

Hack Friday Model Answer

Pets Buy should use a DMCA § 512(c)(3) notice-and-takedown letter to convince Carlotta to remove the comic from the Petsbuyprices.com (“PBP”) website. It should also immediately remove the comic from its own website and create an internal policy against posting such material before its official release. (Pets Buy could consider switching to a clickwrap license instead, which would be binding. *See Caspi*. But that would make the website so unusable that it’s a bad idea.) Although Pets Buy may have viable copyright and CFAA claims against Elmer and viable trademark claims against PBP, these causes of action are less likely to produce the desired result—getting the comic offline—in the immediate future. The DMCA notice is the most useful immediate action.

Elmer’s Access

Contract: The T&Cs on PetsBuy.com are probably unenforceable. In *Specht*, the court held that because the plaintiffs did not assent to the license agreement, which appeared only through a link at the bottom of the page and was not immediately visible, they were not subject to its arbitration clause. We could try to distinguish an arbitration clause (*Specht*) from a copying restriction (as in *ProCD*), but since *Specht* and *ProCD* require notice that the users can’t avoid (i.e. “clickwrap,” not “browsewrap”), even the PetsBuy.com T&Cs, a link to which appears on every page, are probably insufficient. Elmer would have had no reason to click on the link on any of the pages.

CFAA: Elmer “accessed” the PetsBuy.com server when he downloaded the comic. Guessing URLs might be like password guessing and thus “unauthorized.” The Petsbuy.com web server is intended to let people download documents, so he passes the *Morris* intended-function test. Since one doesn’t need an account to download from the web server, he also

passes the Morris no-account test. He might fail the Shurgard purpose test, though, since he violated the T&C against personal shopping use only. But just as the browsewrap T&Cs weren't binding as a contract, Elmer may not have known that his access was unauthorized. After Shurgard, there's probably "damage" from any sales lost to Circus City, because Elmer impaired the "integrity" of the comic when he looked at it before it was intended to be seen. We might have some difficulty proving the amount of those damages, but we have a good argument that our lost profits from diverted sales were caused by Elmer if we can prove unauthorized access. In conclusion, a CFAA claim is possible, but uncertain.

We also probably can't make a trespass to chattels claim against Elmer, since Intel v. Hamidi requires impairment to the chattel (the server). The only damage here is a result of the information leaking out, not damage to the server. Also Elmer's access (a few hits) was too small even for the eBay v. Bidder's Edge what-if-everybody-did-it test. Cyber Promotions might find the damage based on harm to our business, but that holding may not survive Hamidi, and there is also the same problem as above: Elmer may not have had notice of the T&Cs.

There's no DMCA § 1201 claim, because the naming scheme for the advertising flyers doesn't "effectively" prevent users from accessing or copying the comic.

Copyright

The comic book is copyrighted. Elmer uploaded it without permission, so he is a direct infringer. The PBP server is providing copies to anyone who asks for one. That's either direct infringement, or direct infringement by the users. If the users are direct infringers, Carlotta is not a vicarious infringer (since PBP is completely noncommercial) but is providing material assistance in infringement (i.e. the infringing copies), and so is a contributory infringer if she has knowledge. There are no facts that she has actual knowledge, or to indicate that she should know

her site would be used to infringe (most of it contains noninfringing prices and links to PetsBuy.com).

Perhaps they could raise a time-shifting or space-shifting fair-use defense, but no one was supposed to see the comics yet, so they're not like the time-shifting VCR viewers in Sony who were authorized to watch the broadcasts the first time. On the other hand, the comics weren't produced to be sold, so there's no harm to the market for the work, and most people who read the comics even online will still see the ads. On the whole, we have a good case that there isn't fair use, but it's not certain. The other bloggers who link to the comic might be contributory infringers, except that it will be hard to prove knowledge of the infringement (since they don't know that Pets Buy objects to the posting), it may be hard to identify them, and suing them won't do much good quickly in getting the comic taken down.

We can't sue Carlotta for copyright infringement if she complies with the procedures of Section 512 of the Copyright Act. The statute defines "service provider" for all relevant purposes as "a provider of online services or network access". 17 U.S.C. §512(k)(1)(B). Here PBP, a fansite run by a college student where lovers of Pets Buy meet to discuss it, seems to qualify as a service provider with respect to the *storage* of the infringing material. I don't see any facts that would absolutely disqualify Carlotta from the 512(c) safe harbor. (In particular, she doesn't have "red flag" knowledge of infringement or get a financial benefit from the infringement.)

But Section 512 also states that in order to keep that immunity, she must comply with notice-and-takedown procedures of § 512(c)(3). Pets Buy should immediately contact Carlotta to send her a proper notice, §512(c)(3)(A)(i)-(vi). We should emphasize that we will sue her if the takedown notice isn't complied with "expeditiously." Especially since Carlotta is a college student, she has an incentive to keep the immunity, and will be likely to comply with the notice-

and-takedown procedures for that reason. Elmer could send a counter-notice under § 512(g), but the comic wouldn't go back up for at least 10 days, so that wouldn't matter to us before

Thanksgiving.

Trademark

We might be able to proceed against PBP for trademark infringement in its domain name. Because it's just a fan site, however, we may have a difficult time providing commercial use. Under Bucci, a court might find commercial use because it diverts users from reaching Pets Buy's site. On the other hand, it's unlikely that anyone types in petsbuyprices.com when they're looking for Pets Buy's site. Even if there's commercial use, the court would still need to apply the eight-factor test for consumer confusion. This case is like Bally in that the eight factors don't fit well where the point of the site isn't to sell goods. For that reason, I think it's unlikely that we'll succeed. We could also try an ACPA action or a UDRP arbitration, but we'll face the same problem there: Carlotta isn't selling anything. Her lack of profit and her avowed fandom will make it hard to find "bad faith" in the registration. In any event, any action to force her to desist from using the PBP domain name is likely to be too slow to get the comic down immediately. A DMCA notice is a better bet.