

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

_____)	
)	
UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	Civil Action No.:
v.)	
)	
CREATIVE PUBLISHING)	
INTERNATIONAL, INC.,)	
a corporation,)	
Defendant.)	
_____)	

COMPLAINT

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission"), for its complaint, alleges that:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), 16(a) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101, et seq., and the Unordered Merchandise Statute, 39 U.S.C. § 3009, to obtain monetary civil penalties and injunctive and other relief for defendant's violations of the FTC's Trade Regulation Rule entitled "Use of Prenotification Negative Option Plans" ("the Negative Option Rule"), 16 C.F.R. Part 425; the FTC's Trade Regulation Rule entitled "Telemarketing Sales Rule," 16 C.F.R. Part 310; and the Unordered Merchandise Statute.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1339, 1345, and 1355 and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 57b, and 6105(b).

3. Venue in the United States District Court for the District of Minnesota is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c), and 1395(a).

DEFENDANT

4. Defendant Creative Publishing International, Inc. ("CPI") is a Minnesota corporation with its office and principal place of business located within the District of Minnesota at 5900 Green Oak Drive, Minnetonka, MN 55343. CPI transacts business in the District of Minnesota.

COMMERCE

5. At all times relevant to this Complaint, CPI's course of business, including the acts and practices alleged herein, has been and is in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANT'S COURSE OF CONDUCT

6. CPI is a publisher and seller of books. Since July 1, 1997, in connection with the sale, offering for sale, or distribution of its books, CPI has operated several "Direct Preview Programs" that are negative option plans within the meaning of the Negative Option Rule. These negative option plans offer consumers the opportunity to preview books for 14-day free trial periods before deciding to buy.

7. In connection with these negative option plans, in numerous instances from July 1, 1997 through January 1, 2000, CPI disseminated direct mail solicitations and magazine cover wraps and made or caused to be made outbound, unsolicited telemarketing calls (hereafter

referred to collectively as “Initial Advertising”) to hundreds of thousands of consumers in many different states of the United States. This Initial Advertising offered consumers an initial book for a free, 14-day trial period (“Initial-offer Book”). The books advertised as Initial-offer Books included, without limitation: *Deck the Halls; Crafts in a Flash; Joy to the World; Celebrate!; Houseworks: A Guide to Understanding Your Home; Essential Home Tips; Around the Yard; 100 Years in Pictures; 100 Years in Stories; Hunting Today’s Whitetail; The World of Whitetail Hunting; and Fishing for Largemouth Bass*. Consumers returned order forms by mail or consented to verbal solicitations contained in the Initial Advertising to order these Initial-offer Books.

8. CPI’s Initial Advertising stated, for example, that consumers who kept an Initial-offer Book would receive “advance notice about free previews of future books with no obligation to buy.”

9. CPI enrolled all consumers who kept an Initial-offer Book beyond the 14-day trial period and who made partial or full payment as members of its negative option plans.

10. CPI sends additional promotional materials (“Subsequent Announcements”) to all negative option plan members. CPI’s Subsequent Announcements offer consumers other books for 14-day free trial periods (“Subsequent-offer Books”). The books sold as Subsequent-offer Books included, without limitation: *Complete Guide to Home Wiring; Building Decks; Landscape Design & Construction; Kitchen Remodel; Home Plumbing; Around the Yard; Weekend Projects; Crafts in a Flash; Joy to the World; Celebrate!; Make it Merry; 100 Years in Pictures; 100 Years of Classic Stories; Incredible Outdoor Adventures, Venison Cookery; Advanced Whitetail Hunting; Wild Turkey; and Game Bird Cookery*.

11. CPI's Subsequent Announcements contain negative option rejection forms which consumers must return to CPI to reject the Subsequent-offer Books.

12. Initial Advertising disseminated by CPI from July 1, 1997 through June 20, 1999 stated that consumers who kept an Initial-offer Book would receive "advance notice about free previews of future books with no obligation to buy," but did not disclose that CPI would use negative option rejection forms in its Subsequent Announcements. This Initial Advertising did not disclose consumers' obligation to reject Subsequent-offer Books, nor did it disclose the amount of time consumers would have to return the negative option rejection forms. Consumers were consequently not informed at the time they consented to receive an Initial-offer Book that, if they chose to keep and pay for the Initial-offer Book, they had to return negative option rejection forms to reject Subsequent-offer Books and that CPI would automatically ship Subsequent-offer Books if it did not receive the negative option rejection forms.

13. Initial Advertising CPI disseminated from July 1, 1997 through June 20, 1999 also did not disclose to consumers the frequency of the Subsequent Announcements, consumers' right to cancel their memberships, and that consumers had to pay for shipping and handling for Subsequent-offer Books.

14. In addition, the negative option rejection forms disseminated by CPI in Subsequent Announcements from July 1, 1997 through June 20, 1999 did not instruct consumers how they could use the forms to reject the merchandise offered for sale and did not specify a date by which they had to be mailed or a date by which they had to be received by CPI.

15. CPI automatically ships Subsequent-offer Books to all consumers who fail to return the negative option rejection forms contained in the Subsequent Announcements, along with bills

for the Subsequent-offer Books. From July 1, 1997 through June 20, 1999, these Subsequent-offer Books were shipped without consumers' express consent to receive the books or their express consent to allow CPI to interpret their failure to return negative option rejection forms as their consent to receive Subsequent-offer Books.

THE NEGATIVE OPTION RULE

16. The Negative Option Rule, promulgated by the Commission on February 15, 1973, became effective on June 7, 1974. The Rule was amended by the Commission in 1998 under Section 18 of the FTC Act, 15 U.S.C. § 57a. The amended Rule became effective on August 20, 1998, and has since that date remained in full force and effect.

17. The Negative Option Rule regulates sellers of merchandise that operate negative option plans. A negative option plan is defined by the Rule as “a contractual plan or arrangement under which a seller periodically sends to subscribers an announcement which identifies merchandise (other than annual supplements to previously acquired merchandise) it proposes to send to subscribers to such plan, and the subscribers thereafter receive and are billed for the merchandise identified in each such announcement, unless by a date or within a time specified by the seller with respect to each such announcement the subscribers, in conformity with the provisions of such plan, instruct the seller not to send the identified merchandise.”

18. The Negative Option Rule requires a seller to disclose all material terms of membership in a negative option plan in any promotional material that contains a device, such as an order form, that a consumer can return to the seller to subscribe to the plan.

19. The Negative Option Rule also requires that a seller, prior to sending any selection of merchandise to a negative option plan subscriber, send a form to the subscriber that the subscriber can use to reject the merchandise offered for sale.

20. Specifically, the Negative Option Rule contains the following provisions:

Sec. 425.1 The rule.

(a) In connection with the sale, offering for sale, or distribution of goods and merchandise in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice, for a seller in connection with the use of any negative option plan to fail to comply with the following requirements:

(1) Promotional material shall clearly and conspicuously disclose the material terms of the plan, including:

(i) That aspect of the plan under which the subscriber must notify the seller, in the manner provided for by the seller, if he does not wish to purchase the selection;

* * * * *

(iii) The right of a contract-complete subscriber to cancel his membership at any time;

(iv) Whether billing charges will include an amount for postage and handling;

(v) A disclosure indicating that the subscriber will be provided with at least ten (10) days in which to mail any form, contained in or accompanying an announcement identifying the selection, to the seller;

(vi) A disclosure that the seller will credit the return of any selections sent to a subscriber, and guarantee to the Postal Service or the subscriber

NEGATIVE OPTION RULE VIOLATIONS

COUNT I

23. In numerous instances from July 1, 1997 through June 20, 1999, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of negative option plans for the sale of books, as described in paragraphs 6 through 15 above, CPI disseminated promotional material that failed to disclose all of the information required by Section 425.1(a)(1) of the Negative Option Rule.

24. Specifically, CPI's Initial Advertising failed to disclose, without limitation:

a. that aspect of the plans under which consumers must notify the seller, in the

to the seller when the announcement and form are not received by the subscriber in time to afford him at least ten (10) days in which to mail his form to the seller, thereby violating Section 425.1(a)(1)(vi) of the Negative Option Rule; and

- f. the frequency with which the announcements and forms will be sent to consumers and the maximum number of announcements and forms which will be sent to them during a 12-month period, thereby violating Section 425.1(a)(1)(vii) of the Negative Option Rule.

COUNT II

25. In numerous instances from July 1, 1997 through June 20, 1999, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of negative option plans for the sale of books, as described in paragraphs 6 through 15 above, CPI disseminated Subsequent Announcements containing negative option rejection forms that: (a) failed to disclose clearly and conspicuously that consumers would receive merchandise identified in the Subsequent Announcements unless consumers instructed the Defendant seller that they did not want the merchandise, (b) failed to designate a procedure by which the forms could be used by consumers to reject the merchandise advertised for sale, and (c) failed to specify either a return date or a mailing date for the forms, thereby violating Section 425.1(a)(2)(ii) of the Negative Option Rule.

TELEMARKETING SALES RULE

26. Pursuant to the Telemarketing Act, on August 16, 1995, the FTC promulgated the Telemarketing Sales Rule, 16 C.F.R. Part 310, with a Statement of Basis and Purpose, 60 Fed.

Reg. 43842 (Aug. 23, 1995). The Rule became effective on December 31, 1995, and has since that date remained in full force and effect.

27. The Telemarketing Sales Rule prohibits deceptive and abusive telemarketing acts or practices. Specifically, the Telemarketing Sales Rule contains the following provisions:

Sec. 310.3 Deceptive telemarketing acts or practices.

(a) Prohibited deceptive telemarketing acts or practices. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays for goods or services offered, failing to disclose, in a clear and conspicuous manner, the following material information:

* * * * *

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

* * * * *

28. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the Telemarketing Sales Rule are unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

29. Defendant is a seller engaged in telemarketing within the meaning of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.2(r) and (u).

TELEMARKETING SALES RULE VIOLATIONS

COUNT III

30. In numerous instances from July 1, 1997 through June 20, 1999, in connection with the telemarketing of its books, as described in paragraphs 6 through 15 above, CPI failed to disclose, in a clear and conspicuous manner, before a consumer paid, all material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer, including, without limitation:

- a. that CPI automatically enrolled consumers, who kept and made partial or full payment for Initial-offer Books, in negative option plans, thereby violating Section 310.3(a)(1)(ii) of the Telemarketing Sales Rule;
- b. that consumers, who kept and made partial or full payment for Initial-offer Books would receive Subsequent Announcements that required them to return negative option rejection forms to reject Subsequent-offer Books, thereby violating Section 310.3(a)(1)(ii) of the Telemarketing Sales Rule; and
- c. that CPI automatically ships Subsequent-offer Books to all consumers who fail to return negative option rejection forms, thereby violating Section 310.3(a)(1)(ii) of the Telemarketing Sales Rule.

THE UNORDERED MERCHANDISE STATUTE

31. The Unordered Merchandise Statute was enacted in 1970 and since that date has remained in full force and effect. It prohibits the shipping and billing for unordered merchandise that does not fall into narrow exceptions. The statute also prohibits sending dunning communications to recipients of unordered merchandise.

32. Specifically, The Unordered Merchandise Statute, 39 U.S.C. § 3009, reads as follows:

Sec. 3009. Mailing of unordered merchandise

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of

COUNT IV

34. In numerous instances from July 1, 1997 through June 20, 1999, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of negative option plans and the telemarketing of books, as described in paragraphs 6 through 15 above, CPI, which is not a charitable organization soliciting contributions, mailed Subsequent-offer Books to consumers without the prior expressed request or consent of the recipients, and without identifying the merchandise as free samples, thereby violating Section (a) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a).

35. Consumers' consent for CPI to mail Initial-offer Books does not constitute consent to mail Subsequent-offer Books. In addition, from July 1, 1997 through June 20, 1999, consumers' failure to return negative option rejection forms to CPI did not constitute consent to mail Subsequent-offer Books because CPI did not disclose clearly and conspicuously in its Initial Advertising that CPI would automatically ship Subsequent-offer Books to consumers who failed to return negative option rejection forms and consumers could not, therefore, agree to that course of conduct.

COUNT V

36. In numerous instances from July 1, 1997 through June 20, 1999, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of its negative option plans and telemarketing of books, as described in paragraphs 6 through 15 above, CPI mailed bills and dunning communications to consumers to whom it mailed books without the prior expressed request or consent of the recipients, thereby violating Sections (a) and (c) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a) and (c).

THE FTC ACT

37. Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), provides that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

38. Misrepresentations or omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

FTC ACT VIOLATIONS

COUNT VI

39. In numerous instances from July 1, 1997 through June 20, 1999, in connection with the sale, offering for sale, or distribution of books, as described in paragraphs 6 through 15 above, CPI represented, expressly or by implication, that consumers who accepted Defendant's free trial offer for Initial-offer Books and who kept and made partial or full payment for them would receive Subsequent Announcements to which they would have to respond affirmatively to request to receive Subsequent-offer Books for a 14-day, trial period.

40. In truth and in fact, consumers who accepted Defendant's free trial offer for Initial-offer Books and who kept and made partial or full payment for them did not have to respond affirmatively to the Subsequent Announcements in order to request and receive Subsequent-offer Books. Instead, the Defendant automatically shipped Subsequent-offer Books to consumers who failed to reject them.

41. Therefore, the representation set forth in paragraph 39 was, and is, false and misleading and is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT VII

42. In numerous instances from July 1, 1997 through June 20, 1999, in connection with the sale, offering for sale, or distribution of books, as described in paragraphs 6 through 15 above, CPI failed to disclose all material terms and conditions of its free trial offers for books, including, without limitation, that (a) consumers who kept the Initial-offer Books beyond the 14-day, free trial period and who made partial or full payment were enrolled as members in CPI's negative option plans, (b) CPI's negative option plans require consumers to return negative option forms within a specific time to avoid receiving and being billed for Subsequent-offer Books, and (c) consumers must pay for shipping and handling to return books received by consumers for a free trial period. These facts were material to consumers in their decisions to request to receive Initial-offer Books.

43. CPI's failure to disclose these material facts is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

CONSUMER INJURY

44. Consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of CPI's unlawful acts or practices. In addition, CPI has been unjustly enriched as a result of its unlawful practices. Absent injunctive relief by this Court, CPI is likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

**COURT'S POWER TO AWARD
CIVIL PENALTIES, INJUNCTIVE AND OTHER RELIEF**

45. Defendant has violated the Negative Option Rule and the Telemarketing Sales Rule as described above with knowledge as set forth in Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

46. Each advertisement, promotional material or telemarketing call disseminated or made by the defendant during the five years preceding the filing of this complaint that failed to comply with the Negative Option Rule and the Telemarketing Sales Rule in one or more of the ways described above constitutes a separate violation for which plaintiff seeks monetary civil penalties.

47. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, Pub.L. 104-134, and Federal Trade Commission Rule 1.98(d), 16 C.F.R. § 1.98(d), 61 Fed. Reg. 54548 (Oct. 21, 1996), authorize the Court to award monetary civil penalties of not more than \$11,000 for each such violation of the Negative Option Rule and the Telemarketing Sales Rule that occurred after November 20, 1996.

48. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to award such relief as is necessary to redress the injury to consumers or others resulting from defendant's violation of the Negative Option Rule and the Telemarketing Sales Rule.

49. Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), this Court is authorized to enjoin the defendant from violating the Negative Option Rule, the Telemarketing Sales Rule, the Unordered Merchandise Statute, and the FTC Act, as well as to grant plaintiff ancillary equitable relief.

PRAYER FOR INJUNCTIVE AND MONETARY RELIEF

WHEREFORE, Plaintiff requests that this Court, pursuant to 15 U.S.C. §§ 45(m)(1)(A), 53b, 57b, and the Court’s own equity powers:

(1) Enter judgment against Defendant and in favor of Plaintiff for each violation alleged in this Complaint;

(2) Enjoin Defendant from violating the Negative Option Rule, the Telemarketing Sales Rule, the Unordered Merchandise Statute, and the FTC Act;

(3) Award Plaintiff monetary civil penalties from Defendant for each violation of the Negative Option Rule and the Telemarketing Sales Rule alleged in this Complaint;

(4) For the period during which CPI failed to comply with the Negative Option Rule, the Telemarketing Sales Rule, or the Unordered Merchandise Statute, grant Plaintiff consumer redress from Defendant, to include, without limitation: (a) the cancellation of CPI’s direct preview program membership contracts and (b) an injunction prohibiting CPI from collecting payment for Subsequent-offer Books shipped for which consumers have not yet paid;

(5) Award Plaintiff such other and additional relief as the Court may deem just and proper.

DATED:

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