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WESTERN DISTRICT OF WASHINGTON
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICROSOFT CORPORATION, a
Washington corporation,

11 Plaintiff,

12 v.

13 JDO MEDIA, INC., a Florida corporation,
14 and JOHN DOES 1-50

15 Defendants.

No. CV04-050

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

16
17 Plaintiff Microsoft Corporation ("Microsoft") brings this action against JDO MEDIA,
18 INC. and JOHN DOES 1-50.

19 **I. JURISDICTION AND VENUE**

20 1. This is an action for violations of the federal CAN-SPAM Act of 2003 (15
21 U.S.C. §7701 et seq.) and other state and federal causes of action. Passed by Congress and
22 signed into law in December 2003, the CAN-SPAM Act is new, comprehensive legislation
23 aimed at curbing the growing abuse of unsolicited commercial electronic mail by e-mail
24 marketers.

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COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 1

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1 9. Microsoft is unaware of the true names and capacities of defendants sued
2 herein as DOES 1 - 50 and, therefore, sues these defendants by such fictitious names.
3 Microsoft will amend this complaint to allege their true names and capacities when
4 ascertained. Microsoft is informed and believes and therefore alleges that each of the
5 fictitiously named defendants is responsible in some manner for the occurrences herein
6 alleged, and that Microsoft's injuries as herein alleged were proximately caused by such
7 defendants.

8 10. The actions alleged herein to have been undertaken by the defendants were
9 undertaken by each defendant individually, were actions that each defendant caused to occur,
10 were actions that each defendant authorized, controlled, directed, or had the ability to
11 authorize, control or direct, and/or were actions each defendant assisted, participated in, or
12 otherwise encouraged, and are actions for which each defendant is liable. Each defendant
13 aided and abetted the actions of the defendants set forth below, in that each defendant had
14 knowledge of those actions, provided assistance and benefited from those actions, in whole or
15 in part. Each of the defendants was the agent of each of the remaining defendants, and in
16 doing the things hereinafter alleged, was acting within the course and scope of such agency
17 and with the permission and consent of other defendants. Each of the defendants knew, or
18 consciously avoided knowing, that other defendants had or would engage in a pattern or
19 practice that violated the CAN-SPAM Act of 2003.

20 **III. NATURE OF MICROSOFT'S INTERNET E-MAIL SERVICES**

21 11. Microsoft owns and operates interactive computer services that enable its
22 customers to, among other things, access the Internet and exchange electronic mail ("e-mail")
23 on the Internet. Microsoft owns and maintains computers and other equipment, including
24 specialized computers or "servers" that process e-mail messages and otherwise support its e-
25 mail services. Microsoft maintains this equipment in Washington and California, among
26 other states. E-mail sent to and from Microsoft's customers is processed through and stored

1 on these computers. Microsoft is an internet service provider (“ISP”), a provider of “Internet
2 Access Service” as defined by 15 U.S.C. §7702(11), and an “interactive computer service” as
3 defined by RCW 19.190.010. Microsoft’s computers and computer systems are “protected
4 computers” under the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(e)(2).

5 12. One of Microsoft’s services is “MSN Hotmail” which provides free and
6 subscription based email on the Internet through a web-based e-mail service that can be
7 accessed at www.hotmail.com. MSN Hotmail allows account-holders to exchange e-mail
8 messages with any other e-mail user who has an Internet e-mail address throughout the world.
9 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail
10 addresses ending in “@hotmail.com.”

11 13. Another of Microsoft’s services is “MSN Internet Access” (referred to herein
12 as “MSN”) which provides free and subscription-based e-mail services that can be accessed
13 on the web or via Microsoft’s proprietary network. MSN allows account-holders to exchange
14 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the
15 world. MSN has millions of registered accounts, whose users all have unique e-mail
16 addresses ending in “@msn.com.”

17 **IV. SPAM AND THE PURPOSES BEHIND THE FEDERAL CAN-SPAM ACT**

18 14. The United States Congress, in passing the CAN-SPAM¹ Act of 2003,
19 concluded that “[u]nsolicited commercial e-mail, commonly known as ‘spam’, has quickly
20 become one of the most pervasive intrusions in the lives of Americans.” Indeed, Congress
21 estimated that by the end of 2003, if not sooner, spam would account for over 50% of all e-
22 mail. This is in sharp contrast to two years earlier when spam only accounted for 8% of all e-
23 mail. Congress has concluded that the rate at which spam is increasing is “reaching critically
24
25

26 ¹ CAN-SPAM is an acronym for “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003”.

1 high levels.” In fact, in 2003, an estimated 2 trillion spam messages were expected to be sent
2 over the Internet.

3 15. In addition to plaguing recipients by its sheer volume, spam is also notoriously
4 deceptive in form and content. In April 2003, the Federal Trade Commission found that 66%
5 of all spam contains “some kind of false, fraudulent, or misleading information, either in the
6 e-mail’s routing information, its subject line, or the body of its message.” In fact, the FTC
7 found that “one-third of all spam contains a fraudulent return e-mail address that is included
8 in the routing information (known as the ‘header’) of the e-mail message”. Congress found
9 that falsified headers “not only trick ISP’s increasingly sophisticated filters,” but also “lure
10 consumers into mistakenly opening messages from what appears to be people they know.”

11 16. Congress also found that not only do spammers use false sender information,
12 but they also use false or misleading subject lines. According to Congress, the FTC found
13 that 42% of spam contains misleading subject lines that “trick the recipient into thinking that
14 the e-mail sender has a personal or business relationship with the recipient.” Congress
15 provided examples of this type of false or misleading subject line: “Hi, it’s me” and “Your
16 order has been filled.”

17 17. The economic impact of spam is enormous. Congress noted that a 2001
18 European Union study found that “spam costs Internet subscribers worldwide \$9.4 billion
19 each year.” Congress also noted that the estimated costs “to United States businesses from
20 spam in lost productivity, network system upgrades, unrecoverable data, and increased
21 personnel costs, combined, will top \$10 billion in 2003.” Of that amount, approximately \$4
22 billion will be associated with lost employee productivity.

23 18. With these findings as a backdrop, the United States Congress passed the
24 CAN-SPAM Act. In so doing, Congress provided four specific purposes of the Act: “(i)
25 prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or
26 promotional purposes from deceiving intended recipients or Internet service providers as to

1 the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give
2 recipients an opportunity to decline to receive future commercial e-mail from them and to
3 honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also
4 include a valid physical address in the e-mail message and a clear notice that the message is
5 an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting or
6 permitting the promotion of, their trade or business through e-mail transmitted with false or
7 misleading sender or routing information.”

8 19. As Congress recognized, the growth in unsolicited commercial electronic mail
9 imposes significant monetary costs on providers of Internet access services that carry and
10 receive such mail, as there is a finite volume of mail that such providers can handle without
11 further investment in infrastructure. The sheer volume of spam is threatening to overwhelm
12 not only the average consumer's in-box, but also the network systems of Internet access
13 service providers.

14 20. Microsoft has invested substantial time and money in efforts to protect itself
15 and its equipment from spam and the spammers who promote and profit from spam, as well as
16 in efforts to protect its registered users worldwide from receiving spam.

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

24 V. DEFENDANTS' UNLAWFUL CONDUCT

1 22. Microsoft is informed and believes, and on that basis alleges, that defendants
2 have been—and are currently involved in—widespread spamming by sending misleading,
3 deceptive and unsolicited commercial e-mail to MSN Hotmail account holders.

4 23. Microsoft is informed and believes, and on that basis alleges, that defendants
5 own or operate a number of Internet domains, by which they advertise their products or
6 services including, but not limited to, the domains 1upautomated.com, oneupautomated.com,
7 my3minutemovie.org, automarketing.org, 3minutemiracle.org, clickforsuccess.org, my-best-
8 offers.com, and kash4u.net.

9 24. Microsoft is informed and believes, and on the basis alleges, that its MSN
10 Hotmail service has received millions of unsolicited commercial e-mail messages from
11 defendants advertising their domains, and offering products or services relating to their
12 automated multi-level marketing program.

13 25. Many of those e-mail messages contain false or misleading “From” lines. By
14 placing false names in place of the name of the true sender, defendants obscure the point of
15 origin and transmission path of the e-mail.

16 26. Many of those e-mail messages are sent through open proxies, or hijacked
17 computers, thereby disguising the true sender of the e-mail messages.

18 27. Many of those e-mail messages purport to originate from the hotmail.com and
19 msn.com domains when, in fact, they did not. Defendants did not have permission to use
20 Microsoft’s hotmail.com and msn.com domain names in that fashion.

21 28. Many of defendants’ commercial e-mails use fictional domain names or use
22 the domain names of other innocent third-parties. Microsoft is informed and believes, and on
23 that basis alleges, that defendants did not have permission to use those domain names.

24 29. Many of those e-mail messages contain false and misleading subject lines, for
25 example “Elite, Professional Invitation”, “Warning!!! These three minutes could change your
26

1 life”, and “This is your lucky day”. In addition, many of these messages are sent with “high
2 priority.”

3 30. Microsoft has been adversely affected by defendants’ actions. As a result of
4 defendants’ activities, Microsoft’s computer equipment and servers were required to process
5 millions of improper spam e-mails, as well as “bounce back” e-mails which had been sent by
6 defendant to non-existent, out-dated or incorrect e-mail addresses. This significant number of
7 e-mails has taken up substantial amount of Microsoft’s finite computer space, threatens to
8 delay and otherwise adversely affect MSN Hotmail subscribers in sending and receiving
9 legitimate e-mail, and has resulted in and continues to result in significant costs to Microsoft.

10 **COUNT I**
11 **(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and**
12 **Marketing Act of 2003—“CAN-SPAM” (15 U.S.C. § 7704(a)(1)))**

13 31. Microsoft realleges paragraphs 1-30 of this Complaint as if fully set forth
14 herein.

15 32. Defendants initiated the transmission, to protected computers, of commercial
16 e-mail messages that contained, or were accompanied by, header information that is
17 materially false or materially misleading.

18 33. Defendants’ actions were willful and knowing.

19 34. As a result of defendants’ actions, Microsoft has been damaged in an amount
20 to be proven at trial.

21 35. Defendants’ actions violated 15 U.S.C. § 7704(a)(1), and entitle Microsoft to
22 injunctive relief, statutory damages and aggravated damages because of defendants’ willful
23 and knowingly violation of the CAN-SPAM Act.

24 **COUNT II**
25 **(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and**
26 **Marketing Act of 2003—“CAN-SPAM” (15 U.S.C. § 7704(a)(2, 3 and 5)))**

1 36. Microsoft realleges paragraphs 1-35 of this Complaint as if fully set forth
2 herein.

3 37. Defendants engaged in a pattern or practice of initiating, to protected
4 computers, commercial e-mail messages that:

5 a) contained subject headings that defendants knew, or reasonably should have known,
6 were likely to mislead a recipient, acting reasonably under the circumstances, about a material
7 fact regarding the contents or subject matter of the messages;

8 b) failed to contain a functioning return e-mail address or other Internet-based
9 mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply
10 e-mail message or other form of Internet-based communication requesting not to receive
11 future commercial e-mail messages from that sender at the e-mail address where the message
12 was received; and

13 c) failed to include a clear and conspicuous identification that the message was an
14 advertisement or solicitation, failed to provide a clear and conspicuous notice of the
15 opportunity to decline to receive further commercial electronic mail messages from the
16 sender; or failed to provide a valid physical postal address of the sender.

17 38. Defendants' actions were willful and knowing.

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

20 40. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and
21 entitle Microsoft to injunctive relief, statutory damages and aggravated damages because of
22 defendants' willful and knowingly violation of the CAN-SPAM Act.

23 **COUNT III**
24 **(Trespass to Chattels)**

25 41. Microsoft realleges and incorporates by this reference each and every
26 allegation set forth in paragraphs 1 through 40 above.

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

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

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

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

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

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

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

16 54. Microsoft realleges and incorporates by this reference each and every
17 allegation set forth in paragraphs 1 through 53 above.

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

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

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

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

3 58. Microsoft realleges and incorporates by this reference each and every
4 allegation set forth in paragraphs 1 through 57 above.

5 59. 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 60. 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 61. Defendants' activity constitutes 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 VII**
15 **(Violation of the Lanham Act – 15 U.S.C. § 1125(a))**

16 62. Microsoft realleges and incorporates by this reference each and every
17 allegation set forth in paragraphs 1 through 61 above.

18 63. Defendants used the designations "hotmail.com" and "msn.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 64. Defendants' activities involved interstate commerce in connection with goods
23 and services.

24 65. 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.

