

December 22, 2006

By Fax & First Class Mail

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<http://www.cdt.org>

Re; SoftwareOnline.com

Dear Mr. Raskin:

I am responding to your letter of December 8, 2006, to Ari Schwartz and Alissa Cooper of the Center for Democracy & Technology (CDT) concerning your client, SoftwareOnline.com. In your letter, you protest the inclusion of a legal action brought by the State of Washington against your client in a "State Spyware Case Summary" located on CDT's website at <http://www.cdt.org/privacy/spyware/20060626spyware-enforcement-state.php>.

In the complaint brought against your client, *State of Washington v. SoftwareOnline.com and David W. Plummer*, No. 06-2-12343-3SEA (Superior Court, King Co., Washington 2006), the State of Washington asserted that your client engaged in four separate violations of Washington's Consumer Protection Act. In the Stipulated Judgment entered to resolve that complaint, your client admitted that its acts and practices "have the capacity to mislead a substantial number of consumers, are unfair and deceptive, and are unfair methods of competition and therefore constitute violations" of the Consumer Protection Act. Also in the Stipulated Judgment your client agreed to pay a total of \$190,000 in restitution and fees. Both the Complaint and the Stipulated Judgment are available at [http://www.atg.wa.gov/releases/2006/rel\\_SoftwareOnline\\_Settlement\\_041106.html](http://www.atg.wa.gov/releases/2006/rel_SoftwareOnline_Settlement_041106.html).

Your letter advances three basic claims to argue that *Washington v. SoftwareOnline.com* should not be included in CDT's "State Spyware Case Summary": First, you note that the State of Washington did not use its "spyware" statute against your client. Second, you argue that your client's conduct did not meet the definition of "spyware." Third, you assert that your client's conduct does not *today* meet the definition of "spyware" and that following the above case your client "took the issues raised by the Attorney General very seriously and worked cooperatively to take steps to address those issues."

Although we certainly applaud any steps your client may have taken to address the concerns raised in *Washington v. SoftwareOnline.com*, we believe that it is entirely appropriate to include the matter in our case summary. We believe that you have misunderstood what the table conveys. The table does not include *only* cases brought under spyware-specific statutes,

but *also* a number of cases (including *State of Washington v. SoftwareOnline.com*) brought under more general state consumer protection statutes. Indeed, CDT has long argued to state and federal officials that spyware-specific statutes are unnecessary and spyware can be addressed using existing consumer protection statutes.

Further, the table does not include only cases in which *every* charged conduct constitutes spyware, but instead cases in which at least *one* of the charged conducts constitutes spyware. Finally, the table does not purport to assert that all of the charged behaviors that are listed are continuing today – indeed, we hope and assume that most if not all of the defendants in the listed cases have “taken steps” to alter and/or stop the charged conduct.

The *State of Washington v. SoftwareOnline.com* is appropriately included in the table because at least one (if not all) of the charged behaviors constitutes spyware as we understand that term. For example, although your letter curiously is silent on this point, CDT’s web page notes that the State of Washington charged your client with:

Misrepresenting the functions of standard "buttons" on software advertisements, thereby requiring users to continue to view the advertisements when they try to close them.

This description closely tracks the exact wording that the State of Washington used in its Complaint against your client. And this conduct plainly “impair[s] user control over . . . [u]se of their system resources,” which is part of the definition of spyware as stated by the Anti-Spyware Coalition at <http://www.antispywarecoalition.org/documents/DefinitionsJune292006.htm>.

Similarly, CDT’s web page notes that the State of Washington charged your client with:

Leaving software files on users' computers without their knowledge or consent after they have uninstalled the associated software program.

Again, this description closely tracks the language of the Complaint brought against your client by the State of Washington, and leaving software files installed on users’ computers without their consent is – to our understanding – a hallmark of spyware (and plainly violates the Anti-Spyware Coalition’s definition of spyware).

Thus, we believe that it is beyond question that the *State of Washington v. SoftwareOnline.com* case is appropriately included in our State Spyware Case Summary. To ensure that your concerns are adequately addressed, we have taken two actions: First, we have made a few minor changes in the wording of our web page to ensure that the page is clear as to what cases are included in the Summary. Although we believe the page was clear before our changes, we think the page is crystal clear now.

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Second, because we recognize that you may continue to disagree about whether it is appropriate for *State of Washington v. SoftwareOnline.com* to be included in the Summary, we have included links to your letter and this response in the Summary discussion of *State of Washington v. SoftwareOnline.com*. Thus, the fact that you believe that *State of Washington v. SoftwareOnline.com* should not be included on the web page will be clear to any viewers of the page.

I am hopeful that this letter and the minor changes to our web page have addressed your concerns. I am happy to discuss this further with you, although I will be out of the office until January 2, 2007.

I hope that you have a safe and happy holiday.

Sincerely,

/s/ John B. Morris, Jr.

John B. Morris, Jr.  
General Counsel