



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

VMS, INC., a foreign corporation;
PROFORM4LIFE, INC., a foreign
corporation, and JOHN DOES 1-20,

Defendants.

No. **03-2-27978-1 SEA**

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

Plaintiff Microsoft Corporation ("Microsoft") brings this action against VMS, INC.,
PROFORM4LIFE, INC., and JOHN DOES 4-20.

I. JURISDICTION AND VENUE

1. This is an action for trespass to chattels, conversion and for violations of the
Washington Commercial Electronic Mail Act (RCW Ch. 19.190), the Washington Consumer
Protection Act, the federal Computer Fraud and Abuse Act (18 U.S.C. § 1030(a)), and the
Lanham Act (15 U.S.C. § 1125). Microsoft seeks damages and injunctive relief to remedy
defendants' unauthorized use of Microsoft's computers, computer systems and trademarks to

1 send millions of misleading and deceptive unsolicited commercial e-mail messages, or
2 “spam,” in violation of Microsoft’s policies and state and federal law.

3 2. This Court has personal jurisdiction over the defendants, who have engaged in
4 business activities in and directed to Washington, have committed a tortious act within the
5 state, and have used personal property in the state.

6 3. Venue is proper in this Court pursuant to RCW § 4.12.020 to .025 in that a
7 substantial part of the events or omissions giving rise to the claims pled herein occurred in
8 King County, the causes of action arose in King County, and work was performed in King
9 County.

10 **II. THE PARTIES**

11 4. Plaintiff Microsoft is a Washington corporation with its principal place of
12 business in Redmond, Washington.

13 5. Defendant VMS, INC. is or was a Florida corporation.

14 6. Defendant PROFORM4LIFE, INC. is a Florida corporation. Angelo Tirico is
15 an officer and/or registered agent of Defendant Proform4Life, Inc.

16 7. Microsoft is unaware of the true names and capacities of defendants sued
17 herein as DOES 1 - 20, inclusive, and therefore sues these defendants by such fictitious
18 names. Microsoft will amend this complaint to allege their true names and capacities when
19 ascertained. Microsoft is informed and believes and therefore alleges that each of the
20 fictitiously named defendants is responsible in some manner for the occurrences herein
21 alleged, and that Microsoft’s injuries as herein alleged were proximately caused by such
22 defendants. These fictitiously named defendants, along with VMS, Inc. and Proform4Life,
23 Inc., are herein referred to collectively as “defendants.”

24 8. The actions alleged herein to have been undertaken by the defendants were
25 undertaken by each defendant individually, were actions that each defendant caused to occur,
26 were actions that each defendant authorized, controlled, directed, or had the ability to

1 authorize, control or direct, and/or were actions each defendant assisted, participated in, or
2 otherwise encouraged, and are actions for which each defendant is liable. Each defendant
3 aided and abetted the actions of the defendants set forth below, in that each defendant had
4 knowledge of those actions, provided assistance and benefited from those actions, in whole or
5 in part. Each of the defendants was the agent of each of the remaining defendants, and in
6 doing the things hereinafter alleged, was acting within the course and scope of such agency
7 and with the permission and consent of other defendants.

8 **III. NATURE OF PLAINTIFF'S INTERNET E-MAIL SERVICES**

9 9. Microsoft owns and operates interactive computer services that enable its
10 customers to, among other things, access the Internet and exchange electronic mail ("e-mail")
11 on the Internet. Microsoft owns and maintains computers and other equipment, including
12 specialized computers or "servers" that process e-mail messages and otherwise support its e-
13 mail services. Microsoft maintains this equipment in Washington and California, among
14 other states. E-mail sent to and from Microsoft's customers is processed through and stored
15 on these computers. Microsoft is an internet service provider ("ISP"), is an "interactive
16 computer service" as defined by RCW § 19.190.010. Microsoft's computers and computer
17 systems are "protected computers" under the federal Computer Fraud and Abuse Act, 18
18 U.S.C. § 1030(e)(2).

19 10. One of Microsoft's services is "MSN Hotmail" which provides free and
20 subscription-based e-mail on the Internet through a web-based e-mail service that can be
21 accessed at www.hotmail.com. MSN Hotmail allows account-holders to exchange e-mail
22 messages with any other e-mail user who has an Internet e-mail address throughout the world.
23 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail
24 addresses ending in "@hotmail.com."

25 11. Another of Microsoft's services is "MSN Internet Access" (referred to herein
26 as "MSN") which provides free and subscription-based e-mail services that can be accessed

1 on the web or via Microsoft's proprietary network. MSN allows account-holders to exchange
2 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the
3 world. MSN has millions of registered accounts, whose users all have unique e-mail
4 addresses ending in "@msn.com."

5 **IV. THE NATURE OF UNSOLICITED E-MAIL OR "SPAM"**

6 12. Unsolicited commercial e-mail is often referred to as "spam." The
7 transmission of spam, a practice referred to as "spamming," by persons known as
8 "spammers," is widely condemned in the Internet community, and is of significant concern
9 and economic detriment to Microsoft and its customers.

10 13. By using the Internet to send commercial e-mail messages, spammers not only
11 obtain significant cost savings, but impose significant economic burdens on ISPs such as
12 Microsoft. Although it costs very little for a spammer to transmit innumerable e-mail
13 messages, handling the enormous volume of e-mail initiated by spammers places a
14 tremendous burden on Microsoft.

15 14. Microsoft's computers and computer systems are designed and created solely
16 for the benefit and the non-commercial personal use of its customers. The computers and
17 computer systems have finite capacity and are not designed to accommodate innumerable
18 mass mailings from spammers. Microsoft has been required to expend substantial amounts
19 for new equipment to handle the mass mailings by spammers.

20 15. Spamming also can and does result in the degradation and disruption of
21 Microsoft's computers and computer systems. Spam demands storage space and processing
22 capacity of Microsoft's computers and computer systems, making those resources unavailable
23 to serve the legitimate needs of Microsoft's customers. The diversion of these resources from
24 processing authorized e-mail impairs the normal operation of the computers and computer
25 systems. Therefore, the value of that equipment is diminished by spamming.
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1 16. Spamming also has significant impact on the recipients of spam. Individuals
2 who receive spam must take the time and effort to sort through larger volumes of received e-
3 mail, must attempt to distinguish spam from legitimate e-mail, and ultimately discard this
4 unsolicited material. In an effort to mislead e-mail recipients and to make it more difficult for
5 them to identify and discard these unsolicited advertisements, spammers frequently use
6 deceptive methods, such as using a false or misleading information in the e-mail headers and
7 subject lines. When a spammer uses deceptive information to disguise spam as legitimate
8 personal or business e-mail, it causes additional inconvenience and frustration to spam
9 recipients.

10 17. Spam frequently involves products or services of questionable value, or
11 materials of an adult or pornographic nature. Unsolicited advertisements for such products or
12 services, often disguised, are a particularly obtrusive form of spam and are often the subject of
13 customer complaints.

14 18. Spammers know that their bulk e-mailing practices inevitably lead to a
15 significant portion of their e-mail being undeliverable. When an e-mail message is
16 undeliverable, additional e-mail messages (“bounce-back messages”) are generated to advise
17 the sender and the ISP of this fact. Rather than have their own computer equipment burdened
18 with voluminous bounce-back messages, spammers craft their messages to direct the bounce-
19 back messages to others. Thus, a spammer who sends spam by using a MSN or MSN
20 Hotmail return address can be assured that the inevitable, innumerable bounce-back messages
21 will be returned to that address, not to the spammer’s own computer system. This adds to
22 Microsoft’s burdens, as its computers must process and store the bounce-back messages from
23 these spam mailings.

24 19. In an attempt to protect itself and its customers from spam, Microsoft has
25 expended significant resources to developing technologies and practices to prevent its
26 subscribers from sending or receiving spam. Spammers, however, continue to adopt practices

1 and technological devices to evade Microsoft's technologies and to frustrate Microsoft's
2 efforts.

3 20. In passing the Commercial Electronic Mail Act, RCW Ch. 19.190, in 1998,
4 Washington became one of the first states to regulate spam. The legislature has recognized
5 that the spamming practices prohibited by the Act are "matters vitally affecting the public
6 interests" and are unfair and deceptive practices which impact Washington businesses and
7 consumers.

8 21. Microsoft has invested substantial time and money in efforts to disassociate
9 itself from spam and the spammers who promote and profit from spam, as well as in seeking
10 to protect its registered users worldwide from receiving spam.

11 22. Microsoft has a clearly articulated policy prohibiting the use of its services for
12 junk email, spamming, or any unsolicited messages (commercial or otherwise). Microsoft's
13 policies also prohibit automated queries of any sort, harvesting or collection of e-mail
14 addresses, and any use of the services that is not personal and non-commercial. These
15 policies are included in the Terms of Use for MSN and MSN Hotmail, which can be accessed
16 via a clearly marked link on www.msn.com, as well as on the home pages for each of the
17 services.

18 **V. DEFENDANTS' UNLAWFUL CONDUCT**

19 23. Microsoft is informed and believes, and on that basis alleges, that defendants
20 have been—and are currently involved in—widespread spamming by sending misleading,
21 deceptive and unsolicited commercial email to MSN Hotmail account holders.

22 24. Microsoft is informed and believes, and on the basis alleges, that its MSN
23 Hotmail service has received millions of unsolicited e-mail messages from defendants.

24 25. Defendants' e-mail messages promote the sale of Human Growth Hormone
25 from an internet web site entitled "www.800freetrial.com." That website is owned and
26 maintained by defendants, who sell Human Growth Hormone in connection with that website.

1 Defendants' e-mails advertise that Human Growth Hormone will help purchasers lose weight,
2 reverse aging, and have great sex.

3 26. Many of those e-mail messages purport to originate from the domains
4 hotmail.com and msn.com, when, in fact, they originated from defendants' domains.
5 Defendants did not have permission to use Microsoft's hotmail.com or msn.com domain
6 names.

7 27. Many of defendants' commercial e-mails use other domain names, such as
8 "excite.com" and "juno.com." Microsoft is informed and believes, and on that basis alleges,
9 that defendants did not have permission to use those domain names.

10 28. Many of those e-mail messages contain random characters in place of the
11 sending domain name and sender e-mail address, thereby obscuring the point of origin and
12 transmission path of the e-mail.

13 29. Many of those e-mail messages contain false and misleading subject lines,
14 such as "Do this xf."

15 30. As a result of the defendants' actions, Microsoft's computer equipment and
16 servers were required to process millions of improper spam e-mails. These e-mails threaten to
17 delay and otherwise adversely affect MSN Hotmail subscribers in sending and receiving
18 legitimate e-mail, and have resulted in and continue to result in significant costs to Microsoft.
19 Additionally, defendants' illegitimate spam campaign has resulted in complaints by the
20 recipients of defendants' spam.

21 **COUNT I**
22 **(Trespass to Chattels)**

23 31. Microsoft realleges and incorporates by this reference each and every
24 allegation set forth in paragraphs 1 through 30 above.

25 32. The computers, computer networks and computer services that constitute
26 Microsoft's MSN Hotmail e-mail system are the personal property of Microsoft.

1 33. Defendants were aware that their actions were specifically prohibited by
2 Microsoft's Terms of Service and/or were on notice that their actions were not authorized by
3 Microsoft in any way.

4 34. Defendants have knowingly, intentionally and without authorization used and
5 intentionally trespassed upon Microsoft's property.

6 35. As a result of defendants' actions, Microsoft has been damaged in an amount
7 to be proven at trial.

8 **COUNT II**
9 **(Conversion)**

10 36. Microsoft realleges and incorporates by this reference each and every
11 allegation set forth in paragraphs 1 through 35 above.

12 37. Defendants have willfully interfered with and converted Microsoft's personal
13 property, without lawful justification, as a result of which Microsoft has been deprived of
14 possession and use of its property.

15 38. As a result of defendants' actions, Microsoft has been damaged in an amount
16 to be proven at trial.

17 **COUNT III**
18 **(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and**
19 **the Washington Consumer Protection Act (RCW Ch. 19.86))**

20 39. Microsoft realleges and incorporates by this reference each and every
21 allegation set forth in paragraphs 1 through 38 above.

22 40. Defendants initiated the transmission, conspired with one another to initiate the
23 transmission, or assisted in the transmission of commercial e-mail messages from a computer
24 located in Washington and/or to an e-mail address that they knew, or had reason to know, is
25 held by a Washington resident. Those commercial e-mail messages:

26 a) used Microsoft's or another third party's internet domain names without
permission;

1 b) misrepresented or obscured information identifying the point of origin or the
2 transmission path of a commercial electronic e-mail message; or

3 c) contained false or misleading information in the subject line.

4 41. As a result of defendants' actions, Microsoft has been damaged in an amount
5 to be proven at trial.

6 42. Defendants' actions violated RCW § 19.190.020, and entitle Microsoft to
7 actual damages or statutory damages of \$1,000 per email, whichever is greater.

8 43. Defendants' actions affected the public interest, are unfair or deceptive acts in
9 trade or commerce and unfair methods of competition, and violated the Washington
10 Consumer Protection Act, RCW Ch. 19.86. Microsoft is entitled to treble damages and an
11 award of its attorneys' fees and costs under that Act.

12 **COUNT IV**
13 **(Violation of the federal Computer Fraud and Abuse Act – 18 U.S.C. § 1030(a)(4), (g))**

14 44. Microsoft realleges and incorporates by this reference each and every
15 allegation set forth in paragraphs 1 through 43 above.

16 45. By the actions alleged above, defendants knowingly and with intent to defraud,
17 accessed Microsoft's protected computer system, without authorization and/or in excess of
18 authorized access.

19 46. By the actions alleged above, defendants furthered the intended fraud and
20 obtained unauthorized use of Microsoft's protected computer system, and the value of that use
21 exceeds more than \$5,000 in any 1-year period.

22 47. Defendants' activity constitutes a violation of the federal Computer Fraud and
23 Abuse Act, 18 U.S.C. § 1030(a)(4), and Microsoft is entitled to damages under that Act.
24 Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.
25
26

1 **COUNT V**
2 **(Violation of the federal Computer Fraud and Abuse Act – 18 U.S.C. § 1030(a)(5), (g))**

3 48. Microsoft realleges and incorporates by this reference each and every
4 allegation set forth in paragraphs 1 through 47 above.

5 49. By the actions alleged above, defendants intentionally and knowingly accessed
6 Microsoft's protected computer system, and knowingly caused the transmission of a program,
7 information, code, or command, without authorization and/or in excess of authorized access.

8 50. By the actions alleged above, defendants intentionally caused damage, without
9 authorization, to Microsoft's protected computer system, and the aggregate loss resulting
10 therefrom exceeds at least \$5,000 in value.

11 51. Defendants' activity constitute a violation of the federal Computer Fraud and
12 Abuse Act, 18 U.S.C. § 1030(a)(5), and Microsoft is entitled to damages under that Act.
13 Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.

14 **COUNT VI**
15 **(Violation of the Lanham Act – 15 U.S.C. § 1125(a))**

16 52. Microsoft realleges and incorporates by this reference each and every
17 allegation set forth in paragraphs 1 through 51 above.

18 53. Defendants used the designations "msn.com" and "hotmail.com," which
19 incorporate Microsoft's registered trademarks and service marks and which are words, terms,
20 names, or combinations thereof, or false designations of origin, or false or misleading
21 descriptions or representations of fact.

22 54. Defendants' activities involved interstate commerce in connection with goods
23 and services.

24 55. Defendants' conduct is likely to cause confusion, mistake, or deception as to
25 defendants' affiliations, connection, or association with Microsoft, or as to the origin,
26 sponsorship, or approval of their goods or services, or commercial activities.

1 56. Microsoft has been damaged by these acts in an amount to be proved at trial.
2 Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Microsoft respectfully requests that the Court enter judgment against
5 defendants, jointly and severally, as follows:

6 1. That the Court issue temporary and permanent injunctive relief against
7 defendants, and that defendants, their officers, agents, representatives, servants, employees,
8 attorneys, successors and assignees, and all others in active concert or participation with
9 defendants, be enjoined and restrained from:

10 a) establishing any accounts with Microsoft's MSN or MSN Hotmail
11 services;

12 b) using Microsoft's computers and computer systems in connection with
13 sending commercial e-mail messages;

14 c) making unauthorized use of Microsoft's computers and computer
15 systems;

16 d) continuing to violate Microsoft's Terms of Service; and

17 e) continuing to violate the Washington Commercial Electronic Mail Act;

18 f) assisting, aiding, or abetting any other person or business entity in
19 engaging in or performing any of the activities referred to in subparagraphs a) through
20 e) above.

21 2. That the Court award Microsoft actual damages, liquidated damages and
22 statutory damages, in amount to be proven at trial;

23 3. That the Court award Microsoft its attorneys' fees and costs incurred herein;
24 and

25 4. That the Court grant Microsoft such other or additional relief as is just and
26 proper.

1 DATED this 12th day of June, 2003.

2 PRESTON GATES & ELLIS LLP

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4 By David A. Bateman
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