

ELECTRONIC COMMERCE: VERSION 2.0

LAW 619 | PROFESSOR WAGNER | FALL 2001

GRADING RESULTS & EXPLANATION JANUARY 2001

In an effort to provide some transparency into what can be a rather opaque process, I've provided some details about the grading results for the class.

As always, students with questions or concerns are welcome to see me for more information.

I ESSAY EXAM

Question 1: Liberator Software

This was a relatively traditional “issue-spotting” question, designed to both test your ability to apply the material we learned in class to new factual situations, as well as prompt perhaps creative approaches to eCommerce legal problems.

I've attached an example answer written by a student (or students) in the class, so I will simply give an overview of what I was looking for.

The difficulty in this question arose from the fact that the options for stopping Liberator were, as a legal matter, relatively few. I would have organized the discussion into three sections: (a) non-privacy issues, (b) privacy-related issues, and (c) business or technology solutions. Some notes follow.

Non-Privacy Legal Issues

Copyright.

By far the strongest claim against *Liberator* is copyright infringement. The essence of the claim is that obscuring (or replacing) the banner advertisements is an infringement of the underlying web site. Importantly, however, the claim would have to be based on indirect infringement - since the actual “alteration” of the web site occurs only on the screens of *Liberator* users. Thus, the

“infringers” are the users; Liberation Technologies would be liable only under indirect theories of copyright infringement.

We studied the two indirect theories of copyright infringement in class - contributory and vicarious infringement. Here it seems like either theory would fit well: Liberation Technologies tracks what users are doing; the software is specifically designed to obscure/replace portions of the web pages; and Liberation Technologies clearly reaps a financial benefit from the infringement (at least in the way that this prong of the test was described in Napster). It is somewhat unclear how much actual “control” Liberation Technologies retains over what their users are doing, but given the specific and exclusive purpose of the software, one suspect most courts would find the requisite amount of control. (Note also that there does not appear to be a “substantial noninfringing use” of the software, since it specifically searches out advertisements.)

Trademark.

A claim of trademark infringement and/or dilution is also a possibility. Placing advertisements over portions of a web site might confuse the viewer as to the relationship between the advertisements and the underlying site. Further, to the extent that such acts might tarnish or blur the underlying web site’s trademarks’ (assuming these are famous) then dilution is a possibility as well.

The primary problem with the trademark line of argument is that the user (who downloaded and installed *Liberator*) knows full well that the ads are unrelated to the underlying web site, thus posing an obstacle to finding confusion, as well as the dilution argument.

Several answers suggested that *Liberator* caused initial interest confusion. I don’t think this is correct; if anything, *Liberator* would directly confuse the viewer, not lead them to stop searching, as the initial interest confusion theory suggests.

Unfair Competition / Antitrust

We discussed unfair competition in class briefly. It is possible that the advertisers and/or the web sites could bring some form of unfair competition claim against Liberation Technologies. However, these arguments are parasitic on the identification of a “bad act,” which leads again to consideration of Copyright or Trademark. Simply harming the existing online ad providers is not unfair competition or an antitrust problem. The question also did not suggest that Liberation Technologies had or was seeking to “corner the market” on web advertising, or that competing software could not be made available.

Several answers noted that the rumored agreement with computer manufactures was potentially an antitrust violation. Again, however, simply making the agreement is not illegal - you would have to find more troubling activities (such as an exclusive deal, or an agreement not to compete) to work an antitrust violation.

Trespass.

Although the fact pattern of the question might initially suggest it, a trespass theory is unavailable here, as the *Liberator* software does not access the servers of the web sites, which is the core of the trespass cause of action.

Jurisdiction.

The question was not intended to focus extensively on jurisdiction, but some points were awarded for a strong discussion. The “privacy policy,” of course, has a forum selection clause in Paragraph 15 - but the policy would only be binding upon *Liberator’s* users, not your clients. Clearly jurisdiction would be found in Virginia, and (under *Zippo*) would likely also be found in almost any other forum, since the Liberation Technologies web site appears to be quite interactive.

Privacy Issues.

The question noted that your clients included privacy advocates, which should have tipped you off to discuss the privacy implications of *Liberator* activities. There are at least two issues here.

The Binding Nature of the Opt-In Provision.

The Privacy Policy states that it requires opt-in for “any use” of data. Yet the policy also states that the act of downloading and/or using the software will constitute the opt-in authorization. The question is whether that opt-in is binding. This is a contract issue, and the Policy specifies that the contract law of Virginia (which, as we discussed, is UCITA) will apply.

Under UCITA, there seems to be little doubt that the contract would be enforceable. The user clearly has the opportunity to read the relevant terms prior to the downloading, and the act of clicking an “accept/download” button would seem to be an action that might “reasonably” be taken to manifest assent. Good answers would at least discuss the potential impact of *Specht v Netscape*

on these sorts of contracts, however, and note that *Specht* considered non-UCITA contract law, as well as a button that stated only “Download.”

Given the facts here, most courts would probably find the opt-in provision binding, but good answers could come out either way.

Note that if the opt-in provision is not binding (i.e., not effective as securing assent), then Liberation Technologies has got some serious problems relating to unfair competition: as we discussed in class, the FTC takes a very dim view of companies that fail to follow their privacy policies, and the argument could be made here that Liberation Technologies was failing to follow its policy (if the opt-in was ineffective). This was the important aspect of the contract - many answers simply evaluated the nature of the contract without discussing what the implications of the contract actually were.

TRUSTe Enforcement issues.

Liberation Technologies is a member of the TRUSTe program. As such, it is subject to the guidelines and enforcement of TRUSTe. While it does not appear that the Liberation Technologies web site fails to comply with any of the TRUSTe guidelines, an argument might be made that the posted Privacy Policy comes close enough to “trickery” so as to fail to provide the user with adequate notice of the implications of its actions. However, given that the relevant “opt-in” language appears in the actual Policy (as well as the fact that paragraph 2 flags the existence of more opt-in information), it seems unlikely that TRUSTe would find that this violates any other their guidelines.

Note that if the opt-in procedure was deemed to be ineffective, then Liberation Technologies would be failing to follow its privacy policy, and thus in violation of the TRUSTe guidelines.

Unfair Competition.

As we noted in class, the typical mechanism to date regarding the enforcement of privacy violations is claims based on unfair competition, often enforced by the Federal Trade Commission. Here, there seem to be only weak grounds for such an action; the best bet is the “lack of notice” argument outlined above. And again, note that if the opt-in is ineffective, then there is a clear unfair competition claim here.

Some answers suggested that COPPA could be used to attack Liberation Technologies. COPPA applies only to web sites, not to software.

Business and Technological Solutions

The question specifically asked for potential business- or technology-related solutions to the problems faced by your clients. This was an invitation to be creative and think beyond the bare legal frameworks (as we often discussed during class). There were many excellent suggestions; the best answers both suggested options and analyzed their strength.

Below is the grading outline I used:

GRADING GUIDE

["points" indicates the total available for an outstanding discussion on each topic or issue]

<i>Topic / Issue</i>	<i>points</i>
non-privacy legal issues	
copyright infringement	15
trademark infringement / dilution	10
unfair competition /antitrust	5
trespass	5
jurisdiction	5
privacy issues	
opt-in contract	15
TRUSTe policy	8
unfair competition	7
technological or business solutions	10
<i>Total</i>	<hr/> 75

Statistics.

Of the 75 points available on Question 1, the average was a 37, or 49%. The scores ranged from 67 to 15, and the standard deviation was 13.4.

Question 2: The Future of Ideas.

This question, based on the preface to Lawrence Lessig's new book, *The Future of Ideas*, was quite open-ended and policy-oriented. As such, it is difficult to give much guidance, other than to note that the best answers (one of which is attached after this document) were well-organized, had a unifying theme or argument, and directly responded to the passage. I was generally not looking for an overview of the entire course.

Statistics.

Of the 25 points available on Question 2, the average was a 16, or 64%. The scores ranged from 24 to 7, and the standard deviation was 4.0.

ESSAY EXAM STATISTICS

The overall average on the essay exam (out of 100) was 53, with a range from 85 to 23. The standard deviation was 15.4.

**II
MULTIPLE CHOICE EXAM**

While I'm not releasing the questions or answers for the multiple choice exam, students are welcome to drop by my office to inquire about particular questions.

Statistics.

The average on the multiple choice exam (out of 100) was 56, with a range from 80 to 28. The standard deviation was 11.3.

III CLASS PARTICIPATION

As advertised, class participation constituted 15% of the final grade. Grades were assigned on a 1 to 5 scale, using notes I'd taken during the term, as well as the participation on the course discussion board. Most students received a 3; note that the only students who received a 5 were active and informed participants *both* in class and on the discussion board.

Statistics.

Of the 5 points available for class participation, the average was 2.9, or 58%. The range was from 1 to 5, and the standard deviation was 1.3.

IV COMMENTARY POSTS (CPs)

CPs were worth 15% of the final grade. Like class participation, each CP was scored on a 1 to 5 scale. Each student was assigned two CPs; the scores were added together. Relatively few CPs were scored a 5.

Statistics.

Of the 10 points available for CPs, the average was 6.9, or 69%. The scores ranged from 11 to 1 (with the 11 occurring because of the "bonus" point awarded for Class Exercise 3). The standard deviation was 1.8

V OVERALL RESULTS

Total scores are a weighted sum of all four graded components ($t = .35\text{essay} + .35\text{multiple} + .15\text{participation} + .15\text{cp}$). Note that the total score calculation was not done by me, so as to preserve the anonymity of the final scores (and exams).

The total scores were distributed along a normal curve. A distributed percentile score (and ranking) was calculated, and letter grades were assigned by seeking natural "break points" in the dataset corresponding closely with the official Law School distribution of letter grades. The results contained a few fewer As than I wanted - and correspondingly more B+s - but the break points were placed where the data suggested.

Statistics & Details.

The familiar “box score” follows. More detailed results and statistics can be found on the pages following this one, which include a spreadsheet and a graph depicting the distribution of grades.

grade	number	%
A+	3	3%
A	17	18%
B+	34	36%
B	29	31%
B-	3	3%
C	8	9%

Again, thanks for an excellent semester; I hope to see you again in one of my classes.



R. Polk Wagner
January 2001

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rank	essay exam			multiple choice	total score*	distributed %	grade
	essay 1	essay 2	essay total	score			
1	57	16	73	68	80.85	99	A+
2	52	24	76	80	80.10	98	A+
3	50	24	74	64	79.80	98	A+
4	57	16	73	68	74.85	95	A
5	50	17	67	72	72.65	92	A
6	67	18	85	44	72.15	92	A
7	50	17	67	56	71.55	91	A
8	49	17	66	60	71.10	90	A
9	67	18	85	56	70.35	89	A
9	67	18	85	56	70.35	89	A
11	57	16	73	72	70.25	88	A
12	39	23	62	64	69.60	87	A
13	46	20	66	56	68.20	84	A
14	49	13	62	76	67.80	83	A
15	41	24	65	68	67.55	83	A
16	56	20	76	48	67.40	83	A
17	42	14	56	72	67.30	82	A
18	37	22	59	68	66.95	81	A
19	40	13	53	64	66.45	80	A
20	39	14	53	72	66.25	80	A
21	37	18	55	60	65.75	78	B+
22	38	24	62	52	65.40	77	B+
23	35	11	46	72	65.30	77	B+
24	49	13	62	64	65.10	77	B+
24	43	15	58	68	65.10	77	B+
26	50	14	64	68	64.20	74	B+
27	49	17	66	60	63.60	72	B+
28	34	20	54	76	63.50	72	B+
29	29	19	48	72	63.00	70	B+
30	50	17	67	52	62.65	69	B+
31	34	15	49	56	62.25	68	B+
32	46	20	66	56	62.20	68	B+
32	46	20	66	56	62.20	68	B+
34	39	14	53	60	62.05	67	B+
35	49	17	66	64	62.00	67	B+
36	25	23	48	68	61.60	66	B+
37	58	19	77	60	61.45	65	B+
38	39	14	53	52	60.75	63	B+
38	30	7	37	68	60.75	63	B+
40	41	24	65	64	60.15	61	B+
41	37	18	55	68	59.55	59	B+
42	35	14	49	60	59.15	57	B+
43	43	15	58	76	58.90	56	B+
44	39	17	56	64	58.50	55	B+
45	38	15	53	44	57.95	53	B+
46	42	12	54	68	57.70	52	B+
46	52	18	70	52	57.70	52	B+
48	25	23	48	52	57.50	51	B+
49	58	19	77	56	57.05	49	B+
50	26	17	43	64	56.95	49	B+
51	34	13	47	76	56.55	48	B+
52	35	14	49	52	56.35	47	B+
53	52	18	70	56	56.10	46	B+
54	30	14	44	56	56.00	46	B+
55	22	15	37	52	55.15	43	B
55	47	12	59	60	55.15	43	B
55	30	7	37	52	55.15	43	B
58	35	15	50	60	55.00	42	B

* total score is calculated by the formula $t = .35\text{essay} + .35\text{mc} + .15\text{cp} + .15\text{participation}$

59	40	13	53	44	54.95	42	B
60	38	15	53	52	54.75	41	B
61	29	19	48	60	54.30	39	B
62	47	12	59	40	54.15	39	B
63	30	7	37	52	53.65	37	B
64	19	13	32	56	53.30	36	B
65	58	19	77	36	53.05	35	B
66	15	15	30	60	52.50	33	B
67	47	12	59	48	52.45	33	B
68	34	13	47	68	52.25	32	B
69	40	13	53	40	52.05	32	B
70	43	15	58	56	51.90	31	B
71	30	14	44	48	50.20	26	B
72	37	18	55	36	49.85	25	B
73	19	15	34	56	49.50	24	B
74	19	15	34	48	48.20	20	B
75	34	13	47	52	48.15	20	B
76	42	12	54	40	47.90	20	B
77	17	11	28	52	47.50	19	B
78	34	15	49	56	47.25	18	B
79	25	23	48	44	47.20	18	B
80	15	11	26	52	46.80	17	B
80	25	13	38	40	46.80	17	B
82	25	13	38	44	46.70	17	B
83	42	12	54	44	46.30	16	B
84	15	11	26	44	45.50	14	B-
85	15	15	30	40	41.00	7	B-
86	15	15	30	48	40.80	7	B-
87	17	11	28	48	38.60	4	C
88	15	8	23	36	37.15	3	C
89	21	15	36	40	37.10	3	C
89	19	13	32	44	37.10	3	C
91	38	15	53	28	35.85	2	C
92	15	8	23	44	35.45	2	C
93	19	15	34	52	34.60	2	C
94	15	8	23	32	25.25	0	C
	=====	=====	=====	=====	=====		
mean	37.46	15.60	53.05	56.17	57.20		
stdv	13.40	4.04	15.38	11.34	10.89		
high	67	24	85	80	80.85		
lo	15	7	23	28	25.25		

* total score is calculated by the formula $t = .35\text{essay} + .35\text{mc} + .15\text{cp} + .15\text{participation}$

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Total Score Distribution

