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14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA

16 TRAFFICSCHOOL.COM, INC., a  
17 California corporation; DRIVERS ED  
18 DIRECT, LLC., a California limited  
19 liability company,

20 Plaintiffs,

21 v.

22 EDRIVER, INC., ONLINE GURU,  
23 INC., FIND MY SPECIALIST, INC.,  
24 and SERIOUSNET, INC., California  
25 corporations; RAVI K. LAHOTI, an  
26 individual; RAJ LAHOTI, an  
27 individual, and DOES 1 through 10.

28 Defendants.

Case No. CV067561 PA (CWx)  
*The Hon. Percy Anderson*

**DEFENDANTS' OBJECTIONS TO  
AND PROPOSED CHANGES TO  
PROPOSED JUDGMENT AND  
PERMANENT INJUNCTION**

*[Declaration of Bruce Tognazzini and  
Defendants' Proposed Revised  
Judgment lodged concurrently  
herewith]*

Complaint Filed: November 28, 2006  
Trial Commenced: November 6, 2007

1 **1. Introduction**

2 Defendants submit the following objections with the goal of articulating  
3 possible alternatives or modifications to the proposed judgment that could strike a  
4 reasonable balance among the following interests: (a) the interest in preventing  
5 confusion or inadvertent disclosure of confidential information; (b) the public  
6 interest in efficient access to DMV.ORG's information; and (c) DMV.ORG's interest  
7 in being able to operate its business and publish a website in accordance with  
8 industry standard usability practices.

9 Over sixty million visitors come to DMV.ORG each year, a number which  
10 did not decline despite materially increased disclaimers in 2007. The large number  
11 of visitors and significant positive feedback from the public suggests that the  
12 DMV.ORG website provides significant public value. Defendants seek a modified  
13 injunction that addresses the Court's concerns without undermining the usefulness of  
14 the website.

15 On this basis, Defendants object to the form of the proposed permanent  
16 injunction on the following grounds (detailed bases set forth below):

- 17 • The splash page requirement is: (a) not narrowly tailored to remedy the  
18 alleged confusion; and (b) unduly harmful.<sup>1</sup>
- 19 • The redirect requirement (sections (d) and (e) of the proposed injunction) is:  
20 (a) likely to cause confusion as to possible affiliation with those sites;  
21 (b) unnecessary to remedy any alleged confusion of consumers to the  
22 DMV.ORG site; (c) likely to result in the further frustration of consumers  
23 seeking information by directing them merely to state home pages; and (d)  
24 not feasible as many states have more than one entity with responsibility for  
25 driving-related functions (e.g., licensing, title/registration, insurance).

26  
27 <sup>1</sup> In section 3, below, Defendants propose alternative relief tailored to the  
28 concerns expressed by the Court in section D of its Findings.

1 **2. An Injunction Must Be Narrowly Tailored; A Splash Page Fails This Test**

2 In considering injunctive relief, "[t]he law requires that courts closely tailor  
3 injunctions to the harm that they address." [Court's Findings at 27, citing ALPO  
4 Petfoods v. Ralston Purina Co., 913 F.2d 958, 972 (D.C. Cir. 1990)]. "It is well-  
5 settled that the essence of equity jurisdiction has been the power to grant relief no  
6 broader than necessary to cure the effects of the harm caused by the violation."  
7 Forschner Group v. Arrow Trading Co., 124 F.3d 402, 406 (2d Cir. 1997).

8 In Perfumebay.com v. Ebay, 506 F.3d 1165, 1181-82 (9<sup>th</sup> Cir. 2007) the 9<sup>th</sup>  
9 Circuit affirmed a limited injunction precluding Perfumebay only from using  
10 conjoined versions of its mark, thereby permitting ongoing use of Perfume Bay.  
11 Despite the potential for some confusion from use of the Perfume Bay mark, the  
12 Court recognized that the district court had "balanced the conflicting interests both  
13 parties had in unimpaired continuation of their trademark use." Id. at 948.

14 Similarly, in Forschner Group, Inc. v. Swiss Army Brands, Ltd., 124 F.3d 402  
15 (2d Cir. 1997), involving a trademark infringement claim by an importer of Swiss  
16 Army knives from Switzerland, the appellate court affirmed the district court's  
17 limited injunction which allowed the defendant to use the color red for its pocket  
18 knives. In summarizing its review of the district court opinion, the appellate court  
19 found that "by striking a reasonable balance between [plaintiff's] and [defendant's]  
20 conflicting interests, focusing upon hindrances to legitimate competition as well as  
21 assuring sufficient product differentiation to avoid source confusion, the district  
22 court did not abuse its discretion in devising an appropriate injunction." Id. at 410.

23 In terms of identifying the public interest in need of protection, the Court in  
24 its Findings identified three specific areas of concern: (a) confusion arising from  
25 search engine listings; (b) transmission of sensitive information from the public to  
26 DMV.ORG; and (c) possible confusion among teenagers seeking a learner's permit.  
27 [Findings, p. 29.]

28

1 As a remedy, the Court proposes a mandatory splash page that 60 million  
2 consumers must stop and read before proceeding to any portion of the site.

3 The splash page requirement is unduly harmful in that, as is commonly  
4 acknowledged, 25% of consumers who see a splash page, regardless of content, will  
5 simply leave the site due to the inconvenience of the delay and/or frustration at not  
6 being directed to the information they expected. [See Declaration of Bruce  
7 Tognazzini, ¶¶ 11-12, 16, 25.] Mr. Tognazzini is a recognized and published expert  
8 on website usability and, given the substantial impact that such a page could have on  
9 DMV.ORG's traffic, Defendants respectfully request that this Court consider his  
10 expert opinion in this context.

11 Splash pages are used almost exclusively by websites devoted to vices such as  
12 pornography, alcohol and gambling. [Tognazzini Decl. ¶ 13.] Requiring  
13 DMV.ORG to use a splash page will unfairly associate DMV.ORG with these types  
14 of websites. [Id. at ¶ 14.]

15 At trial, Defendants also offered evidence that such splash pages are  
16 uncommon, disrupt a consumer's flow, and create their own confusion and  
17 frustration. [Defendants' Fact 142.<sup>2</sup>] This evidence is supported by numerous  
18 Internet publications. See Eric Holter, Splash Is Dead, (located at:  
19 [http://www.newfangled.com/more/webSMART\\_print.php/id/144](http://www.newfangled.com/more/webSMART_print.php/id/144)) (splash pages  
20 "overpower" visitors, create problems with search engines, suggest to users that  
21 there is inappropriate content behind the splash page, decreases effective use of a  
22 site, and may lead to blacklisting by search engines); Jennifer Kyrnin, Splash Pages:  
23 Pros and Cons (<http://webdesign.about.com/od/navigation/a/aa020303a.htm>) (splash  
24 pages are "annoying," "flawed," may "break search engines," studies show up to  
25 25% of visitors seeing such a page leave immediately); Andy King, Sink the Splash

26  
27 <sup>2</sup> Plaintiffs did not offer any contrary evidence.  
28

1 Pages (<http://www.websiteoptimization.com/speed/tweak/splash/>) (splash pages  
2 "increase bailout rates" and "reduce web credibility with up to 71% traffic loss").

3 Further, splash pages can significantly decrease or eliminate the ability of  
4 search engines to index the contents of websites for purposes of search result listings  
5 (both organic and sponsored listings). Consequently, the proposed splash page puts  
6 the large majority of the internet traffic arriving to DMV.ORG (which comes  
7 through search engine result listings) at risk and therefore DMV.ORG's entire  
8 business at risk. In short, the splash page may lead search engines to conclude that  
9 the DMV.ORG website has no information relevant to motor vehicles; and, instead,  
10 that the website only offers an acknowledgment.

11 Defendants believe that Plaintiffs proposed a splash page precisely because  
12 they understood that, regardless of the value of the content on the DMV.ORG  
13 website, such a page will automatically deter a significant number of users from any  
14 use of the DMV.ORG website and could even prevent consumers from finding  
15 DMV.ORG through search engines. [Tognazzini Decl., ¶¶ 11-12, 16, 25.]

16 DMV.ORG's success year after year is based upon the convenience it  
17 provides to consumers looking for motor vehicle related information. The splash  
18 page substantially reduces that consumer benefit by disrupting, even for what might  
19 be considered a mere moment in time, a consumer's expectation that he or she will  
20 find the information he or she is looking for. It also puts the entire website at risk  
21 due to the impact it will have on search engine indexing of the website. Because  
22 splash pages are known to cause a substantial loss in traffic and goodwill,  
23 Defendants respectfully request that this Court reconsider the splash page concept  
24 altogether.

### 25 **2.1 Specific Points Related To The Drop Down Menu**

26 In addition to the significant loss of traffic outlined above, the requirement of  
27 drop down menu to redirect visitors to state agency websites (section (d)-(e)) is  
28 overbroad in that it goes beyond what is necessary to cure any potential confusion.

1 See New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 202 U.S.P.Q.  
2 643 (9th Cir. 1979) ("a reasonable consumer of average intelligence"); AMF, Inc. v.  
3 Sleekcraft Boats, 599 F.2d 341, 204 U.S.P.Q. 808 (9th Cir. 1979) ("typical buyer  
4 exercising ordinary caution"); Dreamwerks Production Group, Inc. v. SKG Studio,  
5 142 F.3d 1127, 1129, 46 U.S.P.Q.2d 1561 (9th Cir. 1998) ("the test for likelihood of  
6 confusion is whether a 'reasonably prudent consumer' in the marketplace is likely to  
7 be confused").

8 Sections (d) – (e) are not aimed at removing consumer confusion but rather  
9 require DMV.ORG to redirect visitors in a way that may not promote consumer  
10 benefit.

11 First, such a drop down menu would effectively make DMV.ORG a  
12 clearinghouse to the state agency website homepages, and could thereby generate  
13 incremental confusion as to an affiliation between DMV.ORG and the state  
14 agencies. Visitors may also regard the drop down menu as likely to take them to  
15 state specific DMV.ORG pages, not to official state home pages, because a similar  
16 internal navigating function is also in use on the DMV.ORG website already.

17 The drop down menu also has the following additional disadvantages:

- 18 • Such a menu pushes consumers toward a less efficient search by driving them  
19 towards state agency home pages. As set forth below, consumers desiring  
20 specific information from government sites would be better served to simply  
21 click the browser's back button and drill down into government sites from  
22 search results.
- 23 • Such a menu is also impracticable in that many states have more than one  
24 agency with jurisdiction over motor vehicle issues. As set forth below, absent  
25 knowledge of the nature of information sought, these redirecting links will  
26 direct consumers to the wrong agencies, creating more confusion and negative  
27 goodwill for DMV.ORG.

1                   (A)    Clicking The Browser's Back Button Is More Efficient

2           If a consumer accesses DMV.ORG seeking a state agency website, then the  
3 best course of action for such a consumer would simply be to click the "back"  
4 button on his or her browser to navigate to the appropriate website. Bihari v. Gross,  
5 119 F. Supp. 2d 309, n. 15 , 56 U.S.P.Q.2d 1489, n. 15 (S.D.N.Y. 2000) ("resuming  
6 one's search for the correct website is relatively simple. With one click of the mouse  
7 and a few seconds delay, a viewer can return to the search engine's results and  
8 resume searching for the original website."); Savin Corp. v. Savin Group, 68  
9 U.S.P.Q.2d 1893, 2003 WL 22451731 (S.D. N.Y. 2003), aff'd in part, rev'd in part  
10 on other grounds, 391 F.3d 439, 73 U.S.P.Q.2d 1273 (2d Cir. 2004) ("consumers  
11 diverted on the Internet can more readily get back on track than those in actual  
12 space"); J.E. Rothman, Initial Interest Confusion: Standing at the Crossroads of  
13 Trademark Law, 27 Cardozo L. Rev. 105, 175 (2005) ("It takes seconds to click  
14 back to a prior webpage or search results list, or to redirect to another website  
15 online, whereas driving off and on the freeway could take many minutes if not  
16 longer.").

17           The redirect link would likely cost a visitor more time than would simply  
18 clicking "Back," returning to the initial search results, and clicking an alternative  
19 link.

20           For example, assume: (a) consumer searches for "California drivers tests" on  
21 a search engine such as Google; and (b) clicks on a link to DMV.ORG. The  
22 question is, once the person is on notice that he or she is on a private website, and  
23 assuming the person wants to go to the state agency site, what is the most efficient  
24 means to get to that point?

25           Scenario 1: The consumer could get there in two clicks by: (a) clicking the  
26 "Back" button on the browser; and (b) selecting the alternative www.dmv.ca.gov  
27 link on the search results. This path will take the consumer, in two clicks to the  
28 precise page the consumer seeks.

1            Scenario 2: Alternatively, if there is a splash page with a dropdown menu,  
2 then: (a) the user will have to understand the choices presented on the splash page;  
3 (b) select California from the drop down menu (one click, equivalent to back  
4 button); (c) be redirected to the California DMV home page; (d) determine how to  
5 navigate from the California DMV home page to the desired page (in this example,  
6 actual manual navigation from the buttons to any state agency drivers tests is very  
7 difficult); (e) a frustrated user may then try using the California DMV site search  
8 tool, entering yet another search and then click through to the page.

9            A comparison of these two sequential processes shows that consumers will be  
10 better off if they return to original search engine search results and proceed from  
11 there. [See Tognazzini Decl., ¶¶ 20-24.]

12            **(B) Redirection To State Agency Websites Is Not Practicable**

13            Redirect links also prove problematic in practice. The DMV.ORG website  
14 contains information related to many different topics associated with driving and  
15 motor vehicles, including information regarding: (a) what to do if your car is stolen;  
16 (b) current vehicle manufacturer and tire recalls; (c) lemon law rules in various  
17 states and referrals to counsel; (d) buying new and used cars; (e) auto insurance;  
18 (f) drivers training; (g) registration; (h) traffic tickets, etc. [Raj Lahoti Trial Decl.,  
19 ¶ 3.]

20            Each state divides up these state functions in different ways, often among  
21 different departments; and, of course, some states don't cover some of the topics at  
22 all. For example, the following states have multiple departments handling different  
23 topics/functions and they provide information at multiple websites as well:

- 24            • Alabama: Alabama Traffic Service Center ([www.traffic.alacourt.gov/](http://www.traffic.alacourt.gov/))  
25            (Tickets), Department of Public Safety ([www.dps.alabama.gov/](http://www.dps.alabama.gov/)) (Licensing),  
26            Department of Revenue Motor Vehicle Division  
27            ([www.revenue.alabama.gov/motorvehicle/index.html](http://www.revenue.alabama.gov/motorvehicle/index.html)) (Registration).



- 1 • Georgia: Department of Driver Services (www.dds.ga.gov/) (Licensing) and  
2 Department of Revenue – Motor Vehicle Division  
3 (www.motor.etax.dor.ga.gov/) ( Registration).
- 4 • Texas: Department of Public Safety (www.txdps.state.tx.us/) (Licensing) and  
5 Department of Transportation (www.wdot.state.tx.us/) (Registration).

6 [See Defendants' Request for Judicial Notice, No. 10 (filed 10-23-07; docket  
7 number 147).]

8 Consequently, because many states have more than one agency assigned to  
9 driving related information, the proposed redirect links would very likely result in  
10 DMV.ORG sending a consumer to the wrong state website. This could potentially  
11 create confusion and tarnish DMV.ORG's goodwill, as the website redirecting the  
12 visitor, by wasting the consumer's time. In part, the value provided to the public by  
13 the 400+ topics and corresponding 5,000+ pages of the DMV.ORG website is that  
14 visitors can actually locate otherwise difficult-to-find information.

15 **3. A More Narrowly Tailored Injunction**

16 Defendants respectfully submit that, in lieu of a splash page altogether,  
17 alternative, more narrowly tailored measures are available that will address, perhaps  
18 more robustly, the public interest concerns identified by the Court. For instance:

- 19 • To address any possible search engine confusion, require DMV.ORG to use  
20 either the term "unofficial" or "independent" in search results (both sponsored  
21 and organic listings) that directly relate to either traffic school or driver's  
22 education school. Already in use by DMV.ORG, this change was not tested  
23 by Dr. Maronick and constitutes immediate notice of the independent nature  
24 of the site.
- 25 • To help preclude consumers from inadvertently sending confidential  
26 information to DMV.ORG, require visitors sending communications to  
27 affirmatively check a box acknowledging that "DMV.ORG is a **privately**  
28 **owned website** that is **not** owned or operated by any government agency."

1 This more timely and directed notice would likely eliminate any transfer of  
2 confidential information.

- 3 • Require the Court's disclaimer in size 16 point font, to be highlighted and  
4 used at the top of every page of the website (as reflected in Exhibit A).  
5 [Findings, p. 16 (noting large home page disclaimer not used on every page).]  
6 Such a header will be a constant, repeated, and absolutely unavoidable notice  
7 to every visitor to the site.
- 8 • To further decrease the risk of perceived endorsement from explicit  
9 recommendations (Findings, p. 7), preclude DMV.ORG from using express  
10 recommendation language in relation to third party traffic school and drivers  
11 education advertisers.

12 In an effort to proactively address the concerns of the Court, all of these changes are  
13 already in place on the DMV.ORG website for the Court to view. A proposed  
14 revised judgment to establish this further relief is lodged herewith.

15 **4. Conclusion**

16 The use of a splash page will negatively impact the entire DMV.ORG  
17 website. Without taking into consideration the effect that the splash page may have  
18 on search engines' ability to index DMV.ORG, a splash page could nonetheless  
19 drive away 15 million visitors from DMV.ORG each year simply because of  
20 consumers' distaste for such pages, regardless whether DMV.ORG's published  
21 information would in fact answer their questions.

22 Alternative means, proposed above, could ensure ample, repeated notice to  
23 consumers, further enhance protection against inadvertent transfer of confidential  
24 information, and mitigate the risk of perceived endorsement of DMV.ORG  
25 advertisers, without crippling the usability of the website and the business entirely.  
26 Defendants respectfully submit to the Court that the concerns identified in the  
27 Court's findings can be addressed through Defendants' alternative proposed  
28 injunction, rather than a splash page which will have much broader implications.

1 For these reasons, Defendants respectfully request that this Court modify the  
2 proposed injunction and enter the alternative proposed injunction lodged herewith.

3  
4 Respectfully submitted,

5  
6 DATED: June 18, 2008

7 SHEPPARD MULLIN RICHTER & HAMPTON LLP

8  
9 By



10 \_\_\_\_\_  
BRIAN M. DAUCHER

11 Attorneys for Defendants

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**EXHIBIT A**

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## The Unofficial Guide to the DMV<sup>SM</sup>

This Web site was created to provide easy-to-access information and resources for all your Department of Motor Vehicles needs. Because government DMV sites can sometimes be confusing to use, we have developed this free and comprehensive guide for the average person to understand.

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Internet



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Address: <http://www.dmv.org/ca-california/traffic-schools.php>

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EXHIBIT A PAGE 12

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## Driver Education

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Completion of a California Drivers Ed course is required prior to obtaining your learner's permit, and ultimately receiving your Driver's License. DMV.ORG suggests TeenDriversEducation.com as a good choice for completing your California driver education requirement online or with a homestudy course.

TeenDriversEducation.com - Drivers Ed Online

Enroll in a drivers education course. Fulfill your California drivers ed requirement for first time drivers online quickly and easily from the comfort of your home.

### OVERVIEW

- [Where to Start?](#)
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- [Step Three: Driver's Training](#)

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EXHIBIT A PAGE 13



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### Contact Information

#### DMV Office Contact Info

Contact your state DMV to get answers to the following types of questions:

- ✓ I passed my driving test three weeks ago, but I still haven't gotten my license in the mail. When will I get it?
- ✓ I want to pass along a compliment to the supervisor of a specific city branch. How do I contact them?
- ✓ I keep getting an error when I fill out the form to renew my license online. Who do I talk to about this?
- ✓ Any other DMV-specific issues

[Contact Your DMV Office](#)

#### Web Site Contact Info

DMV.ORG is a **privately owned website** that is **not** owned or operated by any government agency.

Only contact DMV.ORG support when you have questions specific to our web site such as:

- ✓ I have questions or comments on an advertised product/service listed at DMV.ORG?
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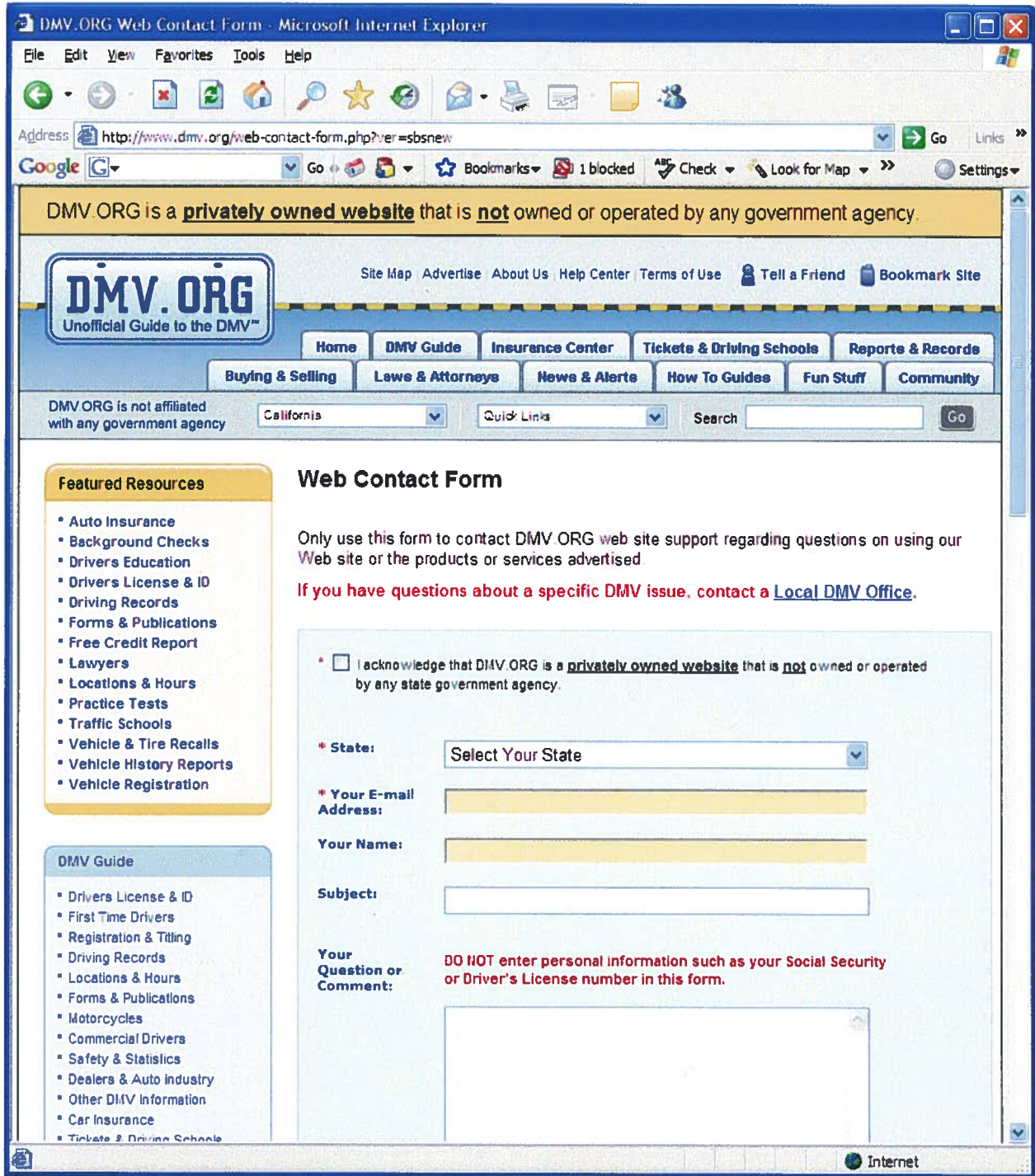


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