

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SEISMIC ENTERTAINMENT
PRODUCTIONS, INC., *et al.*

Defendants.

Civil No.: 04-377-JD

**STIPULATED FINAL ORDER FOR PERMANENT
INJUNCTION AND SETTLEMENT OF CLAIMS FOR MONETARY RELIEF
AGAINST DEFENDANT JOHN ROBERT MARTINSON**

Plaintiff, Federal Trade Commission (“FTC” or “Commission”), filed an Amended Complaint for Permanent Injunction and Other Equitable Relief (“Amended Complaint”) pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), alleging, *inter alia*, that John Robert Martinson (“Martinson”), Mailwiper, Inc. (“Mailwiper”), and Spy Deleter, Inc. (“Spy Deleter”) (collectively, “Defendants”) engaged in unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) in connection with their marketing and distribution of software products to consumers. (Dk. No. 37). Defendant Martinson denies the allegations in the Amended Complaint, except for jurisdictional facts, but is willing to agree to the entry of the following Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief Against Defendant John Robert Martinson (“Order”), without adjudication of any issues of fact or law.

The Commission and Defendant Martinson have stipulated and agreed to the entry of the following Order in settlement of the Commission’s Complaint against him. The Court, being advised in the premises, finds:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and jurisdiction over Defendant Martinson pursuant to 15 U.S.C. §§ 45(a), 53(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.

2. Venue as to Defendant Martinson in the District of New Hampshire is proper pursuant to 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c).

3. The Amended Complaint (Dk. No. 37) states a claim upon which relief can be granted pursuant to Sections 5(a)(1) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b), and the Commission has the authority to seek the relief it has requested.

4. The acts and practices of Defendant Martinson are or were in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

5. The parties waive all rights to seek appellate review or otherwise challenge or contest the validity of this Order. Defendant Martinson also waives any claims that he may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order.

6. Each party shall bear its own costs and attorneys' fees.

7. Entry of this Order is in the public interest.

8. This Order was drafted jointly by Plaintiff and Defendant Martinson and reflects the negotiated agreement among the parties.

9. The paragraphs of this Order shall be read as the necessary requirements for compliance and not as alternatives for compliance and no paragraph serves to modify another paragraph unless expressly so stated.

DEFINITIONS

For the purpose of this Order, the following definitions shall apply:

1. "Assisting others" means knowingly providing any of the following services to any person or entity: (a) developing, supplying, distributing, or publishing any software

program, product, or service; or (b) formulating, developing, or providing, or arranging for the formulation, development, or provision of, any Internet advertising or marketing content for any person or entity; or (c) performing advertising or marketing services of any kind for any person or entity.

2. “Affiliate program” means any program whereby any person agrees to advertise, market, promote, disseminate, distribute, or download any program, product, or service, including, but not limited to, software products, on behalf of Defendants.

3. “Commerce” means as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The “World Wide Web” or the “Web” is a system used on the Internet for cross-referencing and retrieving information. Documents (“pages” or “sites”) on the World Wide Web are most frequently formatted in a language called HTML or HyperText Markup Language, that supports links to other documents on the World Wide Web.

5. A “web site” is a set of electronic files or documents, usually a home page and subordinate pages, readily viewable on a computer by anyone with access to the Web and standard Internet browser software.

6. A “web browser” is a software application used to view, download, upload, surf or otherwise access documents (“pages” or “sites”) on the World Wide Web. Web browsers read coded documents that reside on servers, and interpret the coding into what users see rendered as a web page or web site. A user may retrieve and view a web page or site by entering the Uniform Resource Locator (“URL”) or domain name of the web page in the address bar of the web browser.

7. A “security vulnerability” means a weakness, flaw, or bug in a software program or application that can be used to increase access privileges to a computer system, compromise data stored on it, or control its operation.

8. “Express consent” means that, prior to installing any software program or application to consumers’ computers:

- (a) Defendant clearly and prominently disclose the material terms of such software program or application; and
- (b) Consumers install or download such software program or application by clicking on a button that is labeled to convey that it will activate the installation or download, or by taking a substantially similar action.

9. “Clearly and prominently” shall mean that, in the case of advertisements communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. Provided, however, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer installing or downloading any software code, program, or content and prior to the consumer incurring any financial obligation.

10. Unless otherwise specified, “Defendant” means John Robert Martinson (“Martinson”) individually and in his capacity as an officer and director of Mailwiper, Inc. and Spy Deleter, Inc.

11. “FTC” or “Commission” means the Federal Trade Commission.

12. A requirement that any Defendant “notify,” “furnish,” “provide,” or “submit” to the Commission means that the Defendant shall send the necessary information via first class mail, costs prepaid, or via overnight carrier, to:

Associate Director for Enforcement
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington D.C. 20580
Attn: *FTC v. Seismic Entertainment Productions, Inc., et al.* (D.N.H.)

13. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.

14. The term “including” in this Order means “including without limitation.”

PROHIBITED BUSINESS ACTIVITIES

I.

IT IS THEREFORE ORDERED that Defendant Martinson and his agents, employees, salespersons, independent contractors, affiliates, successors, assigns and all other persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any person, corporation, subsidiary, division, or other device, are hereby enjoined from, or assisting others in, publishing, disseminating, or distributing on or through the Internet, the World Wide Web, any bulletin board system, File Transfer Protocol (“FTP”), electronic-mail, instant message, web page, or web site, any software script, code, or other content that exploits a security vulnerability of any computer operating system, web browser, or other application to download or install onto any computer any software code, program, script, or content.

II.

IT IS FURTHER ORDERED that, Defendant Martinson and his agents, employees, salespersons, independent contractors, affiliates, successors, assigns and all other persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any person, corporation, subsidiary, division, or other device, in connection with the advertising, promotion,

marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any web page or web site, are enjoined from, or assisting others in:

- A. installing or downloading any software program or application without express consent;
- B. redirecting computers connected to the Internet or World Wide Web to different web sites, web pages, FTP servers, or other Internet servers than those that the consumer selects to visit;
- C. changing or causing to change any web browser's default home page to a different web page; and
- D. modifying or replacing any search engine's or other application's search features or functions.

MONITORING BY DEFENDANT FOR COMPLIANCE

III.

IT IS FURTHER ORDERED that Defendant Martinson and his agents, employees, salespersons, independent contractors, affiliates, successors, assigns and all other persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any web page or web site, are hereby enjoined from failing to:

- A. Obtain contact information from any prospective participant in any affiliate program. In the case of a natural person, Defendant shall obtain the prospective participant's first and last name, physical address, country, telephone number, e-mail address, and complete bank account information as to where payments are to be made. In the case of corporations, partnerships, proprietorships, limited liability companies, organizations, associations, cooperatives, agencies, or other legal entities, Defendant shall obtain the first and last name, physical address, country, telephone number, and e-mail address for the natural person who owns,

