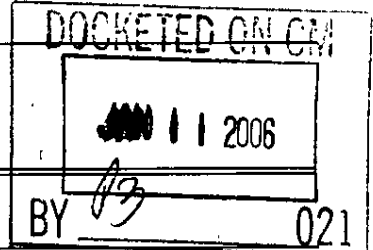


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 05-5408-RGK (SSx) Date January 10, 2006

Title **THOMAS KERRINS v. INTERMIX MEDIA, INC.**

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT (DE 20)

I. INTRODUCTION

Plaintiff Thomas Kerrins ("Plaintiff") has brought a class action suit against Defendant Intermix Media, Inc. ("Defendant") over Defendant's alleged distribution of spyware and adware programs (collectively, "adware"). Adware distributors use adware to track a computer user's online browsing habits for purposes of sending targeted "pop-up" advertisements to the user. For a fee, the distributors help online marketers place advertisements using their adware.

Plaintiff claims that when he downloaded and installed Defendant's purportedly free games and screen-savers, those programs also surreptitiously installed adware on his computer that significantly impaired its function. Plaintiff states that the adware destroyed other software, flooded his screen with pop-up advertisements, exposed his internet browsing activities to online marketers, and slowed down his computer's performance. Plaintiff asserts five claims: 1) unjust enrichment; 2) violation of California Business and Professions Code § 17200; 3) trespass to chattels; and 4) computer crime.

On November 14, 2005, Defendant filed a Motion to Dismiss Plaintiff's First Amended Complaint. For the reasons discussed below, this Court grants the Motion in part and denies it in part.

II. JUDICIAL STANDARD

In considering a motion to dismiss for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6), the Court must assume the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *See United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981). The sole issue raised by such a motion is whether the facts pleaded would, if established, support a valid claim for relief. Thus, the facts alleged, no matter how improbable, must be accepted as true for purposes of the motion. *See Neitzke v. Williams*, 490 U.S. 319, 328-29 (1989). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or

conclusory legal allegations cast in the form of factual allegations. See *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Upon review of a complaint, a court may not dismiss pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, dismissal is proper if a complaint is vague, conclusory, and fails to set forth any material facts in support of the allegation. See *N. Star Int'l v. Ariz. Corps. Comm'n*, 720 F.2d 578, 583 (9th Cir. 1983).

III. DISCUSSION

A. Class Action Claims

First, Defendant argues that all of Plaintiff's class action claims must be dismissed because they are encompassed by California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770, and because Plaintiff has not complied with the notice requirements under the CLRA. The Court is not persuaded. The CLRA does not limit any other statutory or common law right to bring a class action. Cal. Civ. Code § 1752; *Vasquez v. Superior Court*, 4 Cal. 3d 800, 818 (1971); *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003). But see *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 36 (Cal. Ct. App. 1975). Accordingly, Defendant's request to dismiss the class claims is denied.

B. Unjust Enrichment

Defendant next moves to dismiss Plaintiff's claim for unjust enrichment. Plaintiff seeks to recover the profits that Defendants earned from selling Plaintiff's personal information to advertisers and marketers. However, in order to establish a right to restitution, a plaintiff must show that he or she was deprived of something to which he or she was originally entitled. *Hirsch v. Bank of America*, 107 Cal. App. 4th 708, 717 (Cal. Ct. App. 2003). Here, Plaintiff cannot show a legal entitlement to these advertising profits. It was the online advertisers and marketers, not Plaintiff, who paid money to Defendant. Therefore, the claim for unjust enrichment fails. See *Sotelo v. Directrevenue, LLC*, 384 F. Supp. 2d 1219, 1234 (N.D. Ill. 2005) (dismissing unjust enrichment claim against adware distributor under Illinois law because plaintiff did not pay advertising fees to any defendants).

C. Violation of California Business and Professions Code § 17200

Defendant next requests dismissal of Plaintiff's claim for injunctive relief under California Business and Professions Code § 17200 as moot. In October of 2005, Defendant entered into a Consent Decree whereby Defendant agreed to stop distributing adware and to provide users with uninstall utilities and instructions on how to use them. Because this Consent Decree encompasses the injunctive remedies that Plaintiff seeks here, the § 17200 claim is dismissed as moot.

D. Trespass to Chattels

Defendant next argues that the trespass to chattels claim should be dismissed because Plaintiff has not alleged sufficient interference with his computer. This argument lacks merit. Plaintiff has alleged that Defendant's adware damaged his existing software and reduced the efficiency of his computer system. Plaintiff has also alleged that removal of the adware requires users to spend time and to hire a computer specialist. These allegations are sufficient to support a trespass to chattels claim. See *Sotelo*, 384 F. Supp. 2d at 1232-33.

E. Computer Crime

Lastly, Defendant contends that Plaintiff's claim for computer crime under California Penal Code § 502 should be dismissed because that section was intended to only address computer hacking and because Plaintiff has not alleged sufficient interference with his system. This Court disagrees. Section 502 does not contain an express limitation to computer hacking. Rather, it states that it is intended to protect "the integrity of all types and forms of lawfully created computers, computer systems, and computer data." Cal. Penal Code. § 502. And as the Court noted earlier, Plaintiff alleges sufficient damage and interference to his computer system. Therefore, Defendant's request is denied.

IV. CONCLUSION

Based on the foregoing, the Court **grants in part and denies in part** Defendant's Motion. Plaintiff's claims for unjust enrichment and violation of California Business and Professions Code § 17200 are dismissed with prejudice.

IT IS SO ORDERED.

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