

STATE OF NEW YORK
CITY COURT : CITY OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FELONY COMPLAINT

HOWARD CARMACK,

Defendant.

I, James L. Domres, a Supervising Investigator with the New York State Attorney General's Office, accuse the defendant of the following crimes:

COUNT I

Forgery in the Second Degree, in violation of §170.10 (1) of the Penal Law of the State of New York, in that the defendant, on or about June 2, 2002, in the City Of Buffalo, County of Erie, State of New York, knowingly and with the intent to defraud, deceive or injure another, falsely made or altered a written instrument which is or purports to be, or which is calculated to become or to represent if completed an instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status, to wit: a stream of electronic mail.

COUNT II

Criminal Possession of Forgery Devices, in violation of §170.40 (1) of the Penal Law of the State of New York, in that the defendant, on or about May 13, 2003, in the City Of Buffalo, County of Erie, State of New York, possessed with knowledge of its character a device designed for use in forging written instruments, to wit: computer software designed to alter or create false written instruments.

COUNT III

Identity Theft in the Third Degree, in violation of §190.78 (1) of the Penal Law of the State of New York, in that the defendant, on or about February 9, 2003, in the City Of Buffalo, County of Erie, State of New York, knowingly and with the intent to defraud, assumed the identity of Raymond Dennison, by presenting himself to a provider of Internet services, EarthLink, Inc., as that person, and thereby obtained services from EarthLink, Inc.

COUNT IV

Falsifying Business Records in the First Degree, in violation of § 175.10 of the Penal Law of the State of New York in that the defendant, on or about February 9, 2003, in the City Of Buffalo, County of Erie, committed the crime of Falsifying Business Records in the Second Degree, by causing a false entry to be made in the business records of an enterprise, EarthLink, Inc., with the intent to defraud EarthLink, Inc., and with the intent to commit the crime of Theft of Services or conceal the commission thereof .

COUNT V

Identity Theft in the Third Degree, in violation of §190.78 (1) of the Penal Law of the State of New York, in that the defendant, on or about January 13, 2003, in the City Of Buffalo, County of Erie, State of New York, knowingly and with the intent to defraud assumed the identity of Justin Ryan, by presenting himself to a provider of Internet services, EarthLink, Inc., as that person, and thereby obtained services from EarthLink, Inc.

COUNT VI

Falsifying Business Records in the First Degree, in violation of § 175.10 of the Penal Law of the State of New York in that the defendant, on or about January 13, 2003, in the City Of Buffalo, County of Erie, committed the crime of Falsifying Business Records in the Second

Degree by causing a false entry to be made in the business records of an enterprise, EarthLink, Inc., with the intent to defraud EarthLink, Inc., and with the intent to commit the crime of Theft of Services or conceal the commission thereof.

Carmack committed the crimes in the following manner:

From on or about May 2002 to on or about June 2002, the defendant, Howard Carmack, using multiple names and pedigree data, opened multiple subscriber accounts with EarthLink, Inc., a provider of Internet access services and assumed the various subscriber names. From on or about May 31, 2002, to on or about June 7, 2002, Carmack signed onto the EarthLink service using the various subscriber names and used those accounts to send unsolicited commercial e-mail (spam) selling computer software designed to conduct mass e-mailings over the Internet and CD-ROMS containing 20 million deliverable general Internet e-mail addresses. Before sending the spam e-mail to the various e-mail addresses, Carmack removed the EarthLink e-mail address from the "from" line in the e-mail headers and replaced it with the e-mail address **rcw@cle.ab.com**, that was assigned to and owned by Robert C. Wepler. Only Wepler, or someone authorized by Wepler, is allowed to use that e-mail address. Wepler did not give Carmack permission or authority to use the e-mail address.

Carmack continued opening accounts with EarthLink, Inc., using real names and fictitious pedigree and financial data. Carmack used the accounts to send spam. EarthLink terminated each account as it became aware of the spamming activity as such conduct is in violation of the contract that a customer/subscriber agrees to at the time the account is established. Each fictitious account that was opened by Carmack was used by Carmack to send spam e-mail, and thereafter closed by EarthLink after an investigation of customer complaints by its Abuse Team.

On or about January 13, 2003, Carmack opened an account with EarthLink using the

personal identifying information of Justin Ryan to establish the account

justin1132@earthlink.net. Justin Ryan did not give Carmack permission or authority to use his personal identifying information to establish an Internet account with EarthLink, Inc.

On or about February 9, 2003, Carmack opened an account with EarthLink using the personal identifying information of Raymond Dennison to establish the account

r.dennison@earthlink.net. Raymond Dennison did not give Carmack permission or authority to use his personal identifying information to establish an Internet account with EarthLink, Inc.

On or about May 13, 2003, Howard Carmack was in possession of a computer software program designed to allow the user to forge electronic mail.

On or about May 13, 2003 the defendant admitted to opening numerous Internet accounts with EarthLink, Inc., using the personal identifying information of others, and using the above described computer software to send forged spam e-mails to millions of consumers.

The above allegations of fact are made by the complainant upon information and belief, with the sources of complainant's information and the grounds for his belief being the investigation conducted by the New York State Police and the New York State Attorney General's office, witness interviews including Robert C. Wepler, Raymond Dennison, Justin Ryan, Mary Youngblood, and the review of pleadings in the civil proceedings entitled: *EarthLink, Inc. v. Howard Carmack*, currently pending in the US District Court for the Northern District of Georgia, and documents obtained from various sources relative to the facts of this matter and a conversation that I had with Howard Carmack on May 13, 2003.

In a written instrument, a person who knowingly makes a false statement which such person does not believe to be true, commits a crime under the laws of the State of New York punishable as a Class A Misdemeanor (Penal Law §210.45).

Affirmed under penalty of perjury

this ____ day of _____, 2003.

JAMES L. DOMRES