumer engagement, which could aid Tesla in substantiating this claim.

### Contributory Infringement

Car manufacturers may also claim that EZ contributorily infringed. The direct infringer would be the 3rd party advertisers, whom EZ intentionally induced to infringe by encouraging them to bid on keywords to display in their ad copy. EZ, as the service provider, also controlled/monitored the instrumentality the 3rd party advertisers used to infringe.

### Nominative Fair Use Defense

EZ can say its advertisers are using Tesla's mark (for example) only to the extent necessary to refer to the defendant's product, and that their products wouldn't be recognizable without naming Tesla. This will be more compelling if the advertiser makes accessories for that brand of vehicle specifically. EZ/Advertiser cannot do anything to suggest sponsorship or endorsement by the trademark holder. If these elements are satisfied, this defense is likely to work.

### Trademark Dilution

Tesla (and any other national car brand) is sufficiently famous to qualify for a dilution claim. EZ advertisers used the mark in commerce, but it's unlikely that dilution actually occurred. No secondary meaning was applied to the trademark, so there was no blurring. Further, it's unlikely that the mark was used in a way that would harm Tesla's reputation by association, meaning there was no tarnishment.

### Keyword Advertising

Google (and EZ) doesn't block the sale of trademarked keywords, like the ones on EZ's service. Generally, notice-and-takedown notices will be honored if the mark is used by direct competitors or used in deceptive/confusing ways. However, Google will not send takedown notices to advertisers selling components or compatible items to trademarked products. It's unlikely that EZ's advertisers qualify as direct competitors to Tesla simply because they sell accessories that Tesla might also sell. Therefore, use of the term "Tesla" is likely permissible here because it's used to describe Tesla-compatible accessories, therefore EZ would not be required to honor any takedown notices for car manufacturers like Tesla.

### **EZ v. Kendall**

#### Breach of Contract

Kendall breached several TOU provisions, including violating federal law (posting defeat device), overburdening EZ'S system (TTC), copyright infringement, and posting defamatory content. Kendall properly assented to these terms when she made her initial account with EZ. Therefore, EZ's breach of contract claim will likely succeed.

#### Trespass to Chattels

EZ's servers are chattel. EZ has possessory interest in their servers, which users are generally permitted to use. Kendall used EZ's chattel when she uploaded the infringing app. While she undoubtedly violated EZ's TOU in attempting to upload the app, courts have not decided whether term violations equate to unauthorized access for the sake of a TTC claim. Kendall's access had been revoked and IP address blocked, which weighs in favor of unauthorized use.



Kendall likely caused legally cognizable harm when she caused the outage, subject to the requirements of each doctrine.

### Common Law

Kendall intentionally used EZ's chattel, which resulted in an outage lasting 3 hours, a measurable loss. Under the *Register.com* majority rule, a court may deny recovery to EZ because they didn't give Kendall explicit notice that using emojis in an app's title would impair the system, nor is there evidence that Kendall constructively knew or wanted this to occur.

EZ needs to show that Kendall's use of their chattel caused legally cognizable harm, meaning the chattel was in impaired condition or not in use for a substantial time period. No EZ subscribers were able to upload new apps for the duration of the outage, which may be considered substantial. However, if *Hamidi* applies, only harm to the chattel itself will be recognized. EZ's engineering team exercised self-help by uploading a corrected version of the filter, which could bolster EZ's claim.

### CFAA

Kendall transmitted a program/code/command when she uploaded the app, but she did not do so knowingly within the meaning of the 1030(a)(5)(A). The facts do not support a finding that it was Kendall's intention to impair EZ's servers.

1030(a)(5)(C) requires intentional access without authorization leading to system loss. EZ's TOU, which Kendall contracted to, prohibit subscribers from using EZ's server to engage in copyright infringement, which she did knowingly. Therefore, it is possible that her upload constitutes "access without authorization." Kendall's access to EZ had also previously been revoked, which could be enough to find she acted without authorization (see *Power Ventures v. Facebook*).

Kendall's upload impaired the availability of the program – but the CFAA requires a loss of \$5,000 a year. It's uncertain whether the 3-hour outage translates to a quantifiable loss that meets this monetary threshold, but the CFAA might count intrusion remediation costs related to account termination and IP address blocking as part of the overall cost.

Cal Penal Code 502

Kendall accessed the computer system/network knowingly and [possibly] without permission for reasons stated above. Her access resulted in sufficient damage or loss, as the system was inoperable for 3 hours. Therefore, a 502 claim against her will likely be successful.