

Complaint

125 F.T.C.

IN THE MATTER OF

BEYLEN TELECOM, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3782. Complaint, Jan. 23, 1998--Decision, Jan. 23, 1998*

This consent order prohibits, among other things, two companies and an officer from falsely advertising that using their special "viewer" would be "free" and from disconnecting consumers from their local Internet service provider and reconnecting them to international numbers assigned to the country of Moldova. The consent order requires that the proposed settlement include the payment of redress funds to AT&T and MCI, which will issue credits to their customers who were billed for the calls, and to the FTC, which will issue refunds to customers of other long-distance carriers who were billed for the calls.

Appearances

For the Commission: *Paul Luehr* and *Eileen Harrington*.

For the respondents: *Joel R. Dichter, Klein, Zelman & Rothermel*,
New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Beylen Telecom, Ltd. and NiteLine Media, Inc., corporations, and Ron Tan, individually and as an officer of NiteLine Media, Inc. ("the respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Beylen Telecom, Ltd., ("BTL") is a corporation organized, existing and doing business under and by virtue of the laws of the Cayman Islands with its principal office or place of business at Genesis Building, PS Box 2097, Grand Cayman, Cayman Islands, British West Indies.

2. NiteLine Media, Inc. ("NiteLine") is a corporation doing business under and by virtue of the laws of the State of New York with its principal office or place of business at 7302 19th Avenue, Brooklyn, New York.

3. Ron Tan a/k/a Roeun Tan ("Tan") is an officer and shareholder of corporate respondent NiteLine Media, Inc. Individually or in concert with others, he has formulated, directed, controlled or participated in the acts or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of NiteLine Media, Inc.

4. At all times relevant to this complaint, the respondents have maintained a substantial course of trade, advertising, offering for sale and selling computer-stored images via both the Internet and international and interstate telephone lines, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

COURSE OF BUSINESS

5. From at least December 1996 through January 1997, the respondents Tan and NiteLine posted messages to newsgroups and operated and promoted one or more World Wide Web sites, including the web sites located at "www.erotica2000.com" and "www.erotica2000.com." Through newsgroup messages and these web sites, respondents Tan and NiteLine represented, expressly or by implication, that consumers could view "adult" images for free at sites on the Internet. A newsgroup is a collection of electronic messages, purportedly about a given topic, that consumers may read on the Internet. The World Wide Web or Web is a system used on the Internet for cross-referencing and retrieving information. A web site is a set of electronic documents, usually a home page and subordinate pages, readily viewable on computer by anyone with access to the Web, standard software, and knowledge of the web site's location or address.

6. At one or more of the web sites operated by respondents Tan and NiteLine and in one or more of their newsgroup messages, respondents Tan and NiteLine stated that they offered "FREE XXX Images" for viewing at "FREE ADULT SITES." In addition, at one or more of their web sites, the respondents Tan and NiteLine stated that the international sites they offered entailed:

NO MEMBERSHIP FEES!
NO CREDIT CARDS NEEDED!
NO 900# CHARGES!

7. Web sites operated by respondents Tan and NiteLine instructed consumers that to view the "adult" images offered, the consumer had

to first "download a special image viewer." This "image viewer" was a software program, which was identified as "david.exe," or "david7.exe," or other similar names.

8. Contrary to the clear implication of the term "image viewer" that respondents Tan and NiteLine used on their web sites to describe this software program, the "david.exe" (or similarly named software) was not merely a means for reading computer data and converting such data into visual images. Instead, this software, if downloaded, installed, and activated, would, without any explanations or adequate disclosures: (a) automatically terminate the consumer's computer modem connection to the consumer's local Internet service provider while maintaining the appearance that the computer modem remained connected to such local Internet service provider; (b) automatically direct the consumer's computer modem to dial an international telephone number to re-connect to the Internet; (c) maintain the international long distance telephone connection thus established unless and until the consumer turned off the power switch to his computer or modem, or took other unusual action to terminate the telephone connection; and (d) caused the consumer to incur international long distance telephone charges on his telephone bill at rates in excess of \$2.00 per minute for as long as the international long distance telephone connection was maintained. One of the techniques that this software employed to maintain the appearance that the computer modem remained connected to the consumer's local Internet service provider was to automatically turn off the speaker on the consumer's modem before dialing, thus preventing the consumer from hearing the sound of the international number being automatically dialed.

9. Prior to about January 23, 1997, respondents Tan and NiteLine, at one or more of their web sites and in newsgroup messages, failed to disclose any of the events, described above in paragraph eight, that automatically followed if one downloaded, installed and activated the purported "viewer" software.

10. Respondents Tan and NiteLine changed one or more of their web sites on or about January 23, 1997. Nevertheless, after that date, their web sites and newsgroup messages continued to fail to disclose that once a consumer downloaded, installed and activated the "viewer" software, it caused consumers to incur international long distance telephone charges at rates in excess of \$2.00 per minute. In addition, web sites and news group messages posted by respondents

Tan and NiteLine continued to fail to disclose that the consumer's computer modem would maintain the international long distance telephone connection unless and until the consumer turned off the power switch to his computer or modem or took other unusual action to terminate the telephone connection.

11. After about January 10, 1997, one or more of respondents' web sites stated if consumers downloaded their "viewer" software, the consumers' computer modems would be connected to a site in Moldova, a former constituent state of the now-defunct Soviet Union. However, the computer modems of consumers who downloaded the software were not connected to a site located in Moldova, but rather were connected to a site located in Canada. Thus, even though the automatic telephone call generated by the "viewer" software went to Canada, the consumer was charged at the comparatively much higher per-minute rates for a call to Moldova.

12. Once a consumer had downloaded, installed and activated the purported "viewer" software offered by respondents Tan and NiteLine, the consumer continued to incur international long distance telephone charges for as long as his computer modem was connected to the international long distance number and even after the consumer had exited respondents Tan and NiteLine's "adult" sites.

13. Respondents Tan and NiteLine's promises of "free" Internet viewing of computer-stored images lured consumers from the U.S. and foreign countries into incurring hundreds of thousands of dollars in international long distance telephone charges.

14. Respondent BTL is a service bureau that provides telecommunications and other services to entities that promote international pay-per-call programs. In that capacity, respondent BTL assigned Moldovan telephone numbers to respondent NiteLine, as well as to Internet Girls, Inc. -- a defendant in the federal court action, *FTC v. Audiotex Connection, Inc.* CV-97 0726 (DRH) (E.D.N.Y. filed Feb. 13, 1997). Directly or indirectly, respondent BTL also provided NiteLine and Internet Girls with the following services: (a) daily telephone traffic and billing reports; (b) the "david.exe" (or similarly named software) program and technical support for this "viewer" software program described above; (c) text or graphics to use in soliciting consumers on the Internet, including information that Tan or NiteLine incorporated into newsgroup messages or that Tan, NiteLine, or Audiotex defendants William Gannon or Internet Girls incorporated into the web sites "www.erotica2000.com,"

"www.erotica2000.com," "www.sexygirls.com," "www.1adult.com," or "www.beavisbutthead.com"; and (d) a termination point for audiotext calls, namely a site in Canada containing computer images for viewing.

15. A foreign telephone carrier contracted to pay respondent BTL a portion of the revenues received from consumers for calls placed to specific international telephone numbers. Respondent BTL, in turn, contracted to pay respondent NiteLine a per-minute rate for calls they generated to those specific international telephone numbers. (Respondent BTL contracted to pay defendant Internet Girls on a similar basis). Thus, respondents BTL, Tan, and NiteLine were to receive a portion of the amount of international telephone charges incurred by consumers.

VIEWING COST

16. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents Tan and NiteLine represented to consumers, expressly or by implication, that consumers could view the images without cost by downloading, installing and activating purported "viewer" software.

17. In truth and in fact, once a consumer downloaded, installed and activated the purported "viewer" software to view computer-stored images located at Internet sites, the consumer incurred costs for an international long distance telephone call.

18. Therefore, the representations of respondents Tan and NiteLine, as set forth in paragraph sixteen, above, were false and deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

SOFTWARE FOR DOWNLOADING

19. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents Tan and NiteLine represented to consumers, expressly or by implication, that consumers could view the images by downloading, installing and activating purported "viewer" software.

20. In numerous instances, respondents Tan and NiteLine failed to disclose or disclose adequately to consumers the material facts that, by downloading, installing, and activating the purported "viewer" software, the following would result:

- a. The consumer's computer would terminate its modem connection to the consumer's usual local Internet service provider;
- b. The consumer's modem would dial an international long distance telephone number and establish a long-distance telephone connection with an Internet service provider at some remote location outside the United States;
- c. The consumer would likely incur international long distance telephone charges at rates in excess of \$2.00 per minute for as long as the long-distance telephone connection with the remote Internet service provider was maintained; and
- d. The consumer's computer modem would not terminate the international long distance telephone connection to the remote Internet service provider unless and until the consumer turned off the power switch to his computer or modem or took other unusual action to terminate the telephone connection.

21. In view of representations by respondents Tan and NiteLine that consumers could view certain images located at Internet sites by downloading, installing and activating purported "viewer" software, as set forth in paragraph nineteen, above, respondents Tan and NiteLine's failure to disclose or disclose adequately the material information set forth in paragraph twenty, above, was deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

22. By providing respondent NiteLine (and defendant Internet Girls) with telephone numbers, and by directly or indirectly providing the "viewer" software, text or graphics, or other goods or services described in paragraphs fourteen and fifteen, above, for the purpose of inducing consumers to call international telephone numbers, respondent BTL provided the means and instrumentalities to others, and thereby acted in concert with others or knowingly and substantially assisted others, to engage in the deceptive acts and practices alleged in paragraphs sixteen through twenty-one, above, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

TELEPHONE BILLING

23. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents directly or through an intermediary caused charges for long distance calls to Moldova to appear on the telephone

billing statements of consumers who downloaded, installed and activated respondents' purported "viewer" software.

24. In truth and in fact, the call that a consumer's computer modem dialed when the consumer downloaded, installed and activated respondents' purported "viewer" software did not go to Moldova, which has high per-minute long distance telephone rates for calls from the United States, but instead went to Canada, which has comparatively much lower long distance rates for calls from the United States.

25. Therefore, respondents' practice of causing charges for long distance calls to Moldova to appear on the telephone billing statements of consumers who had downloaded, installed and activated respondents' purported "viewer" software, as set forth in paragraph twenty-three, above, was deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

26. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Thompson and Commissioner Swindle not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents for purposes of the order of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are

true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1a. Respondent Beylen Telecom, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the Cayman Islands with its principal office or place of business at Genesis Building, PS Box 2097, Grand Cayman, Cayman Islands, British West Indies.

1b. Respondent NiteLine Media, Inc. is a New York corporation with its principal office or place of business at 7302 19th Avenue, Brooklyn, New York.

1c. Respondent Ron Tan is an individual residing within the State of New York and is an officer and shareholder of NiteLine Media, Inc. Individually or in concert with others he formulates, direct, or controls the policies, acts, or practices of NiteLine Media. His principal office or place of business is the same as that of NiteLine Media, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. "*Beylen*" means Beylen Telecom, Ltd. and its successors, assigns, shareholders, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

2. "*NiteLine*" means NiteLine Media, Inc. and its successors, assigns, shareholders, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

3. "*Ron Tan*" means Ron Tan a/k/a Roeun Tan, individually, and in his capacity as an officer and shareholder of NiteLine Media, Inc., and his successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

4. Unless otherwise specified, "*respondents*" shall mean Beylen and NiteLine, corporations, their successors and their officers; Ron Tan, individually and as an officer of NiteLine; and each of the above's agents, representatives and employees. Unless otherwise specified, "respondent" shall mean NiteLine, Ron Tan or Beylen.

5. "*Commerce*" shall mean "commerce" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

6. "*Clearly and conspicuously*" shall mean as follows:

In an advertisement 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 portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video 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 incurring any financial obligation. The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

7. "*Document*" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from

which information can be obtained. A draft or non-identical copy is a separate document within the meaning of the term.

8. "*David.exe*" means a software program that, as alleged in the Commission's draft complaint, a respondent has promoted, offered, distributed, or provided on web sites as a "viewer," which consumers may download, install, and execute, and which dials an international long-distance telephone number for which a fee is charged.

9. "*Eligible consumer*" means a telephone subscriber that was billed for international long distance calls to Moldova from December, 1996 through February, 1997 to one of the telephone numbers listed in Schedule A, annexed hereto.

10. "*Relevant charges*" means the dollar amount billed by AT&T, MCI, Sprint or another long distance carrier to an eligible consumer for international long distance calls to Moldova from December 1996 through February 1997, to one of the telephone numbers listed in Schedule A, annexed hereto.

I.

It is therefore ordered, That, in connection with using the Internet to place international long distance telephone calls, each respondent shall not violate Section 5(a) of the FTC Act, 15 U.S.C. 45(a) by:

A. Representing, either directly or by implication, that consumers may download, install, activate or use a computer software program to view computer-stored images without cost, unless there are no costs to consumers arising from such activity.

B. Representing, either directly or by implication, that a consumer may view computer-stored images by downloading, installing and activating a software program known as "*David.exe*" or any other substantially similar software, unless such respondent clearly and conspicuously discloses, in close proximity to the representation, any material facts concerning costs and consequences to a consumer that result from downloading, installing, and activating such software, including, but not limited to, the following:

1. That the consumer's computer will terminate its modem connection to the consumer's usual Internet service provider;

2. That the consumer's modem will dial an international long-distance telephone number and establish a long-distance telephone connection with some remote location outside the United States;

3. (a) A statement that "International long distance telephone charges to [insert country of call termination] apply"; and

(b) Either:

(i) A statement that "This call may cost you as much as [insert the maximum estimate of possible per-minute tariffed charge available through one of the three largest U.S. long-distance carriers (*e.g.* MCI, Sprint or AT&T; hereafter "a major U.S. carrier")] per minute"; or

(ii) A stated range of possible costs per-minute for the call, where the maximum possible per-minute charge available through a major U.S. carrier is disclosed at least as prominently as any lower estimate of possible charges, and the lower estimate is based on a non-promotional standard tariffed charge available through a major carrier, and there is a clear and conspicuous disclosure of the following statement: "To determine your exact per-minute charges, contact your long distance carrier."; and,

4. That, once connected, the consumer's computer modem will not terminate the international long-distance telephone connection to the remote service provider unless and until: (a) the consumer terminates the connection by using a "disconnect" feature that is displayed on the screen throughout the connection; OR (b) the call is terminated automatically after some specific, stated period of time (*e.g.* after 5 minutes); OR (c) the consumer turns off the power switch to his computer or modem, or takes other drastic and unusual action to terminate the telephone connection, if neither (a) nor (b) above are applicable.

II.

It is further ordered, That:

A. Each respondent shall not violate Section 5(a) of the FTC Act, 15 U.S.C. 45(a) by directly causing international long-distance charges to appear on the telephone billing statement of any consumer when such call does not, in fact, go to the international destination for which charges are assessed; and

B. Each respondent, when contracting with any entity for international call charges to appear on any consumer's telephone bill, shall include written terms in such contract requiring calls to go to the destination for which charges are assessed on a consumer's telephone bill. If, at the time of the entry of this order, a respondent has an

existing contract with another entity that arranges call charges to appear on any consumer's telephone bill, the respondent may satisfy the requirements of this Section by obtaining from that entity a letter or other written assurance that calls go to the destination for which charges are assessed on a consumer's telephone bill.

III.

It is further ordered, That:

A. Pursuant to the Consent Decree and Order proposed in *FTC v. Audiotex Connection, Inc.*, CV-97 0726 (DRH) (EDNY) ("the Consent Decree"), and after the entry of such Consent Decree, eligible consumers charged by AT&T or MCI for telephone calls involving David.exe shall, to the extent possible, receive a credit on their monthly telephone bill equal to the amount of the relevant charges. To the extent an eligible consumer has already been credited such an amount in full, no additional credit shall be extended. To the extent an eligible consumer has received a partial credit, only the remaining balance of the original relevant charge shall be credited. The process for issuing the credits to eligible consumers will be administered by AT&T and MCI, respectively, and monitored and/or audited by the FTC. The reasonable costs of the two carriers arising from the issuance of credits for the relevant charges and from such administration of credits shall be reimbursed by the escrow agent by deducting and paying to AT&T and MCI, respectively, the amounts stated below.

B. Pursuant to the Consent Decree and Order proposed in *FTC v. Audiotex Connection, Inc.*, CV-97 0726 (DRH) (EDNY), and after the entry of such Consent Decree, a Redress Escrow Account shall be established at a bank with a branch located in the State of New York, and Joel Dichter, Esq., shall be designated as the sole escrow agent and signatory to this Redress Escrow Account. In addition to the funds deposited by the defendants in *FTC v. Audiotex Connection, Inc.*, the respondents shall deposit sufficient funds into the Redress Escrow Account as are necessary to enable the escrow agent to distribute the funds, consisting of a total deposit of all sums provided by Section IIIB(1) and (2), below, contemporaneously with a deposit of the \$60,000 provided by Section IIIB(3), in the following manner:

1. AT&T shall be distributed the sum of \$660,000 toward the cost of administering the credit to consumers provided by Section IIIA,

above, and toward reimbursement of out-of-pocket expenses associated with calls to the Moldova telephone numbers;

2. MCI shall be distributed the sum of \$99,302.57 toward the cost of administering the credit to consumers provided by Section IIIA above and toward reimbursement of out-of-pocket expenses associated with calls to the Moldova telephone numbers;

3. Forty Thousand Dollars (\$40,000) shall be distributed to the Federal Trade Commission and shall be used, where practicable, to provide redress to eligible consumers charged by an international long-distance carrier other than AT&T or MCI (hereinafter referred to as "Eligible Non-AT&T/MCI Consumers"). The Commission, in its sole discretion, may use a designated agent to administer redress for Eligible Non-AT&T/MCI Consumers. If the Commission, in its sole discretion, determines that redress to consumers is wholly or partially impractical, any funds up to Forty Thousand Dollars (\$40,000.00) not so used shall be paid to the United States Treasury. The respondents shall be notified as to how such funds are disbursed, but shall have no right to contest the manner of distribution. Eligible Non-AT&T/MCI Consumers shall have 90 days from the Court's entry of the Consent Decree to request a refund. If the Commission or its designated agent determine within 120 days from the entry of the Consent Decree that the cost of issuing and administering refunds to Eligible Non-AT&T/MCI Consumers exceeds Forty Thousand Dollars (\$40,000.00), the Commission or its designated agent shall so notify the escrow agent, and an additional sum of money not to exceed Twenty Thousand Dollars (\$20,000.00) shall be distributed by the escrow agent to the Commission for redress to Eligible Non-AT&T/MCI Consumers. To the extent that the escrow agent is not notified in writing by the Commission within such 120 day period that all or a portion of the additional Twenty Thousand Dollars (\$20,000.00) is required by the Commission for redress purposes, the \$20,000.00 or remaining portion thereof not required by the Commission for redress purposes shall be released from the Redress Escrow Account and distributed promptly by the escrow agent to any contributing defendant in *FTC v. Audiotex Connection, Inc.* and/or any contributing respondent.

C. If, during the 60-day comment period before the issuance of this order, the respondents distributed funds to the Redress Escrow Account in amounts sufficient to commence the redress program under the Consent Decree in *FTC v. Audiotex Connection, Inc.*, such

