

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ODYSSEUS MARKETING, INC., and
WALTER RINES,

Defendants.

Civil No. 05-CV-330-SM

**STIPULATED FINAL ORDER
FOR PERMANENT INJUNCTION AND
SETTLEMENT OF CLAIMS FOR MONETARY RELIEF**

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”) filed a Complaint and Amended Complaint (“Complaint”) for permanent injunction and other relief pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b). The Complaint alleges that Odysseus Marketing, Inc. (“Odysseus”) and Walter Rines (“Rines”) (collectively “Defendants”) engaged in unfair and deceptive 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 to consumers. Defendants Odysseus and Rines deny the allegations in the Complaint, except jurisdictional facts, but are willing to agree to the entry of the following Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief (“Order”), without adjudication of any issues of fact or law.

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

FINDINGS

1. This Court has jurisdiction over the subject matter of this case, and jurisdiction over Defendants Odysseus and Rines pursuant to 15 U.S.C. §§ 45(a), 53(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.
2. Venue 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 Complaint states a claim upon which relief can be granted and the Commission has the authority to seek the relief it has requested.
4. The activities of Defendants are or were in or affecting commerce, as defined in 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. Defendants also waive any claims that they 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 Defendants Odysseus and Rines 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.

ORDER

DEFINITIONS

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

1. "Odysseus" means Odysseus Marketing, Inc., a New Hampshire corporation with its principal place of business at 6 Laurel Lane, Stratham, New Hampshire 03885.

2. "Rines" means Walter Rines, individually and as an officer and director of Odysseus.
3. "Defendants" means Odysseus and Rines.
4. "Covered product" shall mean any desktop or laptop computer, handheld device, telephone, or other electronic product or device that has a platform on which to download, install, and run any software program, code, or other content.
5. "Kazanon" means the software program marketed under the name "Kazanon," including any and all versions that Defendants advertised, or caused to be advertised, through the Internet, including but not limited to, through the web site www.kazanon.com.
6. "Uninstall" means:
 - a. Removing a software program from a covered product;
 - b. Removing all files, registry keys, and components that were added to a covered product when such software program was initially installed;
 - c. Removing all files, registry keys, and components that were subsequently generated by such software program;
 - d. Restoring all files, registry keys, and components that such software program caused to be altered; and
 - e. Preventing the reinstallation of such software program or any of its files, registry keys, or components.
7. "Express consent" means that:
 - a. Prior to distributing, downloading, or installing any software program, code, script, or other content to any covered product:
 1. The specific effects that such software program, code, script, or other content would have on the covered product are clearly and conspicuously disclosed to the user of the product, including, but not limited to, disclosure of any of the following:

- i. Causing the display of any advertisement, including but not limited to any pop-up or banner advertisement, any sponsored link or hyperlink to an advertisement placed on a web site, or any contextual response;
 - ii. Modifying any web browser or operating system software;
 - iii. Collecting personally identifiable information or passwords or codes that enable access to such information;
 - iv. Causing the download of any additional software program, code, script, or content;
 - v. Causing additional web browser windows to open a URL related to the URL a consumer is viewing; and
 - vi. Placing icons on a consumer's desktop or in the "Favorites" folder; and
 2. The user of the covered product indicates assent to the installation or download of such software program, code, script, or other content by clicking on a button that is clearly labeled to convey that it will activate the installation or download, or by taking substantially similar affirmative action authorizing the installation or download.
- b. Prior to obtaining any personally identifiable information from any person:
1. The specific personal information to be obtained is clearly and conspicuously disclosed to that person;
 2. Each specific use, including but not limited to each sale, rent, lease, transfer, or other disclosure, that will be made of such information is clearly and conspicuously disclosed to that person; and

3. That person indicates assent to the taking and use of such information by clicking on a button that is labeled to convey his or her specific consent to the specific taking and use of the information, or by taking substantially similar affirmative action authorizing the taking and use of the information.
8. “Clearly and conspicuously” means:
 - a. The disclosure shall be unavoidable. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement;
 - b. In the case of any disclosure concerning the distribution or installation of any software program or other content, the disclosure shall be made prior to the consumer installing or downloading any software code, program, or content and prior to the consumer incurring any financial obligation;
 - c. In the case of any disclosure concerning the obtaining or use of personally identifiable information, the disclosure shall be made immediately prior to the person providing any such information;
 - d. In the case of any disclosure required for purposes of obtaining express consent as defined in this Order, a disclosure made in any End User License Agreement shall *not* constitute a clear and conspicuous disclosure; and
 - e. 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 video portion 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 such disclosure.

9. “Personally identifiable information” means identifiable information from or about an individual including, but not limited to:
 - a. A first and last name;
 - b. A home or other physical address, including street name, name of a city or town, and zip code;
 - c. An email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual’s email address;
 - d. A telephone number;
 - e. A Social Security Number, tax identification number, passport number, driver’s license number, or any other government-issued identification number;
 - f. A financial account number, in combination with any information necessary to access the account;
 - g. An Internet Protocol (“IP”) address or host name that identifies an individual;
 - h. A persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual; or
 - i. Any information that is combined with subparts a through h above.
10. 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.

11. “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;
 - 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.
12. “Operating system” means the system software responsible for managing and controlling a covered product’s hardware and computer resources and its basic operations, including providing a platform on which to download, install, and run any software program.
13. 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 HyperText Markup Language (“HTML”), which supports links to other documents on the World Wide Web.
14. A “web site” is a set of electronic files or documents, usually a home page and subordinate pages, readily viewable by anyone with access to the Web and standard Internet browser software.
15. A “web page” is a single electronic document on the World Wide Web, readily viewable by anyone with access to the Web and standard Internet browser software. Every web page on the World Wide Web is identified by a globally unique address.
16. 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.

17. A “Host” or “Hosting Company” is the party that provides the infrastructure for a computer service. With respect to web pages and web sites, a Host or Hosting Company maintains “Internet servers” – the computers on which web sites, web pages, Internet files, or resources reside. The Host or Hosting Company also maintains the communication lines required to link the server to the Internet.
18. “Internet Service Provider” is the party that provides users access to the Internet.
19. “Affiliate program” is an arrangement under which an online merchant pays another (the “affiliate”) to market, advertise, and/or distribute goods, software programs, or services on the merchant’s behalf, with the affiliate being paid based on performances measures, typically sales, downloads, clicks on banner ads, or registrations, for which its activities were responsible.

PROHIBITED BUSINESS ACTIVITIES

Distribution or Installation of Software Script, Code, or Other Content

I.

IT IS HEREBY ORDERED that Defendants, whether acting directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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, 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 operating system, web browser, or other application to download or install any software code, program, script, or content.

II.

IT IS FURTHER ORDERED that Defendants, whether acting directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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, are hereby enjoined from, or assisting others in:

- A. Distributing, installing, or downloading, or causing any user of a covered product to download or install, any software program, code, script, or any other content *unless* such user provides express consent as defined in this Order prior to the distribution, installation, or downloading; and
- B. Distributing, installing, or downloading, or causing any user of a covered product to download or install, any software program, code, script, or any other content that:
 - 1. Redirects any covered product that is connected to the Internet or World Wide Web to different web sites, web pages, FTP servers, or other Internet servers than those the product's user chose to visit;
 - 2. Modifies or replaces any search engine's or other application's search results, search features, or functions; or
 - 3. Changes or causes to change any web browser's default home page to a different web page.

III.

IT IS FURTHER ORDERED that Defendants, whether acting directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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 distributing or downloading any software program, code, script, or other content, are hereby enjoined from, or assisting

others in, deleting, modifying, altering, or replacing files contained in the System32 folder of any Microsoft Windows operating system.

Receipt and Use of Personally Identifiable Information

IV.

IT IS FURTHER ORDERED that Defendants, whether acting directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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, are hereby enjoined from, or assisting others in:

- A. Obtaining any personally identifiable information of any person *unless* that person provides express consent as defined in this Order prior to the taking and use of the information;
- B. Selling, renting, leasing, transferring, or otherwise disclosing any personally identifiable information of any person whose information was obtained without such person's express consent; and
- C. Using or receiving any remuneration or other consideration from any third party for the use of any personally identifiable information of any person whose information was obtained without such person's express consent.

V.

IT IS FURTHER ORDERED that Defendants, whether acting directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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, are hereby enjoined from, or assisting others in, selling, renting, leasing, transferring, disclosing, using, or otherwise benefitting from the use of any personally identifiable information that was obtained by or for any Defendant, at any time prior to entry of this Order, in connection with the distribution of Ipend, Datastorm, or Clientman software or other Internet-related activities. *Provided, however,* the Defendants may

disclose such information to a law enforcement agency or as required by any law, regulation, or court order. *Provided further*, that no later than thirty (30) days after entry of this Order, Defendants shall permanently delete or destroy all such information and shall provide written confirmation to the FTC, sworn under penalty of perjury, that all such personally identifiable information has been deleted or destroyed unless Defendants are prohibited from deleting or destroying such information by law, regulation, or court order, in which case Defendants shall provide a written statement to the FTC, sworn under penalty of perjury, identifying any personally identifiable information that has not been deleted or destroyed and the specific law, regulation, or court order that prohibits Defendants from deleting or destroying such information.

Representations Concerning Efficacy and Performance

VI.

IT IS FURTHER ORDERED that Defendants, directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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 labeling, advertising, promotion, offering for sale, sale, distribution, installation, or downloading of any type of software program, code, file, or content, are hereby enjoined from making, or assisting others in making, expressly or by implication, including through the use of trade names or endorsements:

- A. Any representation that such product makes users of peer-to-peer file-sharing programs anonymous, and that therefore no one will discover their identity, or their computers' IP address or location, when they download or trade music, movies, software, or any other data, sound, or video file over the Internet, or
- B. Any representation concerning the absolute or comparative benefits, efficacy, performance, cost, or features of such software program, code, file, or content, unless such representation is true, non-misleading, and at the time the claim is made,

Defendants possess and rely upon competent and reliable evidence that substantiates the representation.

Removal of Software

VII.

IT IS FURTHER ORDERED that Defendants, whether acting directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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, are hereby enjoined from, or assisting others in, distributing, installing, or downloading, or causing any user of a covered product to download or install, any software program, code, script, or any other content without providing a reasonable and effective means to uninstall such software program, code, script, and any other content from any covered product on which it is installed, either through the use of the default uninstall utility of the product's operating system or an uninstall utility that is included with such software program, code, script, or other content. For purposes of this Order, requiring any user of a covered product to access a web site to uninstall such software program, code, script, or other content shall not constitute a reasonable and effective means to uninstall.

VIII.

IT IS FURTHER ORDERED that Defendants, whether acting directly or through any person, corporation, subsidiary, division, or other device, and their officers, agents, directors, 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, are hereby enjoined from, or assisting others in, distributing, installing, or downloading, or causing any user of a covered product to download or install any software program, code, script or other content that prevents the user of the covered product from readily locating or removing the software, including but not limited to, the following:

