

RECEIVED
In King County Superior Court Clerk's Office
JUN 16 2003
Cashier Section
Superior Court Clerk

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

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

XPAYS, Inc., a foreign corporation, and
JOHN DOES 1-20,

Defendants.

No. **03-2-27988-9SEA**
COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

Plaintiff Microsoft Corporation ("Microsoft") brings this action against XPAYS, Inc., and JOHN DOES 1-20.

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 send millions of misleading and deceptive unsolicited commercial e-mail messages, or "spam," in violation of Microsoft's policies and state and federal law.

1 knowledge of those actions, provided assistance and benefited from those actions, in whole or
2 in part. Each of the defendants was the agent of each of the remaining defendants, and in
3 doing the things hereinafter alleged, was acting within the course and scope of such agency
4 and with the permission and consent of other defendants.

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

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

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

22 10. Another of Microsoft's services is "MSN Internet Access" (referred to herein
23 as "MSN") which provides free and subscription-based e-mail services that can be accessed
24 on the web or via Microsoft's proprietary network. MSN allows account-holders to exchange
25 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the
26

1 world. MSN has millions of registered accounts, whose users all have unique e-mail
2 addresses ending in "@msn.com."

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

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

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

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

18 14. Spamming also can and does result in the degradation and disruption of
19 Microsoft's computers and computer systems. Spam demands storage space and processing
20 capacity of Microsoft's computers and computer systems, making those resources unavailable
21 to serve the legitimate needs of Microsoft's customers. The diversion of these resources from
22 processing authorized e-mail impairs the normal operation of the computers and computer
23 systems. Therefore, the value of that equipment is diminished by spamming.

24 15. Spamming also has significant impact on the recipients of spam. Individuals
25 who receive spam must take the time and effort to sort through larger volumes of received e-
26 mail, must attempt to distinguish spam from legitimate e-mail, and ultimately discard this

1 unsolicited material. In an effort to mislead e-mail recipients and to make it more difficult for
2 them to identify and discard these unsolicited advertisements, spammers frequently use
3 deceptive methods, such as using a false or misleading information in the e-mail headers and
4 subject lines. When a spammer uses deceptive information to disguise spam as legitimate
5 personal or business e-mail, it causes additional inconvenience and frustration to spam
6 recipients.

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

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

21 18. In an attempt to protect itself and its customers from spam, Microsoft has
22 expended significant resources to developing technologies and practices to prevent its
23 subscribers from sending or receiving spam. Spammers, however, continue to adopt practices
24 and technological devices to evade Microsoft's technologies and to frustrate Microsoft's
25 efforts.

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

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

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

16 **V. DEFENDANTS’ UNLAWFUL CONDUCT**

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

20 23. Microsoft is informed and believes, and on the basis alleges, that its MSN
21 Hotmail service has received millions of unsolicited e-mail messages from defendants
22 advertising adult websites, services and products.

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

1 25. Many of defendants' commercial e-mails use the domain names of other
2 internet service providers. Microsoft is informed and believes, and on that basis alleges, that
3 defendants did not have permission to use those domain names.

4 26. Many of those e-mail messages contain false or misleading "From" lines. By
5 placing false names in place of the name of the true sender, defendants obscure the point of
6 origin and transmission path of the e-mail.

7 27. Many of those e-mail messages contain false and misleading subject lines that
8 conceal the nature of the explicit, pornographic pictures contained within the e-mail body,
9 such as "I like it a lot" or "We're curious."

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

16 **COUNT I**
17 **(Trespass to Chattels)**

18 29. Microsoft realleges and incorporates by this reference each and every
19 allegation set forth in paragraphs 1 through 28 above.

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

22 31. Defendants were aware that their actions were specifically prohibited by
23 Microsoft's Terms of Service and/or were on notice that their actions were not authorized by
24 Microsoft in any way.

25 32. Defendants have knowingly, intentionally and without authorization used and
26 intentionally trespassed upon Microsoft's property.

1 33. As a result of defendants' actions, Microsoft has been damaged in an amount
2 to be proven at trial.

3 **COUNT II**
4 **(Conversion)**

5 34. Microsoft realleges and incorporates by this reference each and every
6 allegation set forth in paragraphs 1 through 33 above.

7 35. Defendants have willfully interfered with and converted Microsoft's personal
8 property, without lawful justification, as a result of which Microsoft has been deprived of
9 possession and use of its property.

10 36. As a result of defendants' actions, Microsoft has been damaged in an amount
11 to be proven at trial.

12 **COUNT III**
13 **(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and**
14 **the Washington Consumer Protection Act (RCW Ch. 19.86))**

15 37. Microsoft realleges and incorporates by this reference each and every
16 allegation set forth in paragraphs 1 through 36 above.

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

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

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

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

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

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

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

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

9 42. Microsoft realleges and incorporates by this reference each and every
10 allegation set forth in paragraphs 1 through 41 above.

11 43. By the actions alleged above, defendants knowingly and with intent to defraud,
12 accessed Microsoft's protected computer system, without authorization and/or in excess of
13 authorized access.

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

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

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

22 46. Microsoft realleges and incorporates by this reference each and every
23 allegation set forth in paragraphs 1 through 45 above.

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

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

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

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

9 50. Microsoft realleges and incorporates by this reference each and every
10 allegation set forth in paragraphs 1 through 49 above.

11 51. Defendants used the designations "msn.com" and "hotmail.com," which
12 incorporate Microsoft's registered trademarks and service marks and which are words, terms,
13 names, or combinations thereof, or false designations of origin, or false or misleading
14 descriptions or representations of fact.

15 52. Defendants' activities involved interstate commerce in connection with goods
16 and services.

17 53. Defendants' conduct is likely to cause confusion, mistake, or deception as to
18 defendants' affiliations, connection, or association with Microsoft, or as to the origin,
19 sponsorship, or approval of their goods or services, or commercial activities.

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

22 **PRAYER FOR RELIEF**

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

25 1. That the Court issue temporary and permanent injunctive relief against
26 defendants, and that defendants, their officers, agents, representatives, servants, employees,

1 attorneys, successors and assignees, and all others in active concert or participation with
2 defendants, be enjoined and restrained from:

- 3 a) establishing any accounts with Microsoft's MSN or MSN Hotmail
4 services;
- 5 b) using Microsoft's computers and computer systems in connection with
6 sending commercial e-mail messages;
- 7 c) making unauthorized use of Microsoft's computers and computer
8 systems;
- 9 d) continuing to violate Microsoft's Terms of Service; and
- 10 e) continuing to violate the Washington Commercial Electronic Mail Act
11 or the Lanham Act;
- 12 f) assisting, aiding, or abetting any other person or business entity in
13 engaging in or performing any of the activities referred to in subparagraphs a) through
14 e) above.

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

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

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

21 DATED this 12th day of June, 2003.

22 PRESTON GATES & ELLIS LLP

23 By 

24 David A. Bateman, WSBA # 14262
25 Robert J. Dzielak, WSBA #26178
26 Theodore J. Angelis, WSBA #30300

Attorneys for Plaintiff
Microsoft Corporation