

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

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U.S. DISTRICT COURT
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TEXAS-EASTERN

Federal Trade Commission,

Plaintiff,

v.

Think All Publishing, L.L.C. and

Yuri Minskovsky,

Defendants.

BY _____

Civil Action No. 4:07CV11

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC" or "the Commission"), for its Complaint alleges:

1. Plaintiff, Federal Trade Commission, brings this action under Sections 5(a) and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 53(b), and the Unordered Merchandise Statute, 39 U.S.C. § 3009, to secure preliminary and permanent injunctive relief, rescission or reformation of contracts, restitution, disgorgement of ill gotten gains, and other equitable relief against defendants for engaging in deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Unordered Merchandise Statute, 39 U.S.C. § 3009, in connection with the sale and offering for sale of computer software products.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Venue is proper in the United States District Court for the Eastern District of Texas under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).

PLAINTIFF

4. Plaintiff, Federal Trade Commission, is an independent agency of the United States Government created by statute, 15 U.S.C. §§ 41-58. The Commission is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces the Unordered Merchandise Statute, 39 U.S.C. § 3009(a). The Commission is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act in order to ensure such equitable relief as is appropriate in each case, including restitution for injured consumers. 15 U.S.C. §§ 53(b) and 57(b).

DEFENDANTS

5. Defendant Think All Publishing, L.L.C. ("Think All") is a Texas limited liability company with its principal place of business listed as 5700 Granite Parkway, Suite 200, Plano, Texas 75024. Prior to August, 2005, Think All was known as Manay Software, LLC ("Manay"). Think All transacts or has transacted business in the Eastern District of Texas.

6. Defendant Yuri Mintskovsky is a member, president, and owner of Think All. At all times material to this Complaint, acting alone or in concert with others, defendant Yuri Mintskovsky formulated, directed, controlled, or participated in the acts and practices of defendant Think All, including the various acts and practices set forth in this Complaint. He resides in and transacts or has transacted business in the Eastern District of Texas.

COMMERCE

7. At all times relevant to this Complaint, defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS PRACTICES

8. Since March 2002, and continuing thereafter, defendants have promoted and marketed computer software via an Internet website. Consumers are directed to the website by banner advertisements and keyword searches, such as "free software CDs," on Yahoo! and Google.

9. Defendants' website offers consumers one free CD containing computer software if they agree to pay a nominal shipping and handling fee of \$1.99 to \$2.99. When consumers choose their free CD, the website takes them to another web page in which consumers are directed to choose three more free software CDs for no additional shipping and handling fee. Previously, the defendants' website offered the four free CDs as a single package. This earlier version of the offer also required consumers to pay only a nominal shipping and handling charge.

10. Consumers generally are not surprised to find that the computer software is free since the software is "open source" software that is available from other Internet sources without charge. Consumers believe that defendants are making the free software offer as a means of generating future business because they offer a large array of various categories of software.

11. Consumers who wish to receive the free software provide their names, addresses, and credit or debit card numbers on an online order form. Before consumers are able to complete the transaction, they must check a box on the online order form indicating that they have read the "Terms of Use" statement, which is available through a hyperlink at the bottom of the online order page.

12. Many consumers knowledgeable about computer software have checked the box without clicking on the hyperlink because, in common industry parlance, "terms of use" refers to the computer software licensing arrangements and usage rules. Other consumers have clicked on the hyperlink and have determined that the first three or four paragraphs of the document do, in fact, discuss licensing arrangements and usage rules. Still others have skimmed the document without discovering any statement regarding the free software transaction. Therefore, believing that the "Terms of Use" hyperlink contains no information relevant to the free computer software offer, consumers have completed their transaction by checking the box that indicates they have read the "Terms of Use."

13. Although the "Terms of Use" statement on defendants' website does not appear to consumers to be relevant to the free software offer, that is not the case. Buried in the eighth paragraph of this fourteen paragraph, single-spaced document is language which contradicts and essentially negates the free software offer. In nine point type, the document states that consumers

must send back two of the four "free" CDs within 10 days or they will be charged a fee of \$39.00 to \$49.00. It also states that consumers are automatically enrolled in a software continuity program in which they periodically will be sent more computer software CDs. Furthermore, the document discloses that consumers will be charged \$39.00 to \$49.00 for each shipment of CDs if they do not return them within 10 days. In contrast to these nine point type disclosures, the initial "free" offer advertisement is in much larger 14 point type.

14. The "Terms of Use" document is an unsuccessful attempt to rescind defendants' free software offer. This document fails to clearly and conspicuously disclose to consumers that: (1) they must send back two of the "free" software CDs within 10 days to avoid being charged for them, and (2) they have automatically been enrolled in a software continuity program.

15. Consumers typically receive the four free computer software CDs they ordered from defendants within seven to 10 days. The jewel box containing the CDs is labeled "FREE Software CDs Program," and on the first line of the first page of the liner notes contained in the jewel box, defendants state: "Thank you for requesting our FREE Software CDs." [Emphasis in original.] On the second page of the liner notes, there is a statement indicating that consumers must return two of the software CDs within 10 days or they will be charged an unspecified fee. Most consumers have not noticed the statement; for those who have, it is ordinarily the first indication that the CDs are not truly "free." The liner notes contain no direct reference to the continuity program in which consumers have allegedly agreed to participate. At the bottom of the page, consumers are simply directed to refer to the "Terms of Use" before they use the CDs.

16. Consumers usually first become aware that the four CDs they have received are not really free when they receive their credit card statements and discover that defendants have

charged them for two of the "free" CDs.

17. Typically, consumers do not learn about the continuity plan in which they are enrolled until they are billed for or receive another set of computer software CDs. Because defendants have failed to clearly and adequately disclose or inform consumers about defendants' continuity program, the charges to consumers' credit or debit cards are unauthorized, and the CDs should be viewed as unordered merchandise and considered a gift.

18. Because defendants did not adequately notify consumers about the charges, consumers did not consent to being charged for the CDs and could not reasonably have avoided being charged for them.

19. Consumers who contact defendants to complain and to request a refund are typically informed that they should have read the "Terms of Use" more carefully, and their refund requests usually are denied. However, sometimes consumers are given refunds if they file a complaint with the Better Business Bureau, the State Attorney General, or the FTC.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

20. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair or deceptive acts or practices in or affecting commerce.

COUNT I

21. In numerous instances, in connection with the marketing, offering for sale, or sale of computer software CDs, defendants have represented, expressly or by implication, that consumers would receive four "free" computer software CDs after they paid a nominal shipping and handling charge.

22. In truth and in fact, in numerous instances, consumers did not receive four "free" computer software CDs after they paid a nominal shipping and handling charge.

23. Therefore, the defendants' representation as set forth in Paragraph 21 is false and misleading and constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

24. In numerous instances, in connection with the marketing, offering for sale, or sale of computer software CDs, defendants have represented, expressly or by implication, that consumers who pay a nominal shipping and handling charge to receive four "free" computer software CDs incur no risks or obligations.

25. Defendants have failed to disclose or to disclose adequately to consumers:

- a. that consumers who order the four free computer software CDs are automatically enrolled in defendants' computer software continuity program; and
- b. the material terms and conditions of that program, including:
 - i. the cost of the additional shipments, including whether consumers must pay for shipping and handling; and
 - ii. how consumers may cancel to avoid further shipments and charges.

26. As a result of the representation set forth in Paragraph 24, defendants' failure to disclose or to disclose adequately the material information set forth in Paragraph 25 is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

27. In numerous instances, in connection with the marketing, offering for sale, or sale of computer software CDs, defendants have caused charges to be submitted for payment for the purportedly "free" CD shipments and for the subsequent computer software CD shipments without the express informed consent of consumers.

28. Defendants' practice of causing charges to be submitted for payment for the purportedly "free" CD shipments and for the subsequent computer software CD shipments without consumers' express informed consent causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or competition.

29. Therefore, defendants' practice as alleged in Paragraph 27 is unfair in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE UNORDERED MERCHANDISE STATUTE

30. The Unordered Merchandise Statute, 39 U.S.C. § 3009 (1970), generally prohibits shipping unordered merchandise, unless such merchandise is clearly and conspicuously marked as a free sample, or is mailed by a charitable organization soliciting contributions. The statute also prohibits billing recipients for unordered merchandise.

31. Pursuant to Section (a) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a), violations of the Unordered Merchandise Statute are unfair methods of competition and unfair trade practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

UNORDERED MERCHANDISE STATUTE VIOLATIONS**COUNT IV**

32. In numerous instances, in connection with the marketing, offering for sale, or sale of computer software CDs through defendants' computer software continuity program, defendants, who are not a charitable organization soliciting contributions, have mailed packages of computer software CDs to consumers without the prior expressed request or consent of the recipients and without identifying them as free samples, thereby violating Section (a) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a).

CONSUMER INJURY

33. Consumers throughout the United States have suffered or are likely to suffer substantial monetary loss as a result of defendants' unlawful acts and practices. In addition, defendants have been unjustly enriched as a result of their unlawful practices. Absent injunctive relief by this Court, defendants are likely to continue to injure consumers and harm the public interest.

THE COURT'S POWER TO GRANT RELIEF

34. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other ancillary relief, including consumer redress, disgorgement, and restitution, to prevent and remedy violations of any provision of law enforced by the Federal Trade Commission.

35. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by defendants' law violations.

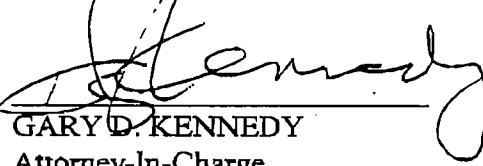
PRAYER FOR RELIEF

WHEREFORE, plaintiff, Federal Trade Commission, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's own equitable powers, requests that the Court:

1. Award plaintiff such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief, including, but not limited to, temporary and preliminary injunctions and an order freezing assets;
2. Enter a permanent injunction to prevent future violations of the FTC Act and the Unordered Merchandise Statute by defendants;
3. Award such relief as the Court finds necessary to redress injury to consumers resulting from the defendants' violations of the FTC Act and the Unordered Merchandise Statute, including, but not limited to, the rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten gains; and
4. Award plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Dated: 1/9/07

Respectfully submitted,

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