

**CML 3358
DCL 7301
REGULATION OF INTERNET COMMERCE**

FINAL EXAMINATION

Fall 2003

Professor Michael Geist

INSTRUCTIONS:

DURATION: 48 HOUR TAKE-HOME

PICKING UP THE EXAM

The exam is available in either traditional paper format or in electronic format. Those students who wish to use the paper format can pick up the exam from the Secretariat on December 9th. It must be returned within 48 hours.

The exam is also available for download from the course website (<http://www.michaelgeist.ca/cml3358>) starting at 9:30 am ET.

RETURNING THE EXAM

The paper exam must be returned to Secretariat within 48 hours of pickup, as per the standard rules for take-home exams.

The electronic exam must be returned electronically by 9:30 am ET on December 11th. In order to ensure confidentiality, please comply with the following steps:

1. Visit <http://mail.yahoo.com>
2. Logon with:

ID - `geistexamsubmission`
password - `ottawa`

3. Send an email to mgeist@pobox.com attaching the exam

4. Include only your student number in the email. Do not include your name or other identification

I will send an email to the class list confirming receipt of the exam, listing the student numbers from whom I have received an exam. Please note that there are occasionally delays with email transmission. If you are sending the exam via email, I would advise leaving some time for transmission.

VALUE of exam is 100% of final grade. The value of each question is indicated on the exam. The exam totals 100 marks for LL.B. students. The exam totals 110 marks for LL.M. students.

There is no page or word limit for your answers.

Students are not allowed to discuss the exam or their answers with anyone during the 48-hour period.

Graduate students are required to answer one additional question as marked.

The exam has SEVEN (7) pages (including the instructions).

It is recommended that answers be submitted in typewritten form.

QUESTION ONE – MANDATORY QUESTION – 30 MARKS

Purelytracks is a leading online and offline music seller of both physical CDs and MP3 files. The company's head office is located in British Columbia. 95 percent of the company's revenues are generated through its very large network of physical retail outlets located throughout British Columbia.

In recent years, the company has placed increasing emphasis on its online presence at purelytracks.com. The website allows for the purchase of music files by credit card payment and subsequent download. Before payment and download, users can sample 20 seconds of any music file before buying. If the user likes the song, they need only click on an "I Want My MP3" button and the full file is downloaded and their credit card billed as appropriate.

Users can also click on a "Tunes Terms" link located at the bottom of the website. It advises that the company is located in B.C. and that any disputes shall be governed by the law of that province. The website also allows users to subscribe to a mailing list and to order catalogues and other promotional material. Given the need for a responsive web presence, the company uses a server farm in Northern California for hosting its website.

Thus far, only 19 of the thousands of users downloading music files via the website since its launch in 2001 have come from Ontario. Only 105 users on the mailing list (out of a total of 11,500 subscribers) are from Ontario. No user from Ontario has requested a catalogue or other promotional material.

- a. Steve Work is one of the users in Ontario who has downloaded music files from Purelytracks' website. Purelytracks knew that Work is from Ontario, as he declared his physical address in a registration form. Work has advised the company that he intends to sue it in Ontario court on a breach of contract claim. Work's claim is worth \$10,000 and relates to music purchased for his personal use.
- b. Purelytrack is an Ontario company, which owns the trademark for "Purelytrack". It operates a series of public recording studios that allow aspiring musicians to record their music for personal and commercial purposes. Purelytrack has informed Purleytracks that it also intends to sue it in the Ontario court system on both trademark and economic tort grounds.
- c. Britney Timberlake is a famous pop star and an Ontario resident who claims to have been defamed in the gossip column hosted on the Purelytracks website. This gossip column is called "B.C. gossip" and is an online edition of the music & cinema part of a local B.C. magazine. Timberlake plans to sue Purelytracks in Ontario for defamation.

You are a junior lawyer at a law firm representing Purelytracks. A firm partner has asked you to draft a memo sorting through the jurisdictional issues raised by

these three prospective lawsuits against the firm's client. Citing relevant caselaw and legal doctrine, please draft a memo to analyzing each respective case, advising on the likelihood that the Ontario court will assert jurisdiction over the matter, and formulating possible arguments that Purelytracks might raise in a motion to contest jurisdiction.

LL.M. STUDENTS ONLY – 10 ADDITIONAL MARKS

Please discuss how your analysis in these cases would differ, if at all, if the Purelytracks head office was located in San Francisco, California.

QUESTION TWO – MANDATORY QUESTION – 30 MARKS

Shane Crosby is an Edmonton, Alberta resident who loves two things – hockey and the Internet. On May 15, 2003, Crosby registered the domain name hockeyheritage.ca. Crosby quickly established a site with information on the two most successful Canadian hockey teams in recent times – the Edmonton Oilers and the Montreal Canadiens. Crosby’s site included profiles of former players, statistics, and an online forum for fans of both teams to talk hockey.

On May 14, 2003, the Edmonton Oilers announced that they would play the first outdoor professional hockey game in November 2003 against the Montreal Canadiens. The game was to be called the Hockey Heritage Classic. The game’s organizers, Heritage Hockey Inc. (HHI), also established a website at hockeyheritageclassic.com featuring information about the game, details on obtaining tickets, and the opportunity to purchase souvenirs.

Interest in the game exceeded all expectations so that when tickets went on sale in August 2003, there were nearly one million interested purchasers for only 50,000 tickets. Since most of the tickets went to Edmonton Oiler season ticket holders, most other fans were unable to purchase tickets and attend the game.

Crosby was one of the unlucky fans who did not manage to obtain tickets. As the excitement surrounding the game began to mount, Crosby became increasingly bitter. He began to use the open forum on his website to criticize the league, the Oilers, and HHI. The forum began to feature false rumours suggesting that the game might be cancelled or that star players were no longer planning on attending. Crosby also began to sell merchandise on his site. He designed t-shirts with a variation on the Hockey Heritage Classic logo accompanied by the word “sucks”.

Once HHI became aware of the site, it sent Crosby a letter asking him to remove postings with false information and to cease selling his merchandise. It also indicated its concern with the potential for confusion with his domain name. Crosby responded with a terse reply – “Four tickets, centre ice and the site disappears”. In the meantime, Crosby also inserted a disclaimer on his site that noted that his site “was not affiliated in any way with some hockey game that may or may not take place in November.”

Following Crosby’s response, HHI launched a domain name dispute resolution action under the CIRA Domain Name Dispute Resolution Policy (http://www.cira.ca/en/cat_dpr_policy.html) against Crosby. HHI is demanding the transfer of the hockeyheritage.ca domain name. HHI has provided evidence of trademarks in both Hockey Heritage Classic and Hockey Heritage Inc. and argued that it meets each of the policy’s criteria for transfer. Crosby argues that he should be able to keep the domain, responding with the facts above, noting the disclaimer, and suggesting that his site is devoted to hockey heritage and has nothing to do with the November game.

You have been appointed as the lead panelist on a three-person dispute resolution panel. Your fellow panelists have asked you to take a first cut at drafting the decision. Please provide your draft following the CIRA policy and rules. The draft should address each of the criteria under the CIRA policy for the contested domain name. You need only provide the discussion and findings elements of the decision – there is no need to provide the procedural history of the case.

**QUESTION THREE – PLEASE ANSWER TWO OF (A), (B), (C), AND/OR (D) –
20 MARKS PER SUB-QUESTION (40 MARKS TOTAL)**

You are the Deputy Minister of Industry Canada. With a change in leadership, a new Minister has just been named and has asked for an immediate meeting to discuss pressing technology policy issues. The Minister has asked for your views on two of the following four issues:

- (a) Solving the “crisis” over online music sharing
- (b) Addressing the appropriate Canadian position on global Internet governance
- (c) Identifying the optimal approach for intermediary liability
- (d) Using legislation to eliminate spam

Please provide the Minister with a memo addressing two of the four issues noted above. Your memo should include a brief overview of the current Canadian legal framework, references to alternative approaches, and an assessment of how, if at all, Canadian policy should change on your selected issues.