

United States District Court,
N.D. Illinois, Eastern Division.

Stephen SOTELO, individually and on behalf of
all persons similarly situated, Plaintiff,

v.

DIRECTREVENUE, LLC; Directrevenue
Holdings, LLC; Betterinternet, LLC; Byron
Udell & Associates, Inc., d/b/a Accuquote;
Aquantive, Inc. and John Does 1-100,
Defendants.

Aug. 29, 2005.

MEMORANDUM OPINION AND ORDER

GETTLEMAN, District Judge.

Plaintiff Stephen Sotelo filed a five-count putative class action complaint against defendants DirectRevenue, LLC, DirectRevenue Holdings, LLC, and BetterInternet LLC (collectively, "Direct Revenue"), and Byron Udell & Associates, Inc., d/b/a AccuQuote ("AccuQuote") and aQuantive, Inc. ("aQuantive"), alleging that, without his consent, defendants caused software known as "spyware"¹ ("Spyware") to be downloaded onto his personal computer. Plaintiff alleges that Spyware tracked plaintiff's Internet use, invaded his privacy, and caused substantial damage to his computer. Plaintiff asserts various claims under Illinois law, including: trespass to personal property (Count I); [...] Plaintiff seeks injunctive relief and compensatory damages.

Defendants removed the class action to federal district court pursuant to 28 U.S.C. § 1332(d)(2) and the Class Action Fairness Act of

¹ Plaintiff defines spyware, also referred to as "adware," as "computer software downloaded to an end-user's computer over the Internet, without consent, that permits the company who downloaded the software (i.e., the spyware company) to track, profile, and analyze a computer user's behavior, for the purpose of sending him or her targeted advertising, which the spyware company can place for its clients."

2005, 28 U.S.C. § 1453. Defendants have filed [a motion to dismiss the trespass claim pursuant to Rule 12(b)(6) for failure to state a claim.] For the reasons discussed herein, defendants' motion [is denied.]

FACTS

[...] Defendant AccuQuote, an Illinois corporation with its principal place of business in Wheeling, Illinois, sells life insurance on the Internet. Defendant aQuantive is a publicly traded Washington corporation headquartered in Seattle, Washington, that is a marketing company that acts as an advertising agent for companies that advertise their products on the Internet. [...]

Plaintiff alleges that DirectRevenue deceptively downloaded Spyware, distributed by defendant BetterInternet LLC, on thousands of computers. Spyware allows DirectRevenue and companies that employ its services to track a computer user's web browsing behavior in order to deliver targeted advertisements to that computer. For example, if a computer with Spyware views music-related Internet sites, Spyware sends a signal of the computer user's activity back to DirectRevenue, which then targets the computer with advertisements from music-related companies that have paid for access to the computer via Spyware. DirectRevenue claims access to 12,000,000 computers in the United States, and has attracted national media attention and criticism for its alleged misconduct in gaining and maintaining such access. According to plaintiff, aQuantive and AccuQuote, or someone on their behalf, used Spyware to send advertisements to the computers.

DirectRevenue "secretly installs" Spyware by bundling it with other legitimate software that is available "free" on the Internet, such as games. When the computer user downloads and installs a game, he or she simultaneously, but unwittingly, downloads Spyware. "The computer users do not consent, let alone have knowledge," that Spyware is being installed on their computers because DirectRevenue has "deceptively caused" Spyware to download

without the users' consent or knowledge. DirectRevenue has an agreement governing Spyware called the "BetterInternet End User License Agreement" ("EULA") that purports to inform a consumer that Spyware will be installed, computer use will be monitored, and the computer will receive targeted advertisements.

According to plaintiff, DirectRevenue installs Spyware in at least three different ways to avoid showing the EULA to computer users. First, for computers with Microsoft settings set to "low," Spyware automatically installs when a user downloads a free software program. These users are "never even shown the [EULA], told of its existence, or advised of the need for any sort of licensing." Second, computer users who have Microsoft Windows' Service Pack 2 (a security feature) installed on their computers receive a pop-up dialog box as the Spyware is being downloaded. The message in the dialogue box is an "unintelligible" incomplete sentence, refers only to " 'the software,' rather than a bona fide program name," and asks the user to click "Install" or "Don't Install." There is no disclosure that the software being downloaded includes Spyware. There is a link to the EULA, but users are not asked to click on the link, advised of the availability of the EULA, or asked to agree to the EULA. Third, Internet users without Microsoft Windows Service Pack 2 are asked to agree to a "Consumer Policy Agreement," but not to the EULA, and there is no such policy available on DirectRevenue's website or elsewhere for computer users to review.

According to plaintiff, Spyware is designed to be difficult to remove from a computer once it is installed. DirectRevenue engages "in a uniformly deceptive course of conduct" to prevent users from removing Spyware after it is installed, including changing its name to prevent disgruntled computer users from complaining and altering the Spyware file names so that anti-Spyware programs and computer technicians cannot locate and remove it. DirectRevenue uses misleading aliases in an effort to deceive consumers including: BestOffers, BetterInternet, Ceres, LocalNRD, MSView, MultiMPP, MXTarget, OfferOptimizer, and Twaintec. The

EULA, if users ever see it, directs users who want to remove Spyware from their computers to a website address, <http://mypctuneup.com/contacts.php>. However, at the time of the complaint, the link did not connect to a web page, and no such site could be found. If a user attempts to use the "add or remove programs" feature to remove the legitimate software to which Spyware was bundled, Spyware "unbundles" and remains on the computer.

Through Spyware, advertisers and advertising agents, including aQuantive and AccuQuote, have access to millions of computers for their targeted advertising. These advertisers, or companies they have hired to advertise on their behalf, bombard users' computers with ads that constantly "pop up" over whatever web page a user is viewing. The pop-up advertisements are sent in a manner that breaches the security of affected computers by bypassing commonly-used software designed to block pop-ups. Once an advertisement is sent, it generally remains on the computer screen until the computer user actually closes the advertisement. Even after closing the advertisement, however, it is sent over and over again, and users receive many advertisements repeatedly. According to plaintiff, "Newsweek reported that Direct Revenue may have as many as 1.5 billion advertising impressions (i.e., pop-ups) per month."

Plaintiff alleges that Spyware wreaks havoc on a computer and its user. Spyware destroys other software programs, and Spyware and the unsolicited advertisements that clog the screen cause computers to slow down, deplete Internet bandwidth and the computer's memory, and use pixels and screen-space on monitors. Productivity is decreased because hours are wasted attempting to remove Spyware from computers, closing recurring and frequent advertisements, and waiting for slowed machines. Users are forced to keep their slowed computers running longer, which uses more electricity, decreases the useful life of a computer, and forces the user to incur increased Internet access charges. It costs approximately \$30 per year to purchase software to effectively remove Spyware and unwanted

advertisements, and to guard against future infections.

DISCUSSION

[...]

III. Trespass to personal property (Count I)

Count I asserts a claim for trespass to personal property/chattels against all defendants. Defendants argue in three separate motions to dismiss that Count I fails to state a claim upon which relief may be granted because plaintiff fails to plead causation and damages as required to state a trespass to personal property claim. For the reasons discussed below, the court denies defendants' motions to dismiss Count I.

In ruling on a motion to dismiss for failure to state a claim, the court considers "whether relief is possible under any set of facts that could be established consistent with the allegations." A complaint should not be dismissed for failure to state a claim unless there is no doubt that the plaintiff cannot prove a set of facts that would entitle her to relief based on her claim. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide its merits.

There is sparse Illinois case law from the last century addressing the elements of trespass to personal property, which had become a little-used cause of action, and all parties rely primarily on treatises and secondary sources. The Illinois Law and Practice Treatise states, "An injury to or interference with possession, with or without physical force, constitutes a trespass to personal property." Illinois Law & Practice, § 3, Trespass to Personal Property. According to the Restatement of Torts, there are two ways to commit this tort: "A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." Restatement (Second) Of Torts, § 217. Harm to the personal property or diminution of its quality, condition, or value as a result of a defendant's use can also result in liability. Restatement (Second) Of Torts, § 218(b).

Plaintiff in the instant case alleges that by installing Spyware defendants "intentionally intermeddled with, damaged, and deprived Plaintiffs of their computers and/or Internet connections, or a portion thereof."

AQuantive cites several cases that equate trespass to personal property with conversion, which has been addressed more frequently by modern courts. See, e.g., *Minuti v. Johnson*, 2003 WL 260705, at *4 (N.D.Ill. Feb.5, 2003) (equating the elements of trespass to chattels with conversion⁸ [FN8] where defendant maintained possession of property). AQuantive argues that plaintiff in the instant case fails to allege that he made any demand for or was refused the return of his property, which is an element of a conversion claim. The court agrees with plaintiff, however, that the two causes of action are distinct in cases such as this, where plaintiff does not allege his property is in defendant's possession or has been rendered entirely worthless, but rather that it was interfered with. See W. Prosser & W. Keeton, Torts § 14, 85-86 (5th ed. 1984) ("[The claim of trespass to personal property's] chief importance now, is that there may be recovery ... for interference with the possession of chattels which are not sufficiently important to be classified as conversion..."); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015, 1022 (S.D. Ohio 1997) ("A plaintiff can sustain an action for trespass to chattels, as opposed to an action for conversion, without showing a substantial interference with its right to possession of that chattel."). The question, then, is whether plaintiff has sufficiently pled the elements of trespass to personal property.

In recent years, trespass to personal property, which had been largely relegated to a historical note in legal textbooks, has reemerged as a cause of action in Internet advertising and e-mail cases. A series of federal district court decisions, beginning with *CompuServe, Inc.*, has approved

⁸ The elements of a conversion claim are: (1) defendant's unauthorized and wrongful assumption of control; (2) plaintiff's right in the property; (3) plaintiff's right to immediate possession; and (4) plaintiff's demand for possession. *Minuti*, 2003 WL 260705, at *4.

the use of trespass to personal property as a theory of liability for “spam e-mails” sent to an Internet service provider (“ISP”) based upon evidence that the vast quantities of spam e-mail overburdened the ISP’s own computer and made the entire computer system harder to use for computer users, the ISP’s consumers. *See also* [citations]

Although the above cases do not apply Illinois law, the law regarding trespass to personal property applied is substantially similar to that used in Illinois, and the courts’ reasoning is applicable to the instant case. Defendants’ attempt to distinguish these cases on the basis that the plaintiffs were ISP’s, not individual computers users like plaintiff in the instant case, is unpersuasive. The elements of trespass to personal property— interference and damage—do not hinge on the identity of the plaintiff, and the cause of action may be asserted by an individual computer user who alleges unauthorized electronic contact with his computer system that causes harm, such as Spyware.

DirectRevenue argues that even if trespass to personal property is a viable cause of action, plaintiff in the instant case has failed to state such a claim because he fails to properly plead causation and damages to his computer. *See Najieb v. Chrysler-Plymouth*, 2002 WL 31906466, at *10-11 (N.D.Ill.Dec.31,2002) (damages are a required element of trespass to chattels claim). Plaintiff, however, has specifically alleged that he is similarly situated to the putative class plaintiffs, and that Spyware is the proximate cause of significant and cumulative injury to computers, including his, and interferes with their use. According to plaintiff, Spyware “bombards” users’ computers with pop-up advertisements that obscure the web page a user is viewing and “destroys other software on a computer.” Plaintiff also alleges that Spyware and the resource-consuming advertisements sent to a computer by Spyware cause computers to slow down, take up the bandwidth of the user’s Internet connection, incur increased Internet-use charges, deplete a computer’s memory, utilize pixels and screen-space on monitors, require more energy because slowed computers must be kept on for longer,

and reduce a user’s productivity while increasing their frustration.

Many companies and computer users consider pop-up advertisements and Spyware an Internet scourge, as evidenced by media reports and on-line complaints, such as those submitted by plaintiff, and by mounting lawsuits filed across the country. Several courts have granted preliminary injunctions to plaintiffs who have alleged that their computer equipment and systems were impaired in similar ways, finding that the harm alleged could state a trespass to chattels claim. For example, in *CompuServe*, the defendant was in the business of sending bulk unsolicited e-mail advertisements, sometimes called “spam,” to subscribers of CompuServe. 962 F.Supp. 1015. The *CompuServe* court held the element of damage to the system could be established by the fact that the “multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff’s computer equipment,” and impose added inconvenience and Internet connection costs on CompuServe’s customers. 962 F.Supp. at 1022; *see also Hotmail*, 1998 WL 388389, at *7 (defendant transmitted tens of thousands of misdirected, unauthorized e-mail messages to plaintiff, thereby filling up the plaintiff’s computer storage space, threatening to damage the plaintiff’s ability to service its legitimate customers, and adding to the plaintiff’s personnel costs).

Plaintiff’s allegations in the instant case reflect the frustration of many computer users, and are analogous to harms alleged by the ISP plaintiffs in the *CompuServe* line of cases. Simply put, plaintiff alleges that Spyware interfered with and damaged his personal property, namely his computer and his Internet connection, by overburdening their resources and diminishing their functioning. Accordingly, the court denies DirectRevenue’s motion to dismiss Count I.

AccuQuote and aQuantive argue that even if plaintiff has stated a cause of action for trespass to personal property against DirectRevenue, plaintiff fails to state a claim against them. AccuQuote, which advertises on the Internet,

argues that plaintiff fails to allege that he received an advertisement from AccuQuote. aQuantive, an Internet marketing company, argues that plaintiff fails to allege that he received an advertisement from a company marketed by aQuantive, and that aQuantive is merely an “ad server” for pop-up advertisements. According to aQuantive, as an ad server, it sends pop-up advertisements to computers that “request” the advertisements, and it has no knowledge or control over whether the computer user has consented to the terms of the EULA.

AccuQuote and aQuantive’s arguments that plaintiff fails to allege that he received advertisements from them are defeated by a fair reading of the complaint, to which plaintiff is entitled on a motion to dismiss. The named plaintiff expressly alleges that he is a member of the putative class of plaintiffs, and alleges that aQuantive and AccuQuote, or their agents, use DirectRevenue to send targeted advertisements to the class members’ computers. In addition, plaintiff clarifies in his briefs and attached declarations that he received advertisements from AccuQuote and Netflix, a company that plaintiff alleges employs aQuantive’s “ad-serving” services to send advertisements to computers with Spyware.

AccuQuote and aQuantive argue that DirectRevenue, not they, caused advertisements to be sent to plaintiff’s computer, and that plaintiff fails to allege their participation or knowledge of DirectRevenue’s actions. AccuQuote and aQuantive ask too much of plaintiff under the liberal standards of the Federal Rules of Civil Procedure, which do not require fact pleading. *See* Fed.R.Civ.P. 8(a)(2). At the motion to dismiss stage, a plaintiff need not allege all of the facts involved in the claim. A plaintiff may plead conclusions, so long as the conclusions “provide the defendant with at least minimal notice of the claim.” Plaintiff’s allegations that aQuantive works “in cooperation with” DirectRevenue to download advertisements, that AccuQuote utilizes Spyware to send unwanted advertisements, and that both defendants have access through DirectRevenue to millions of computers for their targeted advertisements are

sufficient to provide the required notice. In addition, aQuantive and AccuQuote’s factual contentions that they had no role in causing the advertisements to appear on a user’s computer or no relationship with DirectRevenue are inappropriate on a motion to dismiss.

AccuQuote and aQuantive also argue that plaintiff fails to allege that they intended to trespass on his computer, or that they had knowledge of DirectRevenue’s unlawful activities or whether advertisements they sent or served were received by computers on which Spyware had been improperly installed. An intentional act is a required element of a trespass to personal property claim, but a plaintiff need not allege an intent to violate the law. *See* Restatement (Second) Of Torts, § 217 cmt c (“Such an intention is present when an act is done for the purpose of using or otherwise intermeddling with a chattel or with knowledge that such an intermeddling will, to a substantial certainty, result from the act. It is not necessary that the actor should know or have reason to know that such intermeddling is a violation of the possessory rights of another.”).

In support of its argument, aQuantive cites *In re StarLink Corn Prods. Liability Litig.*, 212 F.Supp.2d 828, 844 (N.D.Ill.2002), a conversion case. Unlike the plaintiff in *StarLink*, however, plaintiff in the instant case expressly alleges that defendants, including AccuQuote and aQuantive, intentionally placed or caused to be placed advertisements through Spyware that unlawfully interfered with plaintiff’s use of his computer and his Internet connection. This is sufficient to satisfy the intent element of plaintiff’s trespass to personal property claim against AccuQuote and aQuantive.

AccuQuote and aQuantive also argue that plaintiff fails to allege that they caused actual damage to his property. Several of the cases cited by aQuantive in support of this argument, however, are largely inapposite because they are summary judgment rulings. *See* [citations]. The only dismissal cited by aQuantive, *DirectTV, Inc. v. Chin*, 2003 WL 22102144, at *2 (W.D.Tex. Aug.26, 2003), also cited by AccuQuote, is not

binding on this court and is distinguishable. The DirecTV court dismissed the counter-plaintiff's trespass to chattels claim where he alleged generally that "on more than one occasion," he expended "time and resources" to delete pop-up advertisements from the counter-defendant, holding that the counter-plaintiff alleged "no facts" supporting damage. *Id.* In the instant case, by contrast, plaintiff has alleged that the advertisements caused significantly more injury than occasional wasted time and resources, as discussed above, and his pleading provides more specific details than the scant allegations in DirecTV.

AccuQuote and aQuantive also assert that because each individual advertisement can be closed by the computer user as it appears, they cannot cause any actionable injury. This argument ignores the reality of computer and Internet use, and plaintiff's allegation that part of the injury is the cumulative harm caused by the volume and frequency of the advertisements. The fact that a computer user has the ability to close each pop-up advertisement as it appears does not necessarily mitigate the damages alleged by plaintiff, which include wasted time, computer security breaches, lost productivity, and additional burdens on the computer's memory and display capabilities. Although plaintiff does not allege that AccuQuote and aQuantive are responsible for every pop-up advertisement that he has received, he alleges that they caused at least some of the estimated 1.5 billion advertising impressions generated by DirectRevenue per month, a portion of which were received by his computer. Indeed, AccuQuote admits that a marketing agency it employed placed what it describes as an "insignificant portion" of its advertisements through companies such as DirectRevenue. Questions of fact regarding how many, if any, of these advertisements caused the harms alleged by plaintiff are for a summary judgment motion or trial. At this stage in the litigation, plaintiff has sufficiently alleged that he was damaged by the alleged trespasses of AccuQuote and aQuantive on his computer.

Accordingly, the court denies the motions to dismiss Count I.

[...]

CONCLUSION

For the reasons stated above, the court [...]denies the motions to dismiss Count I [...]