



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

This exam has 1 question. The file containing your answer may not contain a total of more than 3,000 words, including your word count, AGID, and any footnotes (but no footnotes please). Please use a GenXer-friendly font size.

This is an “open book” exam. You may consult any materials you choose, but during the exam period, you may not communicate about the exam or your answer with anyone (orally, electronically, or otherwise), other than law school staff or ExamSoft regarding exam administration. You don’t need to do outside research, and such research is unlikely to help your grade. However, if you aren’t sure exactly what a statute says, don’t rely on summaries from class—read the statute!

I will email you the exam question on December 4, 2024 by 10 am Pacific. You must upload your answer to your ExamSoft profile at <https://ei.examsoft.com/GKWeb/login/sculaw> no later than December 19, 2024, 1 pm Pacific. ExamSoft’s timestamp is irrefutable evidence of your upload time. **IF YOUR ANSWER IS UPLOADED AFTER THE DEADLINE, EVEN BY ONE MINUTE, YOU WILL FAIL THE COURSE. THERE IS NO EXTRA GRACE PERIOD. NO EXCUSES!** Don’t wait until the last minute to upload your answer, and confirm you successfully uploaded your answer (the Assessment Office has provided instructions on how to do so). According to the Assessment Office, you may upload your answer to ExamSoft only once.

Submit your answer as a Microsoft Word or PDF file in accordance with the Assessment Office’s instructions. Name the file “Your6-DigitAGID_InternetLaw_Goldman_Fall2024.” In the file itself, include page numbers and your AGID in the document footer, but don’t include any other identifying information. At the top of your answer, tell me how many words the answer contains. **I DON’T PLAN TO GRADE AN ANSWER THAT EXCEEDS THE WORD LIMIT BY EVEN ONE WORD. OMITTING OR MISSTATING YOUR WORD COUNT MAY INCUR SIGNIFICANT PENALTIES.**

If you have a technology emergency, call Law Technology at (408) 554-5762. If you cannot reach Law Technology, call ExamSoft at (866) 429-8889 to timestamp the issue. Otherwise, contact the Office of Assessment at (408) 554-5494 or lawexams@scu.edu. Do not contact me directly.

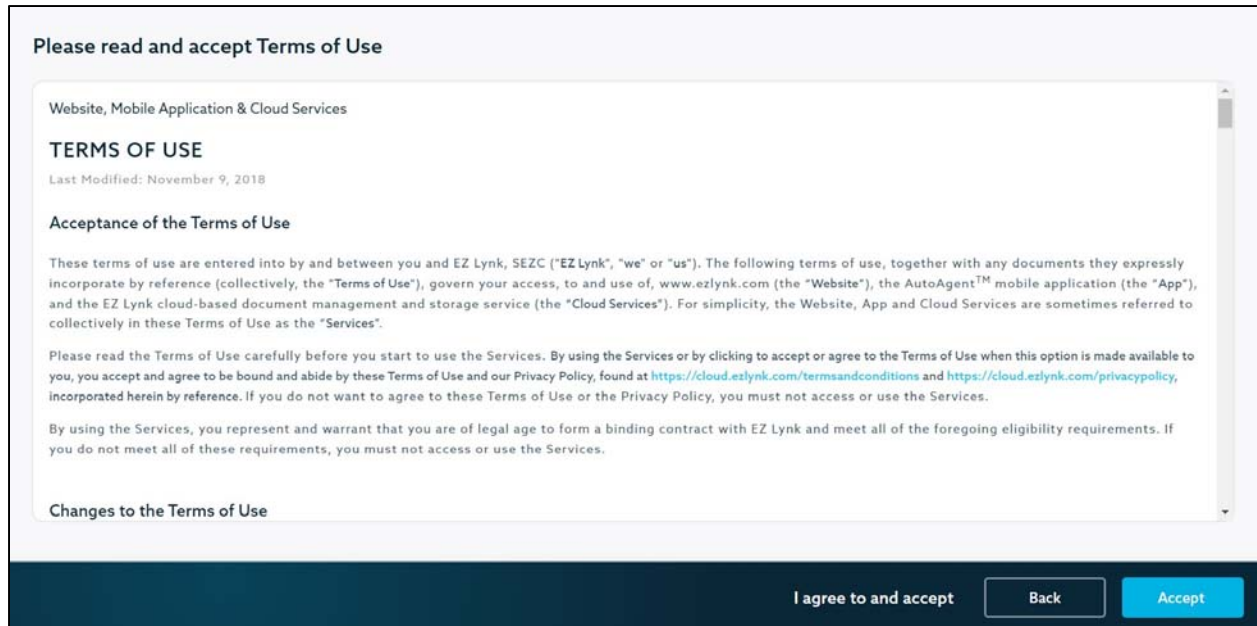
Some additional thoughts for you:

- Unless otherwise specified, all parties are, and all actions take place, in California. Don’t discuss any statutes of limitation. Unless otherwise specified, all parties are adults.
- Only analyze legal doctrines we discussed in class this semester (along with the associated statutes and casebook materials). I change my topical coverage every year, so doctrines discussed on old sample answers may not be in-scope for this exam.

- Read the facts and questions very carefully, and pay close attention to the parties' identities and the specific claims you are analyzing. Answer the questions I actually ask. Don't answer questions I didn't ask.
- Allocate your word count wisely. You score most points from issue-spotting and applying the law to the facts. Organize and prioritize your answer accordingly. It's OK to use bullet points, short citation forms, and unambiguous abbreviations. Please quote statutes or cases only as needed to make your point. You may use IRAC/CREAC or any other method that effectively and efficiently communicates your points.
- If additional information would help your analysis, explain what information you'd like and why it would help.
- While generally your answer should be based on legal principles, you are welcome to address other perspectives and concerns.

(As usual, this exam contains a mix of real and made-up facts).

Many functions in a car are now run by software, and car owners can customize their vehicles by adding to, modifying, or deleting that software. EZ Lynk (“EZ”) caters to professional mechanics and hobbyists who wish to make changes to a car’s software. Consumers can prepay an annual subscription fee to EZ to access EZ’s website, where they can download apps to install in their cars. To access the apps, subscribers must navigate an EZ account creation process that includes the following screen (the “accept” button becomes clickable only after the user reaches the end of the TOU):



Appendix A contains excerpts from EZ’s TOU.

Subscribers can download apps from the EZ website at no additional charge. EZ uses a portion of the subscription fees to pay some money to uploaders of the top 100 most downloaded apps.

Apps available on the EZ website can perform functions like (i) adjust tire pressure monitoring thresholds to match installed tire ratings; (ii) correct the speedometer to match resized tires; and (iii) adjust fuel tank capacity after the tank size changes.

However, the most frequently downloaded apps on EZ’s website are “defeat devices,” which are software apps that help cars cheat during smog checks.

By law, car manufacturers install hardware and software to reduce the car’s pollution output. Some car owners disable these pollution control mechanisms to improve gas mileage or engine performance. Many states, including California, require gasoline-powered cars to get periodic “smog checks” to confirm they are producing pollution within state-mandated limits. Cars that fail a smog check cannot renew their state-required registrations to operate on the roads until the cars undergo costly repairs.

If a car owner has modified their vehicle's pollution control mechanisms, the car can nevertheless improperly pass the smog check if the owner installs a defeat device that fools the smog test about the amount of pollution that the car is producing.

Federal criminal and civil law prohibits the dissemination or installation of defeat devices, with limited exceptions (none of which apply to this exam). EZ knows that over half of the app downloads from its website are defeat devices.

Dylan and Kendall are current EZ subscribers. They both initially created their accounts before December 1, 2023. Dylan uploaded a defeat device app to the EZ website and obtained a copyright registration for the app before uploading it. (Note: copyright ownership is usually available even when other laws may restrict the work's production or distribution). Kendall downloaded Dylan's defeat device app, changed the app's name, and reuploaded it to the EZ website as if it was Kendall's app. Kendall hoped that, with the new name, the app would garner enough downloads to qualify for EZ's compensation program (it didn't reach that threshold). Neither app's name qualified for trademark protection.

EZ deploys a copyright detection filter that automatically checks every new uploaded app and rejects any new uploads that are identical to prior uploads. Three times previously, Kendall downloaded other developers' apps from the EZ website and reuploaded the apps back to the EZ website. Each time, the filter rejected Kendall's uploads as identical to already-uploaded apps. With each rejection, EZ's system automatically sent Kendall a warning that infringing app uploads constituted a misuse of EZ's service and Kendall's account may be terminated for future violations. Because the filter blocked Kendall's previous uploads from reaching other subscribers, EZ never received any 512(c)(3) notices about Kendall's uploads. EZ has made the appropriate 512 filings with the Copyright Office. The filter failed to detect Kendall's upload of Dylan's app because it wasn't identical (the app's name was different).

EZ allows subscribers to post reviews about each downloadable app. To discourage downloads of Dylan's app with the hope that other subscribers will instead choose to download Kendall's reuploaded version, Kendall posted the following review about Dylan's app: "I installed this app but my car failed its smog check and I spent \$3,000 repairing the car to get my registration!" Dylan's app actually fails to defeat the smog check in about 5% of the circumstances, but Kendall didn't know this. Kendall never installed Dylan's app at all.

Soon after Dylan learned about Kendall's activities on the EZ website, Dylan emailed EZ's General Counsel complaining about Kendall's app upload and review of Dylan's app. The email didn't satisfy the requirements of 512(c)(3). The General Counsel took three actions in response to Dylan's message.

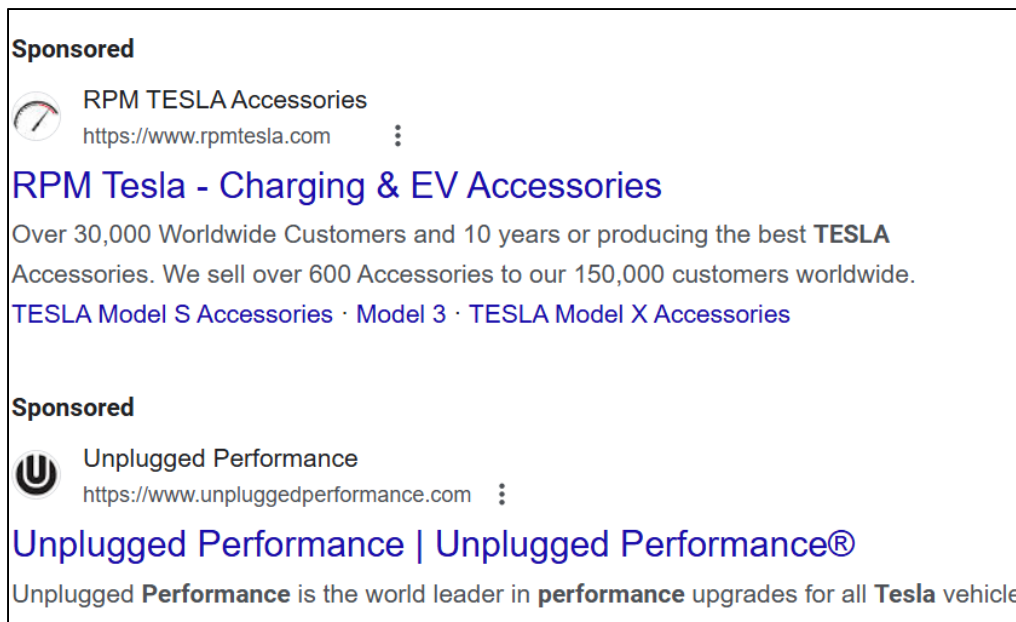
First, the General Counsel sent an email to Kendall instructing Kendall to stop using EZ's service until further notice. Kendall disregarded this instruction.

Second, the General Counsel forwarded Dylan's message to EZ's content moderation team. 15 days later, the team removed Kendall's upload of Dylan's renamed app.

Third, the General Counsel sent Dylan’s message to EZ’s fraud team to investigate Kendall’s activities, which took about 5 hours of the team’s time over a 3 week period. At the conclusion of its investigation, the fraud team (1) suspended Kendall’s account, which also removed Kendall’s review of Dylan’s app, and (2) blocked the IP address that Kendall had last used to log in (which an IAP had dynamically assigned to Kendall).

After the account suspension, Kendall registered a new EZ account (using a different IP address dynamically assigned by their IAP) and tried again to download someone else’s app, rename it, and reupload it. This time, Kendall included emojis in the uploaded app’s title, which EZ’s filter software couldn’t handle. As a result, the filter failed to operate site-wide for 3 hours until EZ’s software engineering team uploaded a corrected version of the filter. During the filter outage, no EZ subscribers could upload new apps.

EZ lets advertisers bid on keywords to display their advertising to EZ subscribers. These advertisers often purchase a car manufacturer’s trademark as the triggering keyword; and their ad copy describes the advertisers’ offerings by referring to the specific car manufacturer. Two example ads displayed in response to the search query “Tesla aftermarket parts” (you can critique these ads in your analysis if you wish):



EZ has adopted a trademark policy regarding keyword ads that matches Google’s.

The TOU excerpts in Appendix A include procedures for TOU amendments. Initially, EZ’s TOU did not contain an arbitration clause. On December 1, 2023, EZ added a mandatory arbitration clause (governing all claims related to its service) to its TOU and posted the new TOU version to its website. In addition, EZ emailed the following notice to the email addresses of all then-current subscribers:

Subject Line: We're Making Some Changes to Our Terms of Use That Will Apply to You

Email Text: There is no action needed from you today. If you would like to learn more, you can find details about these changes, when they apply, and what you can do if you want to decline the changes on our [TOU update page](#). Thank you for being an EZ subscriber.

The blue words "TOU update page" linked to a page saying:

This page details upcoming changes to EZ Lynk's Terms of Use. These changes will become effective automatically on January 1, 2024. Please carefully review the materials below and familiarize yourself with the upcoming changes. By continuing to use our services after the changes take effect, you agree to be bound by those changes. Otherwise, no further action is needed from you to accept such changes. If you would prefer to decline the changes, you will need to close your EZ account before the effective date.

The update page then displayed a "redline" showing the differences between the prior and new TOU versions, including the newly added arbitration provisions.

* * *

Analyze the following topics:

- Whether EZ can compel Kendall and Dylan to arbitrate any matters related to the EZ service.
- Dylan's potential claims against Kendall and EZ.
- EZ's risks if a car manufacturer claims that advertisers' keyword ads on EZ violate the manufacturer's IP rights.
- EZ's potential claims against Kendall.

Note: these bullets are not equally weighted in terms of available points.

Do not discuss: personal jurisdiction; 17 U.S.C. §§ 1201 or 1202; Restatement (Second) of Contracts § 69; web browsing as infringement; publicity rights; COPPA; GDPR; CCPA/CPRA; anti-spam laws; ECPA/state law equivalents; false designation of origin; tortious interference; intentional or negligent infliction of emotional distress; or the equitable doctrine of unclean hands.

Appendix A

EZ Lynk's Terms of Use (Selected Provisions)

TOU Acceptance

By using the Services or by clicking to accept or agree to the TOU, you accept and agree to be bound and abide by these TOU.

TOU Changes

We may revise and update these TOU from time to time in our sole discretion. All changes are effective immediately when posted, and apply to all access to, and use of, the Services thereafter. Your continued use of the Services following the posting of the revised TOU means that you accept and agree to the changes. We encourage you to frequently review these TOU so you are aware of any changes, as they are binding on you.

Prohibited Uses

You agree not to use the Services:

- In any way that violates any applicable law or regulation.
- To use the Services in any manner that could disable, overburden, damage, or impair the site or interfere with any other party's use of the Services, including their ability to engage in real time activities through the Services.
- To use any manual process to copy any of the material on the Services or for any other unauthorized purpose without our prior written consent.
- To engage in any copyright infringement or other intellectual property infringement.
- To upload any apps or content that contains any material that is defamatory, obscene, indecent, abusive, offensive, harassing, violent, hateful, inflammatory or otherwise objectionable.

Termination

We have the right to terminate or suspend your access to all or part of the Services for any or no reason, including without limitation, any violation of these TOU.

Copyright Infringement

If you believe that any content violates your copyright, please contact us at [the TOU then designates EZ Lynk's agent for receiving notice and provides appropriate contact information]. It is our policy to terminate the user accounts of repeat infringers.