

# **EXHIBIT 4**

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JUL 2000 #1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

RECEIVED  
CLERK  
DISTRICT COURT

CASE NUMBER 1:00CV01723

JUDGE: Gladys Kessler

DECK TYPE: Civil General

DATE STAMP: 07/21/2000

JURY TRIAL DEMANDED

JURY  
ACTION

WALTER MUELLER  
808 H ST. NW  
WASHINGTON, D.C. 20006  
202/822-9245

Plaintiff,

vs.

NETSCAPE COMMUNICATIONS CORPORATION  
AMERICA ONLINE, INC.

Defendants.

COMPLAINT FOR MONEY DAMAGES AND INJUNCTIVE RELIEF AND JURY DEMAND

Plaintiff individually and on behalf of all others, similarly situated, by his attorneys, alleges the following upon information and belief (except for those allegations pertaining to plaintiff, which are based on personal knowledge), after due investigation by his counsel.

NATURE OF THE ACTION

Plaintiff brings this action on his own behalf and as a class action on behalf of a class (the "Class") consisting of plaintiff and all other persons or entities who use or who have in the last 3 years used NetScape Navigator, to recover damages caused to the class by defendants' use or theft of their private information in violation of the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act.

Unbeknownst to the members of the Class, and without their authorization, defendants have been spying on their Internet activities and invading personal information stored on their

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computers or obtained indirectly from web sites they have visited using NetScape Navigator.

NetZip's "Download Demon" was purchased by Real Networks and renamed "Real Download". Then NetScape/AOL licensed it from Real and called it "NetScape Smart Download."

"SmartDownload", distributed by defendants to users of NetScape's "Communicator" web browser, secretly transmits to defendants information identifying the name, type, and source of each and every exe or zip file that an Internet user downloads using SmartDownload from any site on the Internet, along with information uniquely identifying the visitor. SmartDownload captures and transmits this information unbeknownst to and without the consent of either the class member or the visitor to the Web Site. This continuing Surveillance of the class member's provisioning of exe and zip files, coupled with the unique information uniquely identifying each visitor, permits NetScape to create a continuing profile of the class member's and each visitor's file transfers over time.

These programs immediately tag a computer with a unique ID, after which every single file a user downloads from anywhere on the Internet is immediately reported back to the program's Source, along with the user's machine's unique ID and its unique Internet IP address.

This information allows NetScape/AOL to compile and create a detailed "profile" about who a user is based upon the web Sites a user visits and the files a user has downloaded.

This surveillance is done without the user's knowledge, without prior notification to him, and without his consent.

#### JURISDICTION AND VENUE

Plaintiff brings this action pursuant to Sections 2511 and 2520 of the Electronic Communications Privacy Act ("ECPA"), 18

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U.S.C.A. §§ 2511 and 2520, and Section 1030 of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, § 1334 and § 1137.

Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c). Each defendant does business in this district, resides in this district, and the illegal use and surveillance of the named plaintiff's computer was effected by electronic signals in this district on a computer maintained in this district.

In connection with the acts and conduct complained of, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including interstate telephone communications and the Internet.

#### THE PARTIES

Plaintiff Walter Mueller maintains a computer in the District of Columbia in which he runs NetScape Navigator and uses SmartDownload to search the web and download exe and zip files, and other members of the class maintain computers on which they run NetScape Navigator and use SmartDownload to search the web and download exe and zip files.

Defendant NetScape Communications Corporation ("NetScape") is a Delaware corporation that does business in this district. NetScape offers a broad range of Internet-related products and services and is best known for its popular Web browser, NetScape Communicator, formerly known as NetScape Navigator (collectively referred to herein as "Communicator"), and its principal Internet Site. America Online, Inc. has its principal place of business in Virginia, and does business in the district of Columbia.

#### CLASS ACTION ALLEGATIONS

Plaintiff brings this action under Rules 23(a), 23(b) (2), and 23(b) (3) of the Federal Rules of Civil Procedure on behalf of

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a class consisting of plaintiff and all other United States persons or entities who run NetScape Navigator on their computers and/or who use NetScape Navigator to access Web Sites on the Internet providing "zip" or "exe" files for download by visitors to the Site ("the class"). Excluded from the class are the defendants herein, any subsidiary of either defendant, all employees and directors of either defendant or any subsidiary, and the legal representatives, heirs, successors or assigns of any such excluded person or entity.

The class is so numerous that joinder of all members is impracticable. At least 14 million people run NetScape Navigator on their computers. Thousands of U.S. Web Sites offer zip and exe files to their visitors, and millions of people have used SmartDownload. The members of the class are geographically dispersed throughout the United States. The exact number of class members is unknown at this time.

Plaintiff's claims are typical of the claims of the other members of the class, as plaintiff and all other members of the class were injured in exactly the same way by the intentional theft of their private information in violation of federal law as complained of herein. Plaintiff will fairly and adequately protect the interests of the members of the class and has retained counsel competent and experienced in class action litigation.

Plaintiff has no interests that are contrary to or in conflict with those of the class.

A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the class members individually to seek redress for the wrongful conduct alleged.

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Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

Common questions of law and fact exist as to all members of the class and predominate over any questions affecting solely individual members of the class. Among the questions of law and fact common to the class are:

whether defendants' acts as alleged herein violated the ECPA and/or the CFAA;

whether defendants participated in the concerted action or common course of conduct complained of;

whether the members of the class have sustained damages and, if so, the proper measure of such damages.

#### SUBSTANTIVE ALLEGATIONS

NetScape has no bona fide existence independent of AOL. In November of 1998, defendant AOL agreed to merge with defendant NetScape (which was at the time publicly held) in exchange for AOL Stock.

The merger was accounted for as a pooling of interests transaction.

Since the consummation of the merger, the operations of AOL and NetScape have been functionally merged and inextricably intermingled, as detailed in AOL'S press release dated November 24, 1998 and in Item 1 of AOL'S Annual Report on Form 10-K for the year ended June 30, 1999.

They routinely provide each other with financial, managerial, and informational resources, physical infrastructure and intellectual property without compensating each other or accounting for such use.

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They are using Internet computers and other assets under their joint control to accomplish the wrongs complained of herein.

NetScape introduced SmartDownload in November of 1998, virtually simultaneously with the execution of the merger agreement with AOL.

SmartDownload facilitates the transfer of large files over the Internet by permitting the transfer to be resumed if it is interrupted

Internet location of the file, along with the identification String from the cookie previously Set by NetScape. It also transmits an additional identification string identifying which user of that particular computer is performing the download. For example, if an Internet user uses SmartDownload to download MicroSoft's Internet Explorer from MicroSoft's Web Site, SmartDownload will transmit to defendants the Internet user's identification string along with the name of the file and the file's location on the Internet.

In So doing, NetScape is using SmartDownload to eavesdrop. It is using SmartDownload to intercept and to send to defendants information about a communication to which defendants are not a party. Moreover, by including the user identification string in the transmission, NetScape is intentionally providing defendants with all of the information that they need to create a moment-by-moment individualized profile of Internet file transactions both of the class member and of Internet web sites.

Defendants never disclose, either to the class member or to the Internet user, that SmartDownload is monitoring the class member's electronic communications and transactions with Internet users. SmartDownload's transmission of the data is functionally unrelated to SmartDownload's ability to resume downloads.

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COUNT I

(Interception of Electronic Communications Under the ECPA)

Plaintiff repeats and realleges each and every allegation contained above.

Plaintiff asserts this Count against both defendants, jointly and severally, pursuant to Sections 2511 and 2520 of the ECPA, 18 U.S.C. §§ 2511, 2520. Section 2511 of the ECPA provides, in part:

Except as otherwise specifically provided in this chapter any person who-intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any... electronic communication;

(d) intentionally uses, or endeavors to use, the contents of any. Electronic communication, knowing or having reason to know that the information was obtained through the interception of any.. electronic communication in violation of this subsection;

Shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Section 2520 of the ECPA provides, in part:

In general, except as provided in Section 2511 (2) (a) (ii), any person whose electronic communication is intercepted. Or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

Relief in an action under this section, appropriate relief includes such preliminary and other equitable or declaratory relief as may be appropriate; damages under subsection (c) and punitive damages in appropriate cases; and a reasonable attorney's fee and other litigation costs reasonably incurred.

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Computation of damages:

In any other action under this Section, the court may assess as damages whichever is the greater of the Sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or Statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.

Limitation:

A civil action under this Section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Section 2510 of the ECPA, setting forth the definitions the terms in § 2511, defines "person" to include "any partnership, association, joint stock company, trust, or corporation." 18 U.S.C. § 2510 (6). Each defendant is a "person" within the meaning of § 2511.

Section 2510 defines "electronic communication" to include "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, or photo optical system that affects interstate or foreign commerce, "Subject to exclusions not relevant to this action. 18 U.S.C. § 2510(12). The Internet communications between the Class member and the Internet user is an "electronic communication" within the meaning of § 2511.

Section 2510 defines "contents" of an electronic communication to include "any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). The file name, its source and the Internet identities of the participants in that electronic communication constitute a part of the "content" of that electronic communication within the meaning of § 2511.

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Section 2510 defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Section 2510 defines "electronic, mechanical, or other device" to mean "any device or apparatus which can be used to intercept a wire, oral, or electronic communication," subject to exclusions not relevant to this action. 18 U.S.C. § 2510(5). SmartDownload is an "electronic device" within the meaning of 18 U.S.C. § 2510(5). By using SmartDownload to secretly obtain the contents of that electronic communication, each defendant "intercepts" that communication within the meaning of § 2511.

By virtue of the foregoing, plaintiff and each member of the Class is a "person whose electronic communication is intercepted or intentionally used in violation of this chapter" within the meaning of Section 2520.

By virtue of the foregoing, defendants are liable to plaintiff and the other members of the Class for their violations of sections 2511 and 2520 of the ECPA.

Since SmartDownload was not available until November of 1998, this action is timely as to plaintiff and each member of the Class.

Defendants' actions complained of herein were conscious, intentional, wanton and malicious, entitling Plaintiff and the other members of the Class to an award of punitive damages.

Plaintiff and the other members of the Class have no adequate remedy at law for defendants' continued violation of the ECPA.

#### COUNT II

(Theft of Intellectual Property Under the CFAA)

Plaintiff repeats, and realleges each and every preceding allegation as if fully set forth herein.

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Plaintiff asserts this Count against both defendants, jointly and severally, pursuant to Section 1030 of the CFAA, 18 U.S.C. § 1030.

Section 1030 provides in part:

Whoever intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer if the conduct involved an interstate or foreign communication; shall be punished as provided in subsection (c) of this Section.

Whoever attempts to commit an offense under subsection (a) of this Section shall be punished as provided in subsection (c) of this Section.

(g) Any person who suffers damage or loss by reason of a violation of this Section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage.

Section 1030 defines the term "protected computer" to include "a computer which is used in interstate or foreign commerce or communication." 18 U.S.C. § 1030(e) (2) (B). Each computer on which SmartDownload is installed is used in interstate communications and is therefore a "protected computer" within the meaning of § 1030.

Section 1030 defines the term "exceeds authorized access" to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accuser is not entitled so to obtain or alter." 18 U.S.C. § 1030 (e) (5). By using SmartDownload to secretly obtain information contained in the computers of Internet users about what files are downloaded, each defendant "accesses a computer without

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authorization or exceeds authorized access" within the meaning of § 1030.

Section 1030 defines the term "damage" to include "any impairment to the integrity or availability of a system that causes loss aggregating at least \$5,000 in value during any 1-year period to one or more individuals". 18 U.S.C. § 1030(e)(8)(A). By using SmartDownload to secretly obtain information contained in the computers of Internet users about what files are downloaded, each defendant has caused "damage" within the meaning of § 1030.

By virtue of the foregoing, defendants are liable to plaintiff and the other members of the Class for their violations of Section 1030 of the CFAA.

Since SmartDownload was not available until November of 1998, this action is timely as to plaintiff and each member of the Class.

Defendants' actions complained of herein were conscious, intentional, wanton and malicious, entitling plaintiff and the other members of the Class to an award of punitive damages.

Plaintiff and the other members of the Class have no adequate remedy at law for defendants' continued violation of the CFAA.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all issues.

WHEREFORE, plaintiff, on behalf of himself and the members of the Class, prays for judgment as follows:

declaring this action to be a proper class action and certifying plaintiff as the proper representative of the Class under rule 23 of the Federal Rules of Civil Procedure;

declaring that defendants' acts alleged above violate the ECPA and the CFAA as alleged herein;

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preliminary and permanently enjoining defendants from pursuing the course of conduct complained of herein;

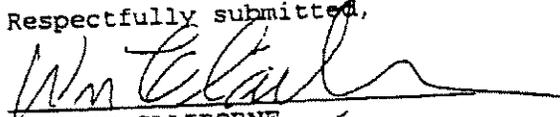
awarding compensatory and statutory damages in favor of plaintiff and the other members of the Class against defendants, jointly and severally, for the damages sustained as a result of the wrongdoing of defendants, together with pre- and post-judgment interest thereon;

awarding plaintiff and the other members of the Class their costs and expenses incurred in this action, including reasonable allowance of fees for plaintiff's attorneys and experts, and reimbursement of plaintiff's expenses;

granting Such other and further relief as the Court may deem just and proper.

Date: July 21, 2000

Respectfully submitted,



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