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NO. 7786 P. 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ORIGINAL WAS RECEIVED AND FILED

BY: TD

HARRIS INTERACTIVE INC.,



AUG 09 2000

Plaintiff,

-vs-

CLERK
WESTERN DISTRICT OF NEW YORK
CELEBRATING 100 YEARS OF SERVICE
TO WESTERN NEW YORK
AMENDED COMPLAINT

00-CV-6364L(F)

JURY TRIAL DEMANDED

MAIL ABUSE PREVENTION SYSTEM, LLC.;
PAUL A. VIXIE, Individually and as Chairman of
MAIL ABUSE PREVENTION SYSTEM, LLC.;
NICK NICHOLAS, Individually and as Agent of
MAIL ABUSE PREVENTION SYSTEM, LLC.;
INCON RESEARCH, INC.; MARTIN P. ROTH,
Individually and as President/Principal of INCON
RESEARCH, INC.; MICROSOFT CORPORATION;
BELLSOUTH.NET, INC.; QWEST COMMUNICATIONS
INTERNATIONAL INC.; ONEMAIN.COM, INC.;
JUNO ONLINE SERVICES, INC.; MPX DATA
SYSTEMS, INC.; ZOOMNET, INC.; MICRON INTERNET;
SERVICES GTS TELECOM, INC.; HYUNDAI INTERNET
TECHNOLOGY, INC.; ALTAVISTA COMPANY, and
JOHN DOE,

Defendants.

Plaintiff Harris Interactive Inc. ("Harris"), by its attorneys, Harris Beach & Wilcox, LLP, for its complaint against defendants alleges as follows:

JURISDICTION AND VENUE

1. Harris is a corporation organized under the laws of Delaware with its principal place of business in Rochester, New York.
2. Upon information and belief, defendant Mail Abuse Protection System, LLC. ("MAPS") is a corporation organized under the laws of California with its

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principal place of business in Redwood City, California. Upon information and belief, MAPS transacts or does business in New York or is otherwise subject to the jurisdiction of this Court.

3. Upon information and belief, defendant Microsoft Corporation ("Microsoft") is a corporation organized under the laws of Washington, with its principal place of business in Redmond, Washington. Upon information and belief, Microsoft transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

4. Upon information and belief, defendant BellSouth.Net, Inc. ("BellSouth") is a corporation organized under the laws of Georgia, with its principal place of business in Atlanta, Georgia. Upon information and belief, BellSouth transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

5. Upon information and belief, defendant Qwest Communications International, Inc. ("Qwest") is a corporation organized under the laws of Delaware with its principal place of business in Denver, Colorado. Upon information and belief, Qwest transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

6. Upon information and belief, defendant OneMain.Com, Inc. ("OneMain") is a corporation organized under the laws of Virginia with its principal place of business in Reston, Virginia. Upon information and belief, OneMain transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

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7. Upon information and belief, defendant Juno Online Services, Inc. ("Juno") is a corporation organized under the laws of Delaware with its principal place of business in New York City. Upon information and belief, Juno does or transacts business in New York.

8. Upon information and belief, defendant MPX Data Systems, Inc. ("MPX") is a corporation organized under the laws of California with its principal place of business in Campbell, California. Upon information and belief, MPX transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

9. Upon information and belief, defendant ZoomNet, Inc. ("ZoomNet") is a corporation organized under the laws of Ohio with its principal place of business in Portsmouth, Ohio. Upon information and belief, ZoomNet transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

10. Upon information and belief, defendant Micron Internet Services, Inc. ("Micron") is a corporation organized under the laws of Delaware with its principal place of business in Nampa, Idaho. Upon information and belief, Micron transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

11. Upon information and belief, defendant GTS Telecom, Inc. ("GTS") is a corporation organized under the laws of Delaware with its principal place of business in Vancouver, Washington. Upon information and belief, GTS transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

12. Upon information and belief, defendant Hyundai Internet Technology, Inc. is a corporation organized under the laws of California with its principal place of

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business in San Jose, California. Upon information and belief, Hyundai transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

13. Upon information and belief, defendant AltaVista Company ("AltaVista") is a corporation organized under the laws of Delaware with its principal place of business in Palo Alto, California. Upon information and belief, AltaVista transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

14. Upon information and belief, defendant Paul A. Vixie is the Chairman of defendant MAPS, and resides in Woodside, California. Upon information and belief, Vixie transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

15. Upon information and belief, defendant Nick Nicholas is an employee of defendant MAPS, and resides in the state of California. Upon information and belief, Nicholas transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

16. Upon information and belief, defendant Incon Research, Inc. ("Incon") is a corporation organized under the laws of Connecticut with its principal place of business in Norwalk, Connecticut. Upon information and belief, Incon transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

17. Upon information and belief, defendant Martin P. Roth is the Principal/President of defendant Incon, and is a resident of Rowayton, Connecticut.

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Upon information and belief, Roth transacts or does business in New York, or is otherwise subject to the jurisdiction of this Court.

18. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§1331 & 1337.

19. Venue is appropriate in this District by reason of 28 U.S.C. §1391(b).

JURY DEMANDED

20. Plaintiff demands a jury trial of all issues triable by right to a jury pursuant to Fed. R. Civ. P. 38(b).

PARTIES

21. Harris is market research company with a substantial portion of its business being Internet research. Harris has expended more than \$10,000,000.00 to construct the infrastructure, and to recruit the necessary subscribers that allow it to create accurate representative samples for its research. Harris' ability to obtain data from a representative sample of the United States population gives it a distinct advantage over its competitors. Among other things, Harris performs online surveys for the media, government, policy-making organizations, and commercial enterprises.

22. MAPS is a self-appointed "member-supported organization" which purports to engage in "a variety of mail abuse prevention activities." Upon information and belief, the corporate defendants have entered into agreements with MAPS whereby MAPS is compensated for identifying alleged Internet mail abuse activities. Once so identified, the corporate defendants act to restrict or block the alleged violator from sending electronic communications to any individual or entity. As part of these activities,

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MAPS creates and publishes Internet mail abuse policies. MAPS also maintains a Realtime Blackhole List ("RBL"), which identifies persons or entities which MAPS has determined violates its Internet mail abuse policies. The RBL is designed to create intentional network outages ("blackholes") to limit the transport of "known-to-be-unwanted" mass or bulk e-mail. The blackholes prevent or restrict an entity such as Harris from communicating with the individuals or subscribers that provide Harris with its research data.

23. Microsoft is a technology firm which, among other things, maintains the Microsoft Network, an Internet Service Provider ("ISP"). As an ISP, Microsoft maintains the "Hotmail" system, a web-based electronic mail provider, which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

24. BellSouth is an Internet access company which, among other things, maintains "BellSouth.Net", a domain which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

25. Qwest is a broadband Internet communications company which, among other things, maintains "USWEST.net", a domain which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

26. OneMain is an ISP, which, among other things, maintains the domains "JPS.net", "THEGRID.net", "USIT.Net", "MIDWEST.net", and "LIGHTSPEED.net," which provides their subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

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27. Upon information and belief, Juno is an ISP which, among other things, maintains the domain "Freewwwweb.com", which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

28. MPX maintains, among other things, the domain "GoPlay.com", which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

29. Micron is an ISP which maintains the domain "Micron.net", which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

30. ZoomNet is an ISP which maintains the domain "ZoomNet.net", which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

31. GST is a communications company which, among other things, maintains the domain "Aloha.net", which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

32. Hyundai is a technology corporation, which, among other things, maintains the domain "animalhouse.com", which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

33. AltaVista is an Internet and communications company, which, among other things, maintains the domain "AltaVista.com", which provides its subscribers with a connection to the Internet and a means of sending and receiving electronic mail.

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34. The unnamed defendants, denominated in the Amended Complaint as "John Doe," are ISPs which provide their subscribers with access to the Internet and a means of sending and receiving electronic mail and which are currently blocking Harris' electronic mail communications with its members.

35. Incon is a market research company that competes with Harris in providing Internet research.

BACKGROUND

36. Harris has been in the market research business for over twenty-five (25) years and was one of the first companies to develop online market research capabilities.

37. Harris conducts a substantial portion of its market research online using a proprietary online panel of respondents consisting of over 6.6 million individuals. Access to this panel, which is the largest in the industry, is central to Harris' success in the market research industry because its panel allows Harris to obtain data from a representative sample of the United States population. The size of Harris' panel allows it to conduct numerous surveys using large sample groups, as well as narrow focus groups. Access to this panel gives Harris capabilities unlike virtually any other market research firm.

38. Individuals generally subscribe to Harris' panel through one of two methods. First, many individuals subscribe to the Harris Poll Online through Excite, Inc. ("Excite") or its subsidiary, MatchLogic. Excite provides its subscribers with a connection to the Internet and, thus, the ability to browse websites and navigate the Internet.

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MatchLogic is an Internet-based marketing and advertising firm, and an Excite subsidiary. When an individual registers on Excite's website or enters a sweepstakes sponsored by MatchLogic, he or she may choose to receive periodic invitations to participate in the Harris Poll Online.

39. In some instances, this registration requires the user to register with Excite or MatchLogic and to indicate affirmatively that he or she wishes to be contacted by the Harris Poll Online. This election is sometimes referred to as an "active" or "affirmative opt-in" procedure. In other instances, the user registers with Excite or MatchLogic, but must affirmatively indicate that he or she does not want to be contacted by the Harris Poll Online during the registration process (a procedure that merely requires the individual to "uncheck" a box that appears on his or her screen). This type of an election is sometimes referred to as a "passive opt-in" procedure.

40. Individuals may also register for the Harris Poll Online through Harris directly (usually on its website) or through companies which partner with Harris. The registration method used by Harris and its partners requires that subscribers make an affirmative or active election to participate in the Harris Poll Online.

41. Once an individual registers to become a member of the Harris Poll Online, Harris sends that individual a "welcome" e-mail message. This message: (1) informs the member of how he or she received the invitation to become a member of the panel; and (2) offers the member an opportunity not to participate in the poll.

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42. If an individual decides not to participate, the process for removing oneself from the Harris Online Poll is simple — the subscriber must simply "click" on the web address in the text and then verify the e-mail address he or she wishes deleted.

43. Once an individual becomes a member of the Harris Poll Online, Harris periodically sends the individual invitations to participate in online surveys. Each invitation again informs the individual how he or she may have become a member and offers him or her the option of being removed from the Poll.

44. Harris also posts a privacy policy on its website which informs members of their right not to participate at any time and the method for removing oneself from the poll.

MAIL ABUSE PREVENTION SYSTEM, LLC

45. Upon information and belief, MAPS is paid by the corporate defendants to monitor the Internet for electronic mail abuse activities. MAPS is an organization that is neither sanctioned by, nor affiliated with, any governmental or Internet regulatory organization. MAPS insists that all communications on the Internet be mutually consensual, and it principally seeks to prevent the dissemination of "spam". A "spammer" is a company that obtains e-mail addresses, usually without the owner's knowledge, and then sends massive amounts of unsolicited e-mail with no mechanism for the recipient to stop receiving the e-mail.

46. MAPS has promulgated its own standards, claiming that they are a "statement of [the] ... best current practices for proper mailing list management." A copy

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of these standards, entitled "Basic Mailing List Management Principles for Preventing Abuse" is attached as Exhibit "A".

47. MAPS' standards require persons or companies who maintain mailing lists to use a "double opt-in procedure" before an individual can receive commercial e-mail from a company such as Harris. In other words, MAPS' standards require: (1) an initial affirmative, or actual, election by an individual to register for a mailing list; and (2) a second confirming communication which requires the user to affirmatively or actually elect to participate for a second time.

48. According to MAPS, all commercial electronic mailings which do not use such a double affirmative "opt-in" methodology are "nonconsensual" and, thus, "spam."

49. When MAPS determines that a network or mail relay (a sender of electronic mail technically called an Internet Protocol) has violated its policies, it posts the name of that sender on its RBL, with the stated purpose, and clear expectation, that such a posting will cause "intentional network outages for the purpose of limiting the transportation of known-to-be-unwanted mass e-mail." Put another way, once MAPS places a name on its RBL, it knows, with virtual certainty, that the ISPs that subscribe to the RBL will then block or restrict all e-mail communications originating with the entity that has been posted. Upon information and belief, the subscribing ISPs do not "choose" to block those e-mail communications as such; the blocking occurs automatically with subscription to the RBL.

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50. The RBL is subscribed to by approximately 20,000 ISPs, corporations, government agencies and individuals. According to MAPS, over forty percent (40%) of the Internet subscribes to its RBL.

51. Once MAPS adds a network or mail relay to the RBL, the subscribing entities cease to transmit electronic mail from that network or mail-relay. MAPS will generally not remove a network or mail server from the RBL until that network or server agrees to comply with its policies and/or other conditions that MAPS may unilaterally impose.

52. Upon information and belief, MAPS maintains the RBL list as part of the services it performs for its ISPs, including the corporate defendants. Moreover, upon information and belief, MAPS and these ISPs, including the corporate defendants, know that MAPS' procedures can also harm entities that do not send unsolicited e-mail. Material on MAPS' website states: "while we try to limit that connectivity loss to only [sic] networks which are friendly or neutral towards spam, sometimes a spammer hides in and amongst nonspammers so as to share a more positive fate with those nonspammers. What actually happens is that the nonspammers share an unpleasant and negative fate with spammers in that case. In other words, if you are not willing to occasionally throw out the baby with the bathwater ... then the MAPS RBL is not for you." Knowing that its policies and practices will harm others, MAPS requires users of the RBL, including the corporate defendants, to sign an agreement indemnifying MAPS from any liability for its actions "[b]ecause of the risk of damage to persons listed on the MAPS RBL."

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HARRIS' PLACEMENT ON THE RBL

53. Upon information and belief, defendant Roth received an e-mail invitation to join the Harris Online Poll sometime in July, 2000.

54. Upon information and belief, defendant Roth received that invitation as a result of his decision to purchase Internet services from Excite. Upon information and belief, Roth elected to join the Harris Online Poll panel through a "passive" opt-in procedure.

55. Upon receiving this invitation, defendant Roth, the Principal/President of defendant Incon, a competitor of Harris, did not "unsubscribe" his Harris Poll Online registration using the simple procedure contained in the e-mail invitation; instead he attempted to "unsubscribe" by contacting (by phone and e-mail) Harris employees whom he knew had no database management responsibility and no ability to delete his name from the poll's registration. Roth also chose not to contact individuals in top management at Harris whom he knew personally, and whom he knew could facilitate the deletion of his name from the online poll registration.

56. Roth's complaints of spamming were first received at Harris on July 5, 2000 (by electronic mail) and on July 7, 2000 (by phone).

57. On July 10, 2000, an employee of Harris called Roth and informed him that his name had been removed from Harris' Online Poll mailing list.

58. After his name had been removed from Harris' panel, Roth, via e-mail on July 12, 2000, nevertheless decided to "nominate" Harris' mail servers to the RBL for "continued spamming."

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59. Roth's July 12 complaint was also based upon alleged "spam" sent to a MAPS employee, Nick Nicholas. According to Harris' records, Nicholas had also registered for the Harris Online Poll with Excite, again, upon information and belief, using a "passive" opt-in procedure. Upon information and belief, Nicholas and Roth conspired together to have Harris placed on MAPS' RBL list.

60. Based upon Roth's and Nicholas' complaint, and without any reasonable investigation of the facts or any reasonable opportunity for Harris to be heard, MAPS placed Harris on its RBL list in early July, 2000.

61. Since its placement on the RBL, Harris has been unable to communicate with more than approximately one-half (1/2) of its database, including over 600,000 members who have actively participated in its surveys in the past. Harris' inability to communicate with these subscribers has affected, and will continue to affect, the plaintiff's ability to conduct its business.

62. Upon information and belief, Harris' electronic mail communications have been interrupted because:

- (a) defendant Microsoft subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (b) defendant BellSouth subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (c) defendant Qwest subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (d) defendant OneMain subscribes to MAPS' RBL and has blocked Harris' e-mail;

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- (e) defendant Juno subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (f) defendant MPX subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (g) defendant ZoomNet subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (h) defendant Micron subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (i) defendant GTS subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (j) defendant Hyundai subscribes to MAPS' RBL and has blocked Harris' e-mail;
- (k) defendant AltaVista subscribes to MAPS' RBL and has blocked Harris' e-mail; and
- (l) the "John Doe" defendants subscribe to MAPS' RBL and have blocked Harris' e-mail.

63. Following Harris' placement on the RBL, it contacted MAPS and several of the corporate defendants in an effort to resolve the dispute and to persuade MAPS to remove Harris from its RBL. However, MAPS and said corporate defendants have refused to remove Harris from the RBL unless Harris:

- (1) agrees to implement a double opt-in methodology for all new online poll subscribers;
- (2) agrees to send a single, new opt-in confirmation to all of its subscribers, even including subscribers who have actively participated in multiple Harris Poll Online surveys, and to create a new list consisting of only positive responses; and
- (3) agrees to refrain from sending any communications to members of the Harris Online Poll until items (1) and (2) are completed.

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64. MAPS' conditions to removing Harris from its RBL are arbitrary, unreasonable and unlawful; these conditions will also prevent Harris from conducting certain key research projects during the month of August, 2000 (including those relating to the Olympic games and the upcoming Presidential election), and would be cost prohibitive to implement. Furthermore, Harris' continued presence on the RBL is causing, and will continue to cause, it material harm because it cannot obtain access to the representative sample of the United States population that it needs to conduct its online surveys and to meet its contractual commitments to clients.

**DEFENDANTS' ANTICOMPETITIVE MOTIVES
IN BLOCKING COMMUNICATIONS TO
HARRIS SUBSCRIBERS**

A. Paul Vixie

65. Upon information and belief, defendant Vixie is a member of the Board of Directors of WhiteHat.com, Inc. ("WhiteHat"), an Arizona corporation which provides "100% opt-in direct e-mail marketing solutions" to customers.

66. WhiteHat's stated mission is "to provide an infrastructure and framework for users and marketers who want to market successfully on the Internet using e-mail correctly. By providing this framework, and the services that are based on it, WhiteHat.com will be able to assist marketers in fully benefitting from e-mail marketing while being responsible 'net citizens. They will be able to avoid negative reaction from customers and prospects, and will be protected from the backlash that has struck many rogue companies."

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67. Upon information and belief, Vixie controls MAPS, and has companies such as Harris placed on its RBL. Using the threat of MAPS' RBL, Vixie intends to and does coerce business entities into purchasing WhiteHat's services.

68. Thus, Vixie operates MAPS, not only for the use of the subscribing ISP defendants, but for his own financial gain and to advance WhiteHat's business in the direct e-mail market.

B. The ISP Defendants

69. Upon information and belief, the corporate ISP defendants, viz. Microsoft, BellSouth, Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai AltaVista and the "John Doe" defendants, have commercial motives in blocking Harris' e-mail to its subscribers.

70. Upon information and belief, the corporate ISPs generate a large proportion of their revenue through advertising on their websites. These advertisements may include, among other things, banners and links.

71. Upon information and belief, the advertisers whose products are displayed on an ISP website pay for this opportunity; however, companies such as Harris, which send materials directly to a subscriber via e-mail, have access to those consumers without paying the ISP for advertising space.

72. Furthermore, the advertising from persons who send commercial e-mail competes with the advertising sponsored by the ISP defendants.

73. Thus, the corporate ISPs have a economic motive to block communications such as those from Harris to its customers because they are not

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compensated for those communications which compete with the advertising displayed on their sites.

74. Upon information and belief, the ISP defendants (Microsoft, BellSouth, Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai, AltaVista and the "John Doe" defendants) subscribe to and support MAPS with the express intention of preventing the dissemination of competing commercial e-mail to their subscribers.

75. Upon information and belief, the ISP defendants support MAPS' double "opt-in" policy because such policies make communicating by electronic mail burdensome and inefficient, and thus less competitive with defendants' advertising and services.

76. Upon information and belief, the intent and effect of the corporate defendants' refusal to transmit Harris' e-mail to its subscribers is to maximize the corporate defendants' revenue.

**FIRST CAUSE OF ACTION AGAINST MAPS,
VIXIE AND NICHOLAS (TORTIOUS
INTERFERENCE WITH BUSINESS AND
CONTRACTUAL RELATIONS)**

77. At all relevant times, these defendants knew or should have known, that it was necessary for Harris to communicate with its database of subscribers to obtain the representative sample of the United States population that it needs to conduct its market research.

78. When it posted Harris' name on its RBL, these defendants knew, or should have known, that its subscribing ISPs, including defendants Microsoft, BellSouth,

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Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai, AltaVista and the "John Doe" defendants, would thereafter block communications between Harris and its subscribers.

79. Despite that knowledge, and despite knowing that the basis for posting Harris' name on the RBL was a single complaint lodged by a Harris competitor, these defendants placed Harris on its RBL, or caused Harris' name to be placed on the RBL, causing the ISP defendants to block Harris' communications to its subscribers.

80. By placing Harris on its RBL, these defendants intended to prevent, and have prevented, Harris from fulfilling its contractual obligations to provide market research services to its clients.

81. Upon information and belief, these defendants knew of the existence of Harris' contracts and agreements to provide marketing research services to its clients.

82. As a result of these defendants' interference with Harris' contractual and business relationships, Harris has suffered, and continues to suffer, irreparable harm and damages which are not presently ascertainable.

**SECOND CAUSE OF ACTION AGAINST
MAPS, VIXIE AND NICHOLAS (COMMERCIAL
DISPARAGEMENT)**

83. Harris repeats and realleges the allegations contained in paragraphs "1" through "82" above.

84. By placing Harris on the RBL, or causing it to be placed there, MAPS, Vixie and Nicholas represented to MAPS' subscribers, including defendants Microsoft, BellSouth, Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai,

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AltaVista and "John Doe" defendants, that Harris was a source of "spam" (unsolicited bulk e-mail) and that it regularly sent such "spam" to consumers.

85. These representations were false and disparaging, and MAPS, Vixie and Nicholas either knew or were recklessly indifferent to their falsity.

86. By their statements, MAPS, Vixie and Nicholas defamed and disparaged Harris' business and methods of operation, causing MAPS' subscribers, including defendants Microsoft, BellSouth, Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai, AltaVista and the "John Doe" defendants, to block Harris' communications to members of its online poll.

87. These representations were made with the intent that MAPS' subscribers (and others) would block Harris' communications and cause harm to Harris' business.

88. By reason of the foregoing, Harris has suffered, and continues to suffer, irreparable harm and damages not presently ascertainable.

**THIRD CAUSE OF ACTION AGAINST MAPS,
VIXIE, NICHOLAS, MICROSOFT,
BELLSOUTH, QWEST, ONEMAIN, JUNO,
MPX, ZOOMNET, MICRON, GTS, HYUNDAI,
ALTAVISTA AND THE JOHN DOE
DEFENDANTS**

89. Harris repeats and realleges the allegations contained in paragraphs "1" through "88" above.

90. At all times relevant, MAPS has been an agent and representative of Microsoft, BellSouth, Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai,

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AltaVista and the "John Doe" defendants (sometimes referred to as the "ISP defendants").

91. By promulgating standards for Internet communications, undertaking to identify violators of those standards on the RBL, and knowing that those listed would have their communications blocked by RBL subscribers, MAPS, Vixie and Nicholas assumed a duty to administer MAPS' RBL in a fair and evenhanded manner so as not to harm those it purported to regulate and to ensure that entities such as Harris and their customers were not prevented from sending and receiving legitimate communications.

92. MAPS, Vixie, Nicholas and the ISP defendants have breached this duty by, *inter alia*:

- (1) Inconsistently and selectively enforcing MAPS' self-promulgated standards;
- (2) Abusing MAPS' ability to cause its subscribers to block communications between Harris and its subscribers;
- (3) Conspiring with defendants Roth and Incon, competitors of Harris, to block Harris' communications to its subscribers;
- (4) Placing Harris on the RBL without good and reasonable cause; and
- (5) Operating MAPS with the purpose of benefitting an affiliated entity, WhiteHat, which provides commercial electronic mailing services.

93. By reason of these defendants' negligence, Harris has suffered, and continues to suffer, irreparable harm and damages in an amount not presently ascertainable.

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**FOURTH CAUSE OF ACTION AGAINST
MAPS, VIXIE, NICHOLAS, MICROSOFT,
BELLSOUTH, QWEST, ONEMAIN, JUNO,
MPX, ZOOMNET, MICRON, GTS, HYUNDAI,
ALTAVISTA AND THE JOHN DOE
DEFENDANTS (VIOLATION OF NEW YORK
GENERAL BUSINESS LAW)**

94. Harris repeats and realleges the allegations contained in paragraphs "1" through "93" above.

95. These defendants have purportedly undertaken to provide a service to the public, and have represented that only the names of those entities that send unsolicited bulk commercial e-mail are placed on the RBL.

96. In fact, these defendants provide this "service" in an inconsistent, selective and deceptive manner by, among other things:

- (1) treating networks or mail relays with identical mailing list policies unequally by placing some on the RBL while allowing others to operate unabated;
- (2) placing networks and mail relays on the RBL as a result of competitors' complaints while not listing the competitors for similar (or more egregious) practices;
- (3) causing the communications of certain networks and mail servers to be blocked even though most of those networks and servers' subscribers consent to and actively participate in those communications; and
- (4) operating the RBL with the purpose of benefitting an affiliated business entity, WhiteHat, without disclosing that interest.

97. By reason of the above deceptive practices, which are prohibited by Gen. Bus. L. §349, these defendants have deceived and confused consumers of this service and the public at large.

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98. As a result, Harris has suffered, and continues to suffer, irreparable harm and damages in an amount not presently ascertainable.

**FIFTH CAUSE OF ACTION AGAINST MAPS,
VIXIE AND NICHOLAS (DEFAMATION PER
SE)**

99. Harris repeats and realleges the allegations contained in paragraphs "1" through "98" above.

100. Defendants MAPS, Vixie and Nicholas have made various false and defamatory written statements that Harris was engaged in the business practice of "spamming."

101. These statements, which had the effect of impugning Harris' business reputation, unequivocally referred to Harris and were communicated to MAPS' subscribers, including defendants Microsoft, BellSouth, Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai, AltaVista, the "John Doe" defendants and others.

102. The statements made by MAPS, Vixie and Nicholas were false and defamatory in that Harris does not send a subscriber electronic mail unless the subscriber registers with Harris or a partnered company and elects to receive mailings for the Harris Poll Online.

103. The false and defamatory statements by MAPS, Vixie and Nicholas caused injury to Harris' reputation and business.

104. Defendants MAPS, Vixie and Nicholas knew that these statements were false, or acted in reckless disregard of their falsity, at the time they were made.

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105. The defamatory statements published by these defendants have caused, and continue to cause, Harris irreparable harm and damages not presently ascertainable.

**SIXTH CAUSE OF ACTION AGAINST
DEFENDANTS MAPS, VIXIE, NICHOLAS,
INCON AND ROTH (CONSPIRACY TO
TORTIOUSLY INTERFERE WITH PLAINTIFF'S
BUSINESS)**

106. Harris repeats and realleges the allegations contained in paragraphs "1" through "105" above.

107. Upon information and belief, defendant Incon was and is engaged in the business of market research in direct competition with Harris.

108. Harris has developed an Internet database for the purpose of online polls upon which its business is dependent.

109. The defendants, Vixie, Nicholas, Roth, Incon and MAPS conspired among themselves for the purpose of depriving Harris of the means to communicate with the members of that Internet database, thereby depriving it of the means necessary to conduct its business.

110. In furtherance of that conspiracy, defendants Roth and Incon, in concert with defendant Nicholas, wrongfully complained to MAPS and Vixie about Harris' electronic mailing practices and alleged that Harris had engaged in "spamming."

111. These complaints were false when made, and were made with the purpose of interfering with and disrupting Harris' business to the ultimate advantage of Roth and Incon.

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112. As a result of Roth, Incon and Nicholas' complaints to MAPS, MAPS and Vixie wrongly placed Harris on its RBL, causing numerous ISPs to block Harris' communications to the members of its online poll.

113. Blocking Harris' communications to its poll members has caused, and continues to cause, irreparable harm to Harris' business by preventing it from conducting its market research over the Internet. Harris has suffered damages in an amount not presently ascertainable.

**SEVENTH CAUSE OF ACTION AGAINST
DEFENDANTS INCON AND ROTH
(TORTIOUS INTERFERENCE)**

114. Harris repeats and realleges the allegations contained in paragraphs "1" through "113" above.

115. Upon information and belief, defendants Incon and Roth knew of Harris' contractual agreements and commitments to its customers to provide market research through Internet surveys, and further knew that any interruption in Harris' communications with its subscribers would cause it irreparable harm.

116. Upon information and belief, defendants Roth and Incon intentionally "nominated" Harris to MAPS' RBL by making false allegations that Harris sent Roth and Nicholas unsolicited electronic mailings. Incon and Roth so nominated Harris for the RBL for the sole purpose of interfering with Harris' business and contractual relationships with its subscribers.

117. MAPS placed Harris on its RBL as a result of Roth and Incon's "nomination."

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118. Since its placement on the RBL, Harris' communications to its subscribers have been blocked, resulting in Harris' inability to provide services to its clients.

119. By reason of the foregoing, Harris has suffered, and continues to suffer, irreparable harm and damages in an amount not presently ascertainable.

**EIGHTH CAUSE OF ACTION AGAINST
DEFENDANTS ROTH AND INCON
(COMMERCIAL DISPARAGEMENT)**

120. Harris repeats and realleges paragraphs "1" through "119" above.

121. In nominating Harris to MAPS' RBL, defendants Roth and Incon falsely stated that Harris was engaged in "spamming" (the dissemination of unsolicited bulk commercial electronic mail).

122. Defendants Roth and Incon made those false statements with the intent to harm Harris and its market research business to their benefit. Moreover, these defendants knew these statements and representations were false when made, or were recklessly indifferent to their falsity.

123. As a result of those false statements and representations, MAPS placed Harris on its RBL, and MAPS' subscribers, including the ISP defendants, have blocked Harris' electronic mail communications to the members of its online poll.

124. By reason of the foregoing, Harris has suffered, and continues to suffer, irreparable harm and damages in an amount not presently ascertainable.

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**NINTH CAUSE OF ACTION AGAINST
DEFENDANTS INCON AND ROTH
(DEFAMATION PER SE)**

125. Harris repeats and realleges the allegations contained in paragraphs "1" through "124" above.

126. Incon and Roth's written "nomination" of Harris to MAPS' RBL for purported spamming was false and defamatory.

127. Incon and Roth's nomination, which was intentionally false and made for the purpose of disrupting and injuring Harris' business reputation, was communicated to various employees of MAPS, including defendant Nicholas, as well as others.

128. The false and defamatory statements by Incon and Roth caused, *inter alia*, injury to Harris' business reputation.

129. By reason of the foregoing, Harris has suffered, and continues to suffer, irreparable harm and damages in an amount not presently ascertainable.

**TENTH CAUSE OF ACTION AGAINST
MICROSOFT, BELLSOUTH, QWEST,
ONEMAIN, JUNO, MPX, ZOOMNET, MICRON,
GTS, HYUNDAI, ALTAVISTA AND THE JOHN
DOE DEFENDANTS (TORTIOUS
INTERFERENCE)**

130. Harris repeats and realleges the allegations contained in paragraphs "1" through "129" above.

131. Harris has business and contractual agreements and relationships with clients to provide market research services; to provide these services it is necessary for Harris to communicate with members of its online poll.

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132. At all times relevant, these defendants have known of these contractual and business relationships.

133. By refusing to transmit Harris' communications to the members of its poll, defendants Microsoft, BellSouth, Qwest, OneMain, Juno, MPX, ZoomNet, Micron, GTS, Hyundai, AltaVista and the "John Doe" defendants have interfered with Harris' contractual obligations and business relationships.

134. These defendants' refusal to transmit Harris' communications to its subscribers is unjustified, unreasonable and unlawful and was done with the sole intent of causing Harris to breach its contractual obligations, to interfere with its business relationships, and to otherwise harm Harris.

135. By reason of the foregoing, Harris has suffered, and continues to suffer, irreparable harm and damages in an amount not presently ascertainable.

**ELEVENTH CAUSE OF ACTION AGAINST
MICROSOFT, BELL SOUTH, QWEST,
ONEMAIN, JUNO, MPX, ZOOMNET, MICRON,
GTS, HYUNDAI ALTAVISTA AND THE JOHN
DOE DEFENDANTS (FEDERAL ANTITRUST
VIOLATIONS)**

136. Harris repeats and realleges the allegations contained in paragraphs "1" through "135" above.

137. The subject matter of this litigation, among other things, includes the provision of Internet advertising services, which is the relevant product market.

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138. The relevant geographic market is the United States, in which Harris conducts the majority of its research surveys and in which the defendants provide a significant portion of Internet advertising.

139. Upon information and belief, by subscribing to MAPS, the ISP defendants conspired among themselves to refuse to deal with Harris and other senders of commercial e-mail by refusing to carry their communications over their transmission networks.

140. By their actions and their refusal to deal with Harris and other senders of commercial e-mail, the defendants have caused anticompetitive effects in the Internet advertising market in the United States.

141. These anticompetitive effects include the blocking of large amounts of commercial electronic mailings, which contain advertisements. This blocking reduces the output of such advertisements, the effect of which is to lessen the competition with defendants' advertising services and increase the price for the advertising services offered by the defendants.

142. Harris has been damaged by this conduct, which is in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

**TWELFTH CAUSE OF ACTION AGAINST THE
ISP DEFENDANTS (FEDERAL ANTITRUST
VIOLATIONS)**

143. Harris repeats and realleges the allegations contained in paragraphs "1" through "142" above.

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144. The ISP defendants have willfully attempted to monopolize the Internet advertising market by predatory conduct — subscribing to MAPS' RBL and refusing to deal with Harris and other senders of commercial e-mail by refusing to carry their communications over their networks.

145. Because they control a significant portion of the Internet, those defendants have a dangerous probability of successfully monopolizing the United States Internet advertising market.

146. For the foregoing reasons, those defendants have violated §2 of the Sherman Act, 15 U.S.C. §2.

**THIRTEENTH CAUSE OF ACTION AGAINST
THE ISP DEFENDANTS (FEDERAL
ANTITRUST VIOLATIONS)**

147. Harris repeats and realleges the allegations contained in paragraphs "1" through "146" above.

148. The ISP defendants have monopolized the United States Internet advertising market by predatory conduct -- subscribing to MAPS' RBL and refusing to deal with Harris and other senders of commercial e-mail by refusing to carry their communications over their networks.

149. By reason of the foregoing, the ISP defendants have violated §2 of the Sherman Act, 15 U.S.C. §2.

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**FOURTEENTH CAUSE OF ACTION AGAINST
THE ISP DEFENDANTS (FEDERAL
ANTITRUST VIOLATIONS)**

150. Harris repeats and realleges the allegations contained in paragraphs "1" through "149" above.

151. The ISP defendants have willfully conspired among themselves to monopolize the United States Internet advertising market by predatory conduct — subscribing to MAPS' RBL and refusing to deal with Harris and other senders of commercial e-mail by refusing to carry their communications over their networks.

152. By reason of the foregoing, the ISP defendants have violated §2 of the Sherman Act, 15 U.S.C. §2.

**FIFTEENTH CAUSE OF ACTION AGAINST
THE ISP DEFENDANTS (FEDERAL
ANTITRUST VIOLATIONS)**

153. Harris repeats and realleges the allegations contained in paragraphs "1" through "152" above.

154. By subscribing to MAPS, the ISP defendants have combined to form an organization in the nature of a trade association to, among other things, regulate the transmission of commercial e-mail over their networks.

155. MAPS' (and hence the ISP defendants') practices are unreasonably restrictive of competition because, although MAPS and the ISP defendants purport to maintain neutral policies against unsolicited commercial e-mail, they:

- (1) treat networks or mail relays with identical policies unequally by "blacklisting" or placing some on the RBL while allowing others to operate unabated;

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- (2) place networks or mail relays on the RBL as a result of competitors' complaints while not listing the competitors for similar (or more egregious) practices;
- (3) cause the communications of certain networks and mail relays to be blocked even though most of those networks' and relays' subscribers consent to and actively participate in those communications; and
- (4) block the communications of certain networks or mail relays while the communications of networks or mail relays associated or affiliated with the ISP defendants are not blocked.

156. The practices resulting from the ISP defendants' association through MAPS are unreasonably restrictive of competition because they:

- (a) reduce output;
- (b) favor certain competitors in the Internet research industry while disadvantaging others;
- (c) favor Internet advertisers in association or affiliated with the defendants while disadvantaging others; and
- (d) otherwise harm competition.

157. Harris has been damaged by the ISP defendants' conduct, which violates §1 of the Sherman Act, 15 U.S.C. §1.

**SIXTEENTH CAUSE OF ACTION AGAINST
THE ISP DEFENDANTS (DONNELLY ACT
VIOLATIONS)**

158. Plaintiff repeats and realleges the allegations contained in paragraphs "1" through "157".

159. By reason of the foregoing, the ISP defendants have violated §340(1) of the New York General Business Law.

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WHEREFORE, plaintiff demands:

- A. Judgment for compensatory damages against all defendants in an amount to be determined upon the trial of this action, but which, upon information and belief, exceeds \$50,000,000.00, including prejudgment interest, reasonable attorneys' fees, and the costs and disbursements of this action, as well as treble damages on the antitrust claims.
- B. Punitive damages in an amount to be determined upon the trial of this action; and
- C. Such other and further relief as the Court deems just and proper.

Date: August 9, 2000

HARRIS BEACH & WILCOX, LLP



Paul J. Yesawich, III
Laura W. Smalley
Gregory J. McDonald
Attorneys for Plaintiff
130 East Main Street
Rochester, New York 14604
Telephone: (716) 232-4440

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Basic Mailing List Management Principles for Preventing Abuse

By Nick Nicholas, last revised: \$Date: 1999/07/20 01:22:17 \$

Basic Mailing List Management Principles for Preventing Abuse

Mailing lists have a long and venerable history on the Internet. Mailing lists are an excellent vehicle for distributing focused, targeted information to an interested, receptive audience. Consequently, mailing lists have been used successfully as a highly effective direct marketing tool.

Unfortunately, some marketers misuse mailing lists through a lack of understanding of Internet customs and rules of the forum pertaining to email. Others fail to take adequate precautions to prevent the lists they manage from being used in an abusive manner.

Managers and administrators of mailing lists must understand that they have certain responsibilities, the two most important being (1) to respect the right of mailbox owners to determine how those mailboxes are used, and (2) to ensure that mailing lists are not used for abuse.

Internet users are often subscribed to mailing lists without their knowledge or permission. Sometimes this is done as a result of *address harvesting* by spammers; other times it's done by a third party as a prank. It is mandatory that all lists which fall victim to this prank be made proof against it. *Noone should ever have to unsubscribe from a list they did not intentionally subscribe to.*

The following guidelines are offered as a statement of Internet standards and best current practices for proper mailing list management.

1. The email addresses of new subscribers must be confirmed or verified before mailings commence. This is usually accomplished by means of an email message sent to the subscriber to which s/he must reply, or containing a URL which s/he must visit, in order to complete the subscription. However it is implemented, a fundamental requirement of all lists is for *verification* of all new subscriptions.
2. Mailing list administrators must provide a simple method for subscribers to terminate their subscriptions, and administrators should provide clear and effective instructions for unsubscribing from a mailing list. Mailings from a list must cease promptly once a subscription is terminated.
3. Mailing list administrators should make an "out of band" procedure (e.g., an email address to which messages may be sent for further contact via email or telephone) available for those who wish to terminate their mailing list subscriptions but are unable or unwilling to follow standard automated procedures.
4. Mailing list administrators must ensure that the impact of their mailings on the networks and hosts of others is minimized by proper list management procedures such as pruning of invalid or undeliverable addresses, or taking steps to ensure that mailings do not overwhelm less robust hosts or networks.
5. Mailing list administrators must take adequate steps to ensure that their lists are not used for abusive purposes. For example, administrators can maintain a "suppression list" of email addresses from which all subscription requests are rejected. Addresses would be added to the suppression list upon request by the parties entitled to use the addresses at issue. The purpose of the suppression list would be to prevent subscription of addresses appearing on the suppression list by unauthorized third parties. Such suppression lists should also give properly authorized domain administrators the option to suppress all mailings to the domains for which they are responsible.
6. Mailing list administrators must make adequate disclosures about how subscriber addresses will be used, including whether or not addresses are subject to sale or trade with other parties. Once a mailing list is traded or sold, it may no longer be an opt-in mailing list; therefore, those who are acquiring "opt-in" lists from others must examine the terms and conditions under

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which the addresses were originally compiled and determine that all recipients have in fact opted-in *specifically* to the mailing lists to which they are being traded or sold.

7. Mailing list administrators should make adequate disclosures about the nature of their mailing lists, including the subject matter of the lists and anticipated frequency of messages. A substantive change in either the subject matter or frequency of messages may constitute a new and separate mailing list requiring a separate subscription. List administrators should create a new mailing list when there is a substantive change in either the subject matter or frequency of messages. A notification about the new mailing list may be appropriate on the existing mailing list, but existing subscribers should never be subscribed automatically to the new list. For example, if Company A acquires Company B, and Company B has compiled opt-in mailing lists, Company A should not summarily incorporate Company B's mailing lists into its own.

Contact the MAPS RBL Project | MAPS Home Page