

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA – DIVISION OF TUCSON**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CYBERHEAT, INC., an Arizona corporation,

Defendant.

No. _____

**COMPLAINT FOR CIVIL
PENALTIES, PERMANENT
INJUNCTION AND OTHER
EQUITABLE RELIEF**

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC” or “Commission”), pursuant to Section 16(a)(1) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 56(a)(1), for its Complaint alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), 16(a), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b, and under Section 7(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM” or the “CAN-SPAM Act”), 15 U.S.C. § 7706(a), to secure civil penalties, a permanent injunction, and other equitable relief for Defendant’s violations of Section 5(a) and (d) of CAN-SPAM, 15 U.S.C. § 7704(a) and (d), and the FTC’s Adult Labeling Rule (the “Adult Labeling Rule” or the “Rule”), 16 C.F.R. Part 316.4.

JURISDICTION AND VENUE

2. Subject matter jurisdiction is conferred upon this Court by 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), 57b, and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355. This action arises under 15 U.S.C. § 45(a).

3. Venue in the United States District Court for the District of Arizona, Division of Tucson is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b)-(c), and 1395(a).

DEFENDANT

4. Defendant Cyberheat, Inc., is an Arizona corporation with its registered office located at 5149 E. Paseo Del Bac, Tucson, AZ 85718. Since May 19, 2004, Cyberheat, Inc. has formulated, directed, controlled, or participated in the acts or practices set forth in this Complaint. Cyberheat, Inc. resides in the District of Arizona, Division of Tucson and transacts business within the District and throughout the United States.

COMMERCE

5. At all times relevant to this Complaint, Defendant has 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.

DEFENDANT’S BUSINESS PRACTICES

6. Since May 19, 2004, and continuing to the present, Defendant has owned and operated dozens of commercial web sites that sell access to a vast collection of sexually oriented videos and pictures. Defendant promotes these sites through an affiliate program that pays “webmasters” to steer consumers to Defendant’s sites. Defendant’s affiliate program also

provides a number of other services to affiliated webmasters, including free web hosting, marketing and promotional tools, and real-time access to detailed sales statistics.

7. Many webmasters who participate in Defendant's affiliate program advertise and promote Defendant's commercial web sites through widely distributed commercial email messages. These email messages often contain sexually explicit pictures and stories that hyperlink to Defendant's web sites. The hyperlinks in the email messages allow Defendant to identify a particular webmaster as the entity deserving payment when a potential customer clicks through an email to one of Defendant's sites. Since May 19, 2004, numerous email messages that advertise and promote Defendant's commercial web sites have been mailed to computers used in interstate or foreign commerce and communication.

8. In connection with the marketing and promotion of Defendant's commercial web sites, Defendant, through its affiliate program, has induced others, by monetary payments and other consideration, to transmit commercial email messages on Defendant's behalf. In doing so, Defendant has procured the transmission of such messages and is thereby an initiator, as that term is defined under CAN-SPAM, of the email messages sent by its affiliates that promote and market Defendant's web sites. In addition, because Defendant's web sites are being advertised or promoted by such messages, Defendant is also a sender, as that term is defined under CAN-SPAM, of the email messages that its affiliates are transmitting on Defendant's behalf.

9. In connection with the marketing and promotion of Defendant's commercial web sites, Defendant's affiliates have transmitted email messages that fail to include clear and conspicuous notice of a recipient's opportunity to decline to receive further commercial email messages from Defendant at the recipient's email address. For example, in numerous instances,

the opt-out mechanism is displayed in a small font at the bottom of the email message after a depiction of people engaged in sexual intercourse.

10. In connection with the marketing and promotion of Defendant's commercial web sites, Defendant's affiliates have transmitted email messages that fail to include a valid physical postal address of Defendant.

11. In connection with the marketing and promotion of Defendant's commercial web sites, Defendant's affiliates have transmitted email messages that contain depictions of sexually explicit conduct and that fail to include the phrase "SEXUALLY-EXPLICIT: " in the subject line of the message.

12. In connection with the marketing and promotion of Defendant's commercial web sites, Defendant's affiliates have transmitted email messages that contain depictions of sexually explicit conduct and that fail to include, in the initially viewable area of the message, the phrase "SEXUALLY-EXPLICIT: ", a functioning opt-out mechanism, or a valid physical postal address of Defendant.

13. In connection with the marketing and promotion of Defendant's commercial web sites, Defendant's affiliates have transmitted email messages that include sexually oriented materials in the initially viewable area of the message.

14. In numerous instances, recipients of the commercial email messages set forth in paragraphs 11 through 13 have not given prior affirmative consent to receive such messages.

THE CAN-SPAM ACT

15. The CAN-SPAM Act, 15 U.S.C. § 7701 et seq., became effective on January 1, 2004, and has since remained in full force and effect.

16. Section 3(2) of the CAN-SPAM Act, 15 U.S.C. § 7702(2), defines “commercial electronic mail message” to mean:

any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).

17. Section 3(9) of the CAN-SPAM Act, 15 U.S.C. § 7702(9), defines “initiate,” when used with respect to a commercial email message, to mean:

to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message.

18. Section 3(12) of the CAN-SPAM Act, 15 U.S.C. § 7702(12), defines “procure,” when used with respect to the initiation of a commercial email message, to mean:

intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.

19. Section 3(13) of the CAN-SPAM Act, 15 U.S.C. § 7702(13), defines “protected computer” by reference to 18 U.S.C. § 1030(e)(2)(B), which states that a protected computer is:

a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.

20. Section 3(16) of the CAN-SPAM Act, 15 U.S.C. § 7702(16), defines “sender,” when used with respect to a commercial electronic mail message, as:

a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.

21. Section 5(a)(3) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(3), states:

It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning

return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that –

(i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

(ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.

22. Sections 5(a)(5)(A)(ii) and (iii) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(a)(5)(A)

(ii) and (iii), state:

(A) It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides –

(i) clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and

(ii) a valid physical postal address of the sender.

23. The Commission promulgated the Adult Labeling Rule pursuant to Sections 5(d)(3) and 13(a) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(d)(3) and 7711(a). The Rule became effective on May 19, 2004, and sets forth marks and notices to be included in commercial email messages that contain sexually oriented material.

24. Section 5(d)(4) of the CAN-SPAM Act, 15 U.S.C. § 7704(d)(4), defines “sexually oriented material” as:

any material that depicts sexually explicit conduct (as that term is defined in section 2256 of title 18, United States Code), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.

25. The CAN-SPAM Act and the Adult Labeling Rule both prohibit any person from initiating the transmission, to a protected computer, of any commercial email message that

includes sexually oriented material and fails to include the phrase “SEXUALLY-EXPLICIT: ” as the first nineteen (19) characters at the beginning of the subject line. 15 U.S.C. § 7704(d)(1)(A); 16 C.F.R. § 316.4(a)(1).

26. The CAN-SPAM Act and the Adult Labeling Rule also require that any message that includes sexually oriented material place only the following information within the content of the message that is initially viewable by the recipient, when the message is opened by the recipient and absent any further action by the recipient (“initially viewable content”):

- A. the phrase “SEXUALLY-EXPLICIT: ” in a clear and conspicuous manner, 15 U.S.C. § 7704(d)(1)(B)(i); 16 C.F.R. § 316.4(a)(2)(i);
- B. clear and conspicuous identification that the message is an advertisement or solicitation, 15 U.S.C. § 7704(d)(1)(B)(ii); 16 C.F.R. § 316.4(a)(2)(ii);
- C. clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial email messages from the sender, 15 U.S.C. § 7704(d)(1)(B)(ii); 16 C.F.R. § 316.4(a)(2)(iii);
- D. a functioning return email address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient may use to submit, in a manner specified in the message, a reply email message or other form of Internet-based communication requesting not to receive future commercial email messages from that sender at the email address where the message was received; and that remains capable of receiving such messages or communications for no less than 30 days

after the transmission of the original message, 16 C.F.R. § 316.4(a)(2)(iv);

- E. clear and conspicuous display of a valid physical postal address of the sender, 15 U.S.C. § 7704(d)(1)(B)(ii); 16 C.F.R. § 316.4(a)(2)(v); and
- F. any needed instructions on how to access, or activate a mechanism to access, the sexually oriented material, 15 U.S.C. § 7704(d)(1)(B)(iii); 16 C.F.R. § 316.4(a)(2)(vi).

27. The labeling and placement requirements of the CAN-SPAM Act and the Adult Labeling Rule set forth in paragraphs 25 and 26 do not apply if the recipient has given prior affirmative consent to receipt of the message. 15 U.S.C. § 7704(d)(2); 16 C.F.R. § 316.4(b).

28. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a), states:

[T]his Act shall be enforced by the [FTC] as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).

COUNT I

29. In numerous instances, including but not limited to the practices set forth in this Complaint, Defendant has initiated the transmission, to protected computers, of commercial email messages that include sexually oriented material and that:

- A. fail to include the phrase “SEXUALLY-EXPLICIT: ” as the first nineteen (19) characters at the beginning of the subject line;
- B. fail to include, within the initially viewable content of the message, a second instance of the phrase “SEXUALLY-EXPLICIT: ”;

- C. fail to include, within the initially viewable content of the message, clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial email messages from Defendant;
- D. fail to include, within the initially viewable content of the message, clear and conspicuous display of a valid physical postal address of Defendant; or
- E. include sexually oriented material within the initially viewable content of the message.

30. Therefore, Defendant's acts or practices, as described in paragraph 29, violate Section 5(d) of the CAN-SPAM Act, 15 U.S.C. § 7704(d), and the Adult Labeling Rule, 16 C.F.R. § 316.4(a).

COUNT II

31. In numerous instances, including but not limited to the practices set forth in this Complaint, Defendant has initiated the transmission, to protected computers, of commercial email messages that advertised or promoted Defendant's Internet web sites and failed to include clear and conspicuous notice of the recipient's opportunity to decline to receive further commercial email messages from Defendant at the recipient's email address.

32. Therefore, Defendant's acts or practices, as described in paragraph 31, violate Section 5(a)(5)(A)(ii) or Section 5(a)(3) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(a)(5)(A)(ii) or 7704(a)(3).

COUNT III

33. In numerous instances, including but not limited to the practices set forth in this Complaint, Defendant has initiated the transmission, to protected computers, of commercial email messages that advertised or promoted Defendant's Internet web sites and failed to include Defendant's valid physical postal address.

34. Therefore, Defendant's acts or practices, as described in paragraph 33, violate Section 5(a)(5)(A)(iii) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(iii).

INDIVIDUAL AND BUSINESS INJURY

35. Individuals and businesses throughout the United States have suffered, and continue to suffer, substantial injury as a result of Defendant's unlawful acts or practices. In addition, Defendant has been unjustly enriched as a result of its unlawful practices. Absent injunctive relief by this Court, Defendant is likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

36. Section 7(a) of the CAN-SPAM Act, 15 U.S.C. § 7706(a), provides that "[CAN-SPAM] shall be enforced by the [FTC] as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. § 57a(a)(1)(B))." Accordingly, violations of the CAN-SPAM Act, including those sections of the CAN-SPAM Act that are interpreted by the Adult Labeling Rule, shall be enforced as if the violation were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the FTC Act (15 U.S.C. § 57a(a)(1)(B)), that is, these provisions shall be enforced as if the violation

had been a violation of an FTC trade regulation rule. Furthermore, Section 18(d)(3) of the FTC Act provides that “[w]hen any rule under subsection (a)(1)(B) of [Section 18] takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) of this title[.]” 15 U.S.C. § 57a(d)(3).

37. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R. § 1.98(d) (1997), authorizes this Court to award monetary civil penalties of not more than \$11,000 for each violation of CAN-SPAM, including those sections of the CAN-SPAM Act that are interpreted by the Adult Labeling Rule. Defendant’s violations of CAN-SPAM and the Adult Labeling Rule were committed with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

38. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court, as authorized by Sections 5(a), 5(m)(1)(A), 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b) and 57b, and pursuant to its own equitable powers:

1. Enter judgment against Defendant and in favor of Plaintiff for each violation alleged in this Complaint;

2. Award Plaintiff monetary civil penalties from Defendant for every violation of the CAN-SPAM Act, including those sections of the CAN-SPAM Act that are interpreted by the Adult Labeling Rule;

3. Permanently enjoin Defendant from violating CAN-SPAM and the Adult Labeling Rule;

4. Order Defendant to pay the costs of this action; and

5. Award Plaintiff such other preliminary and permanent equitable relief as the Court may determine to be just and proper.

Dated: _____, 2005

Respectfully submitted,

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