

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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THE PEOPLE OF THE STATE OF NEW YORK
by **ELIOT SPITZER, Attorney General**
of the State of New York,

VERIFIED PETITION

Petitioners,

Index No. _____

-against-

INTERMIX MEDIA, INC.

Respondent.

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The People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York, allege upon information and belief that:

INTRODUCTION

1. Petitioners bring this summary proceeding (a) to permanently enjoin Respondent from installing any advertising, ad-serving, redirecting, or toolbar program onto any consumer's computer; (b) to require Respondent to issue an accounting of its installation of advertising, ad-serving, redirecting and toolbar programs; and (c) to require Respondent to pay disgorgement of unjust enrichment, as appropriate, and penalties and costs to the State of New York.

JURISDICTION AND PARTIES

2. Petitioners are the people of the state of New York, by their attorney, Eliot Spitzer, Attorney General of the State of New York. Petitioners have offices in the County of New York, located at 120 Broadway, New York, New York.

3. The Attorney General brings this summary proceeding pursuant to his authority under Executive Law § 63(12) and General Business Law ("GBL") §§ 349-350, and his common

law authority, to enjoin Respondent from engaging in persistent deceptive, fraudulent and illegal practices, and false advertising, in the distribution of certain advertising software, known as “spyware,” as well as persistent violation of New York common law prohibiting trespass to chattels.

4. GBL § 349 empowers the Attorney General to seek injunctive relief when any person or entity has engaged in deceptive acts or practices in the conduct of any business. GBL § 350-d empowers the Attorney General to seek, inter alia, civil penalties in the amount of \$500.00 for each violation of GBL § 350, the False Advertising Statute, and GBL § 349, the Deceptive Practices Statute. In addition, Executive Law §§ 63(12) and 63(15) empower the Attorney General to seek injunctive and equitable relief when any person or business entity has engaged in or otherwise demonstrated repeated fraudulent or illegal acts in the transaction of business. Finally, CPLR § 8303 entitles the Attorney General’s office to \$2000.00 in costs when it prevails on its claims.

5. Defendant Intermix Media, Inc. (“Intermix”) is a publicly-traded Delaware corporation with its principal offices in Los Angeles, California. Prior to July 15, 2004, Intermix was known as eUniverse, Inc. Since at least 2003, Intermix has distributed to millions of consumers a wide variety of “free” games, cursors, screensavers and other small software programs. As set forth herein, and in greater detail in the accompanying Affirmation of Justin Brookman dated April 16, 2005 (“Brookman Aff.”) and Affidavit of Vanessa Ip dated April 18, 2005, Intermix has deceptively and surreptitiously “bundled” with these programs undisclosed and invasive spyware (also known as “adware”) programs.

6. In addition to secretly bundling this spyware with its own software programs,

Intermix has contracted with agents to bundle the spyware with their own free programs.

7. Pre-litigation notice as provided for in GBL §§ 349 and 350-c has been given, by certified mail delivered on five or more days notice to Respondent. See Brookman Affirmation, ¶ 75.

**INTERMIX’S REPEATED AND PERSISTENT
PATTERN OF DECEPTIVE SPYWARE INSTALLATIONS**

8. The Attorney General has conducted an investigation into the manner in which Intermix and its agents deceptively and surreptitiously have spread Intermix’s spyware programs onto the computers of unsuspecting users. Generally, Intermix has done so by first offering ostensibly “free” software programs (such as screensavers and games) that anyone can download. Without disclosure to consumers, however, Intermix surreptitiously tacks onto these programs one or more additional programs that deliver ads and other invasive content. Thus, when users install a “free” Intermix screensaver or game, they also unwittingly install one or more spyware programs as well. In this manner, known as “bundling,” Intermix has spread its advertising programs onto millions of consumers’ hard drives. According to Intermix’s own figures provided to this office, this includes more than three million installations to New Yorkers.

9. As set forth in the Brookman Affirmation and Ip Affidavit, when bundling its spyware in this manner, Intermix offers consumers either no notice or only token notice about the hidden spyware programs. Intermix either fails to disclose these additional programs in any manner, or hides mention of them deep within lengthy, legalistic license agreements. Even in the latter case, the information Intermix does provide about the spyware programs is vague, incomplete and often factually incorrect.

10. Spyware programs that Intermix has fraudulently spread in this manner include “KeenValue” (a program that shows pop-up advertisements); “IncrediFind” (a program that redirects web addresses to Intermix websites); “Updater” (a program that allows Intermix to add or update programs and functionality to a user’s computer); and various “Toolbar” programs (programs that overlay onto users’ web browsers a “toolbar” linking to Intermix’s services and clients). Because these programs are permanently installed on the user’s hard drive and run during subsequent browsing sessions, they continue to advertise Intermix’s clients and report information about the user long after the user has left the websites of Intermix or its agents.

11. Between November 2004 and February 2005, this office tested all known distribution sites for Intermix’s spyware programs. In every single test, Intermix provided either no notice or woefully insufficient notice about Intermix’s bundled spyware programs. See accompanying Brookman Aff. with exhibits.

A. Spyware Installations From Websites Owned and Operated by Intermix

12. Intermix owns and operates over 40 distinct websites. Through several of these websites, Intermix advertises “free” programs for users to download, such as games, quizzes and screensavers. However, the company bundles with these programs a variety of spyware or adware programs, which bombard users with “pop-up” advertising and toolbars, redirect website requests and generally invade and obstruct users’ web browsing experience.

13. For instance, on <http://www.MyCoolScreen.com>, Intermix advertises dozens of free screensavers for users to download. In three separate tests, an Attorney General’s Investigator downloaded and installed screensaver programs from MyCoolScreen.com. See Brookman Aff. ¶¶ 14-30. In each case, several undisclosed spyware programs were

surreptitiously installed along with the screensaver, including KeenValue, IncrediFind and a Toolbar program.

14. In each such instance, none of the six screens leading up to the download of the screensaver product made any mention whatsoever of any bundled spyware products. The only hint of disclosure that additional software was bundled with the screensaver was the vague statement, in very tiny font on a single web page, that “[b]y downloading this screensaver, you agree to our Terms of Service.” See Brookman Aff. ¶ 26. Further hidden within the linked “Terms of Service” page, which primarily addressed arcane legal issues, was a cryptic (and factually inaccurate) warning that users would receive “the Grip toolbar [and] a piece of navigational software that offers results and suggested sites for misspelled web addresses.” The KeenValue pop-up ad program was not mentioned at all, by name, description or function. See id. ¶¶ 27-29.

15. The Attorney General recorded similar practices at other websites owned by Intermix, including <http://www.CursorZone.com>. See Brookman Aff. ¶¶ 31-32.

B. Spyware Installations From Websites Owned and Operated by Intermix’s Agents

16. Intermix also contracts with third party agents to bundle its spyware programs with other, seemingly innocuous, programs.

17. For instance, Intermix paid Acez Software (“Acez”), which is based in East Greenbush, New York, over \$170,000 between June 2003 and February 2005 to distribute spyware products such as IncrediFind, KeenValue and a Toolbar program. See Brookman Aff. ¶ 34.

18. As described in the Brookman Affirmation and Ip Affidavit, Acez bundled

Intermix's spyware programs in the same deceptive manner as on MyCoolScreen.com, discussed supra. Namely, Acez offered numerous free screensaver programs for users to download. However, when downloaded, each of these screensavers, unbeknownst to users who downloaded them, was bundled with one or more Intermix spyware programs.

19. As with MyCoolScreen.com, neither Intermix, nor Acez acting on Intermix's behalf, provided notice or disclosure about the bundled spyware programs prior to download. In successive tests conducted by the Attorney General's office, the sole hint – far from legally sufficient – of any software bundled with the screensaver occurred on the fourth page of a long license agreement, under the vague heading “Additional Information.” Even then, the bundled spyware was described in vague and misleading terms. See Brookman Aff. ¶¶ 35-42.

20. Intermix was aware of, and directed and controlled, Acez's deceptive actions. For instance, Intermix's Todd Smith provided Acez with the code for Intermix's spyware programs and determined what disclosure would be provided to Acez's customers. Smith also dismissed Acez's warnings about various complaints and criticisms of Intermix's secretly bundled spyware programs. See Brookman Aff. ¶¶ 44-47.

21. As set forth in the Brookman Affirmation, Intermix paid and directed several other agents to distribute its spyware, in similar fashion. In many instances, the disclosure to consumers was even worse, with no mention of Intermix or its bundled spyware programs anywhere. See Brookman Aff. ¶¶ 49-63.

22. The above instances are mere examples of Intermix's consistent practice of deceptively installing spyware. Other examples of this same deceptive conduct are set forth in the accompanying evidence and testimony. In all, Intermix has installed over three million such

programs to New Yorkers alone through its own websites and through its agents' websites. In our office's undercover tests, Intermix's spyware programs were never sufficiently disclosed to users before (or even after) download and installation. See Brookman Aff. ¶¶ 14-63.

**C. Intermix Obstructs User Efforts to
Detect and Remove its Spyware Programs**

23. Exacerbating the harm from its installation of hidden spyware programs, Intermix employs deceptive methods to prevent users from detecting and removing its software.

24. As described supra, Intermix does not adequately inform consumers that its software has been installed on their computers. Thus, when users later begin to receive annoying pop-up ads or redirected web page requests, the users generally have difficulty identifying and uninstalling the offending programs. Compounding this deception, Intermix prevents its software from being listed in the commonly accessed "All Programs" or "Programs" list, accessible through the "Start" button on Microsoft Windows. In addition, Intermix often hides programs such as "Updater" in the unlikely "Common Files" folder within Windows (as opposed to the appropriate and more commonly-accessed "Programs Files" folder). See Brookman Aff. ¶¶ 64-65, 71-72.

25. Making matters worse, Intermix designs its spyware programs so that when users uninstall the program with which the spyware was bundled (e.g., a screensaver), Intermix's spyware products remain behind, installed and fully operational. See Brookman Aff. ¶ 66.

26. Intermix also prevents its spyware programs from being listed in the commonly-accessed "Add/Remove Programs" utility in the Microsoft Windows operating system, making removal yet more difficult. Microsoft's "Add/Remove Programs" feature is the most common mechanism by which consumers uninstall programs from their computers. See Brookman Aff.

¶¶ 67-68.

27. Intermix even fails to provide its own “uninstall” utility – i.e., a small file that can be double-clicked to remove the program – within many of its spyware programs’ files or folders. Such functions are common in the software industry, particularly when a given program cannot be uninstalled by the operating system’s Add/Remove feature. See Brookman Aff. ¶ 69. In the rare instance where Intermix does allow for the uninstallation of its software, the uninstall often does not work properly, leaving files and functionality installed. See id. ¶ 70.

28. Finally, Intermix sometimes reinstalls spyware after a user has deleted it. Intermix’s Updater program installs new versions of other spyware programs onto users’ computers when they become available – even when those same users had deliberately deleted the programs previously. As noted supra, this Updater program is itself hidden in the “Common Files” folder, and likely would escape the attention of a user seeking to remove unwanted spyware from her computer. See Brookman Aff. ¶¶ 73-74.

**FIRST CAUSE OF ACTION
(DECEPTIVE ACTS AND PRACTICES)**

29. Petitioner repeats, realleges and incorporates paragraphs one through twenty-eight contained herein.

30. By engaging in the acts and practices described above, Respondent repeatedly and persistently has engaged in deceptive business practices in violation of GBL § 349.

31. GBL § 349 makes unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in [New York].”

32. By repeatedly and persistently engaging in the acts and practices described above, Respondent has repeatedly and persistently engaged in deceptive acts or practices in violation of

GBL § 349.

33. Respondent's violations of GBL § 349 constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

**SECOND CAUSE OF ACTION
(FALSE ADVERTISING)**

34. Petitioner repeats, realleges and incorporates paragraphs one through thirty-three contained herein.

35. GBL § 350 makes unlawful "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

36. By repeatedly and persistently engaging in the acts and practices described above, Respondent has repeatedly and persistently engaged in false advertising in violation of GBL § 350.

37. Respondent's violations of GBL § 350 constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

**THIRD CAUSE OF ACTION
(TRESPASS TO CHATTELS)**

38. Petitioner repeats, realleges and incorporates paragraphs one through thirty-seven contained herein.

39. New York common law prohibits the intentional intermeddling with a chattel, including a computer, in possession of another that results in the deprivation of the use of the chattel or impairment of the condition, quality or usefulness of the chattel.

40. By repeatedly and persistently engaging in the acts and practices described above, Respondent has repeatedly and persistently engaged in trespass to chattels in violation of New

York common law.

41. Respondent's violations of New York common law constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

WHEREFORE, Petitioners request that this court grant relief pursuant to Executive Law § 63(12), General Business Law §§ 349 and 350, and New York common law, against

Respondent by issuing an Order and Judgment as follows:

- i. permanently enjoining Respondent from installing any advertising, ad-serving, redirecting, or toolbar program onto any consumer's computer;
- ii. directing Respondent to provide Petitioners with all records of all Respondent's advertising, ad-serving, redirecting and toolbar programs installed onto consumers' computers, including all records concerning or reflecting any disclosure provided to consumers prior to or during installation;
- iii. directing Respondent to provide Petitioners with an accounting of all revenues generated from the distribution of its advertising, ad-serving, redirecting and toolbar programs and that a money judgment be entered against Respondent in the sum of unjust enrichment;
- iv. directing that a money judgment in civil penalties pursuant to G.B.L. § 350-d be entered against Respondent in favor of the State of New York, based upon the sum of Five Hundred Dollars (\$500) per each instance of a deceptive or unlawful practice;
- v. directing that a money judgment be entered against Respondent in favor of

Petitioners in the sum of Two Thousand Dollars (\$2000) in costs against
Respondent, pursuant to CPLR § 8303(a)(6);

- vi. granting Petitioners such other and further relief as this Court finds just
and proper.

DATE: April __, 2005
New York, New York

**ELIOT SPITZER
ATTORNEY GENERAL
OF THE STATE OF NEW YORK**

By: Justin Brookman
Internet Bureau
Attorney for Petitioner
120 Broadway, 3rd Floor
New York, New York 10271
(212) 416-8433

Of Counsel:
Kenneth M. Dreifach
Assistant Attorney General In Charge
Internet Bureau