THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AVENUE MEDIA, N.V., a Curacao corporation, Plaintiff, v. DIRECTREVENUE, LLC, a Delaware limited liability company; DIRECTREVENUE HOLDINGS, LLC, a Delaware limited liability company; and BETTERINTERNET, LLC, a Delaware limited liability company, Defendants.	No. 04-CV-02371-JCC **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

Plaintiff and defendants have a long-standing business relationship. Plaintiff is unhappy with defendants' performance under BetterInternet, LLC's ("BetterInternet") End User Licensing Agreement ("EULA") with individual computer end-users. Pursuant to BetterInternet's EULA, end-users expressly authorize BetterInternet to disable any other adware on an end-user's computer.

The present situation comes as no surprise to plaintiff. Plaintiff, as one of BetterInternet's distributors, has itself obtained end-users' consents to BetterInternet's EULA.

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Plaintiff has collected more than $800,000 from BetterInternet for distributing "BI" software to end-users.[1] Plaintiff has always known that BetterInternet's EULA authorizes BetterInternet to disable other adware.

Why plaintiff's Complaint makes no mention of the parties' long-standing commercial relationship is unclear. Plaintiff and BetterInternet have in place a detailed Standard Distribution Agreement (the "Distribution Agreement") that defines their respective rights and obligations. One reason plaintiff may have failed to mention the Distribution Agreement is that it specifically limits BetterInternet's liability for damages, and the contract excludes injunctive relief as an available remedy. Another reason may be the choice-of-forum clause, which designates New York as the exclusive venue.

Plaintiff's motion for a temporary restraining order should be denied for the following reasons: (1) the Court lacks personal jurisdiction over BetterInternet; (2) venue is improper in the Western District of Washington; (3) plaintiff cannot demonstrate probable success on the merits of its claims; (4) plaintiff readily admits that it can be compensated in money damages, if successful, and therefore cannot demonstrate irreparable harm; and (5) the relief requested would impose undue burdens on BetterInternet and on end-users who are not parties to this case.

II. BACKGROUND

A. Avenue Media, N.V.

Plaintiff is an offshore company incorporated in Curacao. Part of plaintiff's business is to provide "contextual advertising" over the Internet through its software product, Internet Optimizer. See Complaint ¶¶ 7-9. As described in plaintiff's moving papers, "[u]sers download the program . . . sometimes in exchange for watching free videos." Leslie Decl. ¶ 2.

Plaintiff and its principal, Shawn Boday, are affiliated with Flying Crocodile, Inc., which describes its "flagship product" as the "SexTracker." See Abram Decl., ¶ 8.

[1] For the sake of clarity, BetterInternet's software product is referred to as "BI."

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Although the SexTracker says it protects its customers' privacy and, more specifically, personal identities,[2] end uses who download Avenue Media's Internet Optimizer software from www.sextracker.com are in for something completely different:

> In consideration for viewing of video content, Avenue Media may send email to your Microsoft® Outlook® contacts and/or send instant messages to your IM contacts offering the video to them on your behalf. By viewing the video content, you expressly consent to said activity.

Weiss Decl., Ex. B (Internet Optimizer EULA § 6, ¶ 2). This practice, commonly known as "email harvesting," poses grave privacy concerns for Internet users. Plaintiff's intention to harvest email addresses and sow adult videos is troubling.

B. BetterInternet

Defendants DirectRevenue, LLC; DirectRevenue Holdings, LLC; and BetterInternet operate a leading Internet business, headquartered in New York. Defendants' operations include Offeroptimizer.com, which, as of December 4, 2004, ranks 7th among the top 100 most-trafficked websites on the Internet, behind Yahoo! (1st), Google (3rd), and eBay (6th) and ahead of AOL (8th) and Amazon (10th). Abram Decl. ¶ 2.

BetterInternet develops and distributes a software product, BI, which enables it to provide contextual advertising services over the Internet. Id. ¶ 3. Contextual advertising is a form of

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[2] SexTracker states:

> At our sites, we are committed to protecting your privacy. Our sites provide a secure environment for adult visitors. . . .
>
> ***When you visit our sites, we gather information that does not identify individual users.*** Our sites use cookies to track your IP address only for the purposes of tracking unique user sessions and providing you with custom-tailored content. We merely use aggregate information along with other data to make improvements to and update our sites for our visitors.

Weiss Decl, Ex. A (emphasis added).

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targeted advertising that enables advertisers to direct advertisements and promotional offers to particular individuals based on each individual's interests. Using no personally identifiable information, (BetterInternet has no information regarding the name, address, email or identity of its users) BI looks at URLs visited by a given computer to ascertain relevant advertising. Just as commercials subsidize free television programming and reduce the price of print media, contextual advertising has promoted the unparalleled production and distribution of free substantive content on the Internet. See, e.g., www.nytimes.com (last visited Dec. 6, 2004); www.seattletimes.com (last visited Dec. 6, 2004).

BetterInternet's BI software is typically offered by third party distributors, such as by Avenue Media. These distributors download BI to end-users in connection with free access to other software (e.g., games), services, and other content available on the Internet.[3] In exchange, end-users agree to receive advertisements targeted to their particular interests. See Abram Decl. ¶¶ 4, 9. As the BI EULA explains:

> 2. Functionality – BI delivers advertising and various information and promotional messages to your computer screen while you view Internet web pages. BetterInternet is able to provide you with BI free of charge as a result of your agreement to download and use BI, and accept the advertising and promotional messages it delivers.

Id., Ex. A.

End-users are required to consent to the terms and conditions of the BI EULA before downloading and installing BI. See, e.g., id. ¶ 5. By accepting the BI EULA, the end-user expressly authorizes BetterInternet to disable other adware resident on the end-user's computer:

[3] The overwhelming majority of BI downloads to end users are completed by distributors of BetterInternet. BetterInternet itself offers a few free software items, which are displayed on its website at http://www.abetterinternet.com/downloads.asp. See, e.g., Abram Decl., Ex. D (screen shot of free software downloads available through BetterInternet's website).

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> [Y]ou further understand and agree, by installing the Software, that BetterInternet and/or the Software may, without any further prior notice to you, remove, disable or render inoperative other adware programs resident on your computer . . . .

Id., Ex. A § 2.2.

Making BI the exclusive adware on an end-user's computer is favorable to the end-user. Running multiple adware products on a single computer can create an unfavorable end-user experience. Id. ¶ 7. Adware clients deliver targeted advertising and promotions to the end-user based on the end-user's Internet browsing behavior. Id. ¶ 7. If more than one adware client is operating on an end-user's computer, the end-user may receive duplicative ads and a high volume of advertising. Id. ¶ 7. Running multiple adware clients may also affect a computer's system performance from compatibility and capacity perspectives. Id. ¶ 7.

C. The Parties' Business Relationship

1. Plaintiff Is a BetterInternet Distributor

BetterInternet relies primarily on third parties, including plaintiff, to distribute BI. See id. ¶ 9. The parties' relationship is governed by the Distribution Agreement. Id., Ex. C.

BetterInternet pays plaintiff a commission on each new copy of BI plaintiff distributes worldwide. Id. ¶ 11. Since February 2003, BetterInternet has paid plaintiff over $800,000 for distributing copies of BI to end users. Id. ¶ 11.

On information and belief, plaintiff no longer makes BetterInternet's software available for download. Id. ¶ 13. BetterInternet has not terminated its Distribution Agreement with plaintiff, because BetterInternet intends to retain the protections of the contractual limitation on liability, exclusion of remedies, and forum selection clauses detailed below.

2. Plaintiff Is Required to Obtain End-User Consent to the BI EULA

As a BI distributor, plaintiff has been contractually obligated to obtain each end-user's consent to the BI EULA before allowing that end user to download and install BI.

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> Company represents and warrants that the Product will not be installed until after each potential Registered User has agreed to (by means of legally valid affirmative consent): (a) an end-user license agreement (EULA) provided by [BetterInternet] or (b) a EULA that provides [BetterInternet] with rights, limitations or liability and other terms and conditions that are equivalent to those set forth in [BetterInternet's] standard EULA.

Id., Ex. C § 2.2.

3. The Parties Agreed to Limit Plaintiff's Remedies

The Distribution Agreement limits plaintiff's remedies as follows:

> **9. LIMITATIONS OF LIABILITY - NO OTHER WARRANTIES**
>
> EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, EACH PARTY SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING ITS RESPECTIVE SOFTWARE OR SERVICE, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR IMPLIED WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE. ***IN NO EVENT SHALL BI BE LIABLE FOR ANY LOSS OF DATA, LOST PROFITS, OR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR EXEMPLARY DAMAGES***, EVEN IF BI HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED HEREIN. ***NOTWITHSTANDING ANY OTHER PROVISION TO THE CONTRARY IN NO EVENT SHALL BI BE LIABLE IN ANY MANNER FOR ANY DAMAGES OR OTHER LIABILITIES OF ANY KIND: (A) ARISING IN CONNECTION WITH OR OTHERWISE RELATING TO ANY THIRD PARTY ADVERTISING SERVED THROUGH THE PRODUCT OR (B) IN AN AMOUNT IN EXCESS OF THE TOTAL FEES PAID BY BI TO COMPANY UNDER THIS AGREEMENT IN THE SIX MONTHS PRIOR TO THE EVENT GIVING RISE TO THE LIABILITY***.

Id., Ex. C (emphasis added).

4. New York Law Governs and Provides the Exclusive Venue

The Distribution Agreement contains a choice-of-law provision selecting New York law:

> The laws of the State of New York without regard to its conflict of interest principles shall govern this Agreement. The parties agree to submit to the exclusive jurisdiction of the state and federal

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courts in New York, New York.

Id., Ex. C § 11.5. New York is the exclusive venue.

III. ARGUMENT

The crux of plaintiff's complaint is that, ***without the end user's authorization***, BetterInternet has disabled plaintiff's Internet Optimizer adware. As BetterInternet's distributor, plaintiff clearly knows that end-users expressly authorize BI to disable other adware on their computers pursuant to BetterInternet's EULA. Plaintiff knows this because, on BetterInternet's behalf, plaintiff distributes BI to end users only after first obtaining end-users' consent to the BetterInternet EULA.

Plaintiff cannot satisfy the necessary elements for issuance of a temporary restraining ("TRO") order, which requires proof of "'(1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.'" Citizens Alliance to Protect Our Wetlands v. Wynn, 908 F. Supp. 825, 829 (W.D. Wash. 1995) (quoting Big Country Foods, Inc. v. Bd. of Educ., 868 F.2d 1085, 1088 (9th Cir. 1989)); see Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291, 1298 (9th Cir. 2003). "Under this formula, the degree of irreparable injury required increases as the probability of success on the merits decreases." Wynn, 908 F. Supp. at 829; see also Earth Island, 351 F.3d at 1298 ("'These two alternatives represent "extremes of a single continuum," rather than two separate tests.'" (quoting Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003))). Because plaintiff cannot sustain its burdens under this standard, plaintiff's request for a TRO should be denied.

Moreover, plaintiff also seeks a mandatory injunction in the form of an order requiring BetterInternet to install plaintiff's Internet Optimizer software on BetterInternet's customers' computers. This request imposes a substantially higher burden on plaintiff—a burden that plaintiff cannot meet. See Dahl v. HEM Pharms. Corp., 7 F.3d 1399, 1403 (9th Cir. 1993)

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("'[M]andatory preliminary relief' is subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." (citation omitted)); Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979) ("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored . . . ."). Plaintiff's extraordinary request for mandatory injunctive relief should therefore be denied.

A. Absent (1) Personal Jurisdiction over BetterInternet and (2) Venue over This Dispute, Issuance of a TRO Is Inappropriate

There exist insufficient contacts with Washington State for the Court to exercise personal jurisdiction over BetterInternet. See Defendants' Motion to Dismiss or, in the Alternative, to Transfer Venue (filed contemporaneously herewith and incorporated herein by this reference). Further, the parties' Distribution Agreement expressly provides that New York is the exclusive venue for disputes, which would include this controversy. Without plaintiff first demonstrating the existence of in personam jurisdiction and proper venue (which it cannot do), plaintiff's motion for a TRO should be denied. See Zepeda v. United States Immigration & Naturalization Serv., 753 F.2d 719, 727 (9th Cir. 1983) ("A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court."); Hyundai Mipo Dockyard Co. v. AEP/Borden Indus. (In re Rationis Enters., Inc. of Panama), 261 F.3d 264, 269 (2d Cir. 2001) ("'[S]ubstantial probability that the court will find a basis for federal jurisdiction . . . is a crucial element necessary to justify the issuance of an injunction pendente lite.'" (ellipsis in original; citations omitted)).

B. The Parties' Distribution Agreement Bars the Relief Sought by Plaintiff

Plaintiff cannot demonstrate a likelihood of success on the merits of any of its claims. Plaintiff's Complaint alleges that BetterInternet's software, BI, has disabled plaintiff's own adware. Plaintiff alleges that the BI software has caused a loss of data, lost revenues, and

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damages (including supposed damages related to third-party advertising). See Complaint ¶¶ 12, 19.[4]

The parties' Distribution Agreement bars the remedies plaintiff now seeks:

> REGARDING ITS RESPECTIVE SOFTWARE OR SERVICE, . . . ***IN NO EVENT SHALL BI BE LIABLE FOR ANY LOSS OF DATA, LOST PROFITS***, OR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR EXEMPLARY DAMAGES . . . . IN NO EVENT SHALL BI BE LIABLE IN ANY MANNER FOR ANY DAMAGES ***OR OTHER LIABILITIES OF ANY KIND***: (A) ARISING IN CONNECTION WITH OR OTHERWISE RELATING TO ANY THIRD PARTY ADVERTISING SERVED THROUGH THE PRODUCT . . . .

Abram Decl., Ex. C. In addition to limiting damages, the parties have contractually excluded injunctive relief as an available remedy. Therefore, issuance of a TRO would be inappropriate.

The conduct that plaintiff challenges—BetterInternet's disabling of plaintiff's adware—was expressly contemplated by the parties in their course of dealing, as evidenced by BetterInternet's EULA, which plaintiff itself distributed to end users.

C. Plaintiff Cannot Demonstrate Probable Success on the Merits of Its Claims Under the Computer Fraud and Abuse Act, Because End-Users Consented to Allowing BI to Disable Other Adware Resident on Their Computers

BetterInternet acted within the expressly authorized scope of the access end-users granted to BetterInternet. Thus plaintiff cannot demonstrate probable success on the merits of its claims under the Computer Fraud and Abuse Act (the "CFAA").

Pursuant to 18 U.S.C. § 1030(a)(5):

> (a) Whoever—
>
> . . . .
>
> (5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct,

[4] See also Boday Decl., ¶ 2 ("Avenue Media is paid a portion of the fee charged by the pay-for-search browser and for revenues generated from targeted contextual advertising.").

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> intentionally causes damage ***without authorization***, to a protected computer;
>
> (ii) intentionally accesses a protected computer ***without authorization***, and as a result of such conduct, recklessly causes damage; or
>
> (iii) intentionally accesses a protected computer ***without authorization***, and, as a result of such conduct, causes damage; . . .
>
> . . . .
>
> shall be punished as provided in subsection (c) of this section.

(Emphasis added.)[5]

Likewise, under 18 U.S.C. § 1030(a)(4), "a claimant may establish a civil cause of action . . . by demonstrating that a person has (i) 'knowingly and with intent to defraud,' (ii) accessed a 'protected computer,' (iii) '***without authorization***,' and as a result (iv) has furthered the intended fraudulent conduct and obtained 'anything of value.'" Pac. Aerospace & Elecs., Inc. v. Taylor, 295 F. Supp. 2d 1188, 1195 (E.D. Wash. 2003) (quoting 18 U.S.C. § 1030(a)(4)) (emphasis added). Section 1030(a)(4) also prohibits any act that "exceeds authorized access" with respect to a protected computer. The term "exceeds authorized access" means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the ***accesser is not entitled so to obtain or alter***[.]" 18 U.S.C. § 1030(e)(6) (emphasis added).

End-users contractually authorized BetterInternet to establish BI as the exclusive contextual advertising client on the end-users' computers. End-users expressly consented to

[5] The term "protected computer," used throughout 18 U.S.C. § 1030, includes certain federal government computers and computers "used in interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(A)-(B).

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allowing BI to disable other adware resident on their computers, including plaintiff's Internet Optimizer software.

> [Y]ou further understand and agree, by installing the Software, that BetterInternet and/or the Software may, without any further prior notice to you, ***remove, disable or render inoperative other adware programs resident on your computer*** . . . .

Abram Decl., Ex. A § 2 ¶ 3 (emphasis added). Plaintiff is incorrect in asserting that BetterInternet lacked authority or exceeded the scope of its authority to access end-users' computers.[6] Fir this reason, plaintiff cannot demonstrate a likelihood of success on the merits of its CFAA claims.

D. Plaintiff Cannot Demonstrate Probable Success on the Merits of Its Tortious Interference Claim, Because the Contracts in Question Are Terminable at Will

Plaintiff's motion for a TRO also should be denied because plaintiff cannot demonstrate a likelihood of success on the merits of its claim for tortious interference with business relations. Plaintiff's motion papers do not establish that (1) it had a business relationship with a third party, (2) BetterInternet interfered with that relationship, (3) BetterInternet acted with the "sole purpose" of harming plaintiff or used wrongful means, and (4) plaintiff's business relationship was injured. See Wolff v. Rare Medium, Inc., 171 F. Supp. 2d 354, 360 (S.D.N.Y. 2001).[7]

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[6] In addition, with respect to plaintiff's claim under 18 U.S.C. § 1030(a)(4), defendants note that plaintiff has not identified any allegedly "fraudulent conduct" by BetterInternet.

[7] Under the parties' Distribution Agreement, New York law governs. See Abram Decl., Ex. C § 11.5. In any event, Washington law is substantially similar to New York law on this point. See Scott v. City of Seattle, 99 F. Supp. 2d 1263, 1269 n.7 (W.D. Wash. 1999) ("A claim for tortious interference with a contractual relationship or a business expectancy requires five elements: (1) existence of valid contractual relationship or business expectancy; (2) defendants' knowledge of that relationship; (3) intentional interference inducing or causing breach or termination of relationship or expectancy; (4) defendants' interference for an improper purpose or use of improper means; and (5) resultant damage.") (citing Leingang v. Pierce County Med. Bureau, Inc., 131 Wash. 2d 133, 930 P.2d 288, 300 (1997) (en banc)).

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Because New York law seeks to protect society's interest in free and legitimate business competition, see Guard-Life Corp. v. S. Parker Hardware Mfg., 406 N.E.2d 445, 448 (N.Y. 1980), "the culpable conduct necessary to state a cause of action . . . for . . . interference with . . . contracts terminable at will is significantly higher than the conduct necessary for interference with present contracts," Jurlique, Inc. v. Austral Biolab Pty., Ltd., 590 N.Y.S.2d 235, 236 (N.Y. App. Div. 1992). "In order to demonstrate interference with future contracts or contracts terminable at will, a showing of 'wrongful' conduct, defined as fraudulent representations, threats, or a violation of a duty of fidelity owed to the plaintiff by reason of a confidential relationship between the parties, is required." Jurlique, 590 N.Y.S.2d at 236 (citations omitted).

Plaintiff's allegations simply do not establish probable success on the merits of its tortious interference claim. The contract that plaintiff identifies to this Court—the Internet Optimizer EULA—is terminable at will by the end-user:

> At any time during the use of the Service, you have the right to choose to stop using the Service by uninstalling the SOFTWARE PRODUCT.

Weiss Decl., Ex. B (Internet Optimizer EULA § 6, ¶ 1). As discussed above, BetterInternet end-users specifically consented to allowing BI to remove other adware resident on end-users' computers at the time the end-user executed its licensing agreement with BetterInternet. Because these end-users are under no obligation whatsoever to keep Internet Optimizer on their computers, BetterInternet has not "interfered" with the Internet Optimizer EULA. Rather, the end-user has authorized the disabling of, and chosen to disable, Internet Optimizer.

This amounts to nothing more than consumer choice of one competing product over another:

> The rule . . . that competition may be an interference that is not improper also applies to existing contracts that are terminable at will. If the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of

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> them. ***As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it. The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination.*** Thus he may offer better contract terms, as by offering an employee of the plaintiff more money to work for him or by offering a seller higher prices for goods, and he may make use of persuasion or other suitable means, all without liability.

Restatement (Second) of Torts § 768 cmt. i (1979) (emphasis added); see Prudential Ins. Co. of Am. v. Sipula, 776 F.2d 157, 162 (7th Cir. 1985) ("A defendant's inducement of the cancellation of an at-will contract constitutes at most interference with a prospective economic advantage, not interference with contractual relations."); Guard-Life, 406 N.E.2d at 450 ("[T]here is no liability for interference with performance of a competitor's voidable contract absent employment of wrongful means, unlawful restraint of trade, or lack of competitive motive.").[8]

In sum, plaintiff cannot demonstrate that BetterInternet's end-users breached the terms of the Internet Optimizer EULA by consenting to BI's removal of Internet Optimizer from their computers. Each end-user's relationship with plaintiff was terminable at will—the end-users

[8] See also Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 865 (7th Cir. 1999), in which the court noted:

> There is in general nothing wrong with one sports agent trying to take a client from another if this can be done without precipitating a breach of contract. That is the process known as competition, which though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is the cornerstone of our highly successful economic system. ***Competition is not a tort***, but on the contrary provides a defense (the "competitor's privilege") to the tort of improper interference. It does not privilege inducing a breach of contract—conduct usefully regarded as a separate tort from interfering with a business relationship without precipitating an actual breach of contract—but it does privilege inducing the lawful termination of a contract that is terminable at will. Sellers (including agents, who are sellers of services) do not "own" their customers, at least not without a contract with them that is not terminable at will.

(Emphasis added; citations omitted.)

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merely exercised their express contractual right to terminate their relationship with plaintiff. Thus there was no breach of the Internet Optimizer EULA as a matter of law.

E. Plaintiff Cannot Demonstrate Irreparable Harm

Plaintiff cannot demonstrate that it will suffer irreparable harm if preliminary relief is denied, for three independent reasons.

1. Plaintiff's Own Conduct Directly Caused the Current Circumstances

Self-inflicted consequences do not qualify as "irreparable" harm. Salt Lake Tribune Pub. Co. v. AT & T Corp., 320 F.3d 1081, 1106 (10th Cir. 2003); Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 839 (3d Cir. 1995). Plaintiff distributes BI. In so doing, plaintiff represented and warranted to BetterInternet that plaintiff had obtained from each end-user a "legally valid affirmative consent" to the BI EULA. Plaintiff is equitably estopped and prevented as a matter of law from now complaining that BetterInternet's software operated in precisely the manner expressly set forth in the BI EULA—that is, that BI disables other adware, including Internet Optimizer. See Crossman v. Pease & Elliman, Inc., 284 N.Y.S.2d 751, 753-54 (N.Y. App. Div. 1967) (individual acting on behalf of contracting party is presumed to know contents of agreement).

In Caplan, the defendants had obtained a preliminary injunction prohibiting their insurer, Vigilant, from settling the lawsuit. On appeal, the court reversed.

> The district court defined the irreparable harm to defendants here as the damage to their ability to seek legal redress against Caplan in a malicious prosecution action. The outcome of the present action will of course determine defendants' ability to sue Caplan because they cannot do so unless this action terminates favorably to them. The termination which defendants fear is a settlement . . . . But defendants contracted with Vigilant to authorize Vigilant to settle this litigation. ***Because defendants have acted to permit the outcome which they find unacceptable, we must conclude that such an outcome is not an irreparable injury. If the harm complained of is self-inflicted, it does not qualify as irreparable***.

Caplan, 68 F.3d at 839 (emphasis added) (citation omitted).

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Here, plaintiff "acted to permit the outcome which [it] find[s] unacceptable." Id. As BetterInternet's distributor, plaintiff obtained, on BetterInternet's behalf, end-users' consent to the BI EULA. Having actively brought about the situation of which it now complains, plaintiff cannot challenge BetterInternet's contractual authorization to disable other adware resident on end-users' computers, including the disabling of plaintiff's Internet Optimizer product.

Plaintiff has played both sides against its own middle by (1) working as BetterInternet's distributor, while, at the same time, undisclosed and unbeknownst to BetterInternet, (2) competing against BetterInternet by distributing its own adware, Internet Optimizer. And plaintiff apparently had no problem collecting more than $800,000 as a BetterInternet distributor. Having contractually agreed to distribute BetterInternet's software and obtain consent to the BI EULA, plaintiff cannot allege that it is irreparably injured by its own acts.

2. Plaintiff Alleges That Its Harm Is Readily Calculable in Dollars

Plaintiff alleges that the harm it suffered is readily calculated in money damages. See Complaint ¶ 16 (alleging that defendants' conduct has caused lost revenues of $7,000 per day). "Mere financial injury, however, will not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation." Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 471 (9th Cir. 1984). Defendants disagree with plaintiff's alleged damages—however, for purposes of plaintiff's motion for a TRO, plaintiff's own allegations defeat the bases for the requested injunctive relief.

Plaintiff offers only conclusory allegations that it might suffer damage to its business and goodwill. See Complaint ¶ 18. For example, Mr. Boday states that "[o]ur business is irreparably damaged without restoration of our software . . . ." Boday Decl. ¶ 5. Such unsupported speculative assertions are insufficient to satisfy the requisite element of a finding of irreparable harm. See Goldie's Bookstore, 739 F.2d at 472 (unsupported allegations of irreparable harm cannot support injunctive relief).

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3. Plaintiff Alleges an Injury That Is Entirely Speculative

A purported loss of a contract's performance is not sufficient to support a claim absent evidence that the contract would have been profitable. Big Country Foods, 868 F.2d at 1088 (allegation of lost revenue from allegedly unlawful termination of contract too speculative to support injunctive relief). Plaintiff says that it has lost revenue because its Internet Optimizer software has been disabled on an unspecified number of end-users' computers. But plaintiff makes no effort whatsoever to quantify any tangible injury going forward. See id. (noting that lost revenue is not the same as lost profits; movant must affirmatively demonstrate that contract would be profitable going forward in order to establish injury).

In any event, as explained above, in the Distribution Agreement plaintiff specifically disclaimed plaintiff's right to recover lost profits.

F. The Balance of Hardships and the Public Interest Clearly Favor BetterInternet

In determining whether to grant preliminary relief, a court should consider "both the balance of hardships and whether the public interest militates in favor of injunctive relief." Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1038 (C.D. Cal. 1998). Here, neither factor favors plaintiff. Plaintiff seeks an injunction requiring BetterInternet to install plaintiff's Internet Optimizer product on BetterInternet's end-users' computers. If granted, this relief would impose undue hardship on BetterInternet and prejudice the interests of third parties who are not parties to this case.

1. The Relief Requested Would Impose an Undue Burden on BetterInternet

Pursuant to the BI EULA, BetterInternet periodically updates the BI software. One such update instructed BI to disable other adware resident on the end-user's computer, including Internet Optimizer. Abram Decl., ¶ 18.

BI's update was sent to end-users' computers that had BI installed. BI's update was sent without regard to whether Internet Optimizer was also resident on a particular end-user's computer. Some end-users had Internet Optimizer installed. Some did not. BetterInternet has

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no way of knowing whether Internet Optimizer was resident on a particular end-user's computer. As a consequence, there is no way for BetterInternet to determine which end-users' computers would be subject to a reinstallation of Internet Optimizer if plaintiff's request were granted. Id., ¶ 19.

Moreover, even if BetterInternet could determine which of its end-users had previously installed Internet Optimizer, there is no way to determine whether the BI update was successful in disabling Internet Optimizer. Internet Optimizer can be disabled in numerous ways. Some end-users may well have uninstalled Internet Optimizer themselves. There are also a number of products on the market, such as offerings by Symantec Corporation, that detect adware on and uninstall it from end-users' computers. Id. ¶ 21.

2. The Relief Requested Would Prejudice BetterInternet's End-Users, Who Are Not Parties to This Action

"In exercising their sound discretion, courts should pay particular regard to public consequences in granting an injunction." Prescott v. County of El Dorado, 915 F. Supp. 1080, 1084 (E.D. Cal. 1996). BetterInternet strongly believes that the relief requested, even if feasible, would be against the public interest.

Plaintiff's Internet Optimizer EULA provides, among other things:

> In consideration for viewing of video content, Avenue Media may send email to your Microsoft® Outlook® contacts and/or send instant messages to your IM contacts offering the video to them on your behalf. By viewing the video content, you expressly consent to said activity.

Weiss Decl., Ex. B (Internet Optimizer EULA § 6, ¶ 2). This practice obviously raises grave privacy concerns, especially in the context of adult video content accessible on sites operated by Mr. Boday's other companies (e.g., www.sextracker.com).

As explained above, BetterInternet cannot determine which of its end-users had previously installed Internet Optimizer and consented to the terms and conditions of the Internet Optimizer EULA. Plaintiff now asks this Court to order BetterInternet to reinstall Internet

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Optimizer on end-users' computers—end-users who, by agreeing to the terms of the BI EULA, specifically chose to remove all other adware from their computers, including Internet Optimizer. In short, the relief plaintiff requests would effectively undo the end-users' choice to install BI as their only contextual advertising client and has the potential to subject these individuals to plaintiff's dubious practices.

Moreover, BI is installed on many computers that ***never*** had Internet Optimizer installed. BetterInternet's user base is larger than the base that includes both BI and Internet Optimizer. If BetterInternet were forced to install Internet Optimizer on all computers that have BI installed, the installation would be vastly overinclusive and would result in installation of Internet Optimizer on computers of end-users who never agreed to plaintiff's Internet Optimizer EULA. Plaintiff might then harvest email from end-users who have not consented to the Internet Optimizer EULA, seek to forward adult entertainment ads, or engage in other activity to which the end-users have not agreed.

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IV. CONCLUSION

This case is governed by the parties' Distribution Agreement—which plaintiff inexplicably failed to disclose to the Court—and the BI EULA. Those documents expressly and categorically dispose of plaintiff's claims in this matter. Moreover, plaintiff cannot demonstrate irreparable harm, and the balance of harms tips decidedly against issuing the requested relief. For the foregoing reasons and the reasons stated in BetterInternet's motion to dismiss, plaintiff's request for preliminary relief should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document with the Clerk of the Court using the Cm/ECF system, which will send notification of such filing to the following person:

Warren Joseph Rheaume
wrheaume@hewm.com

DATED: December 7, 2004, at Seattle, Washington.

/s/Christopher N. Weiss

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