

**SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK**

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**THE PEOPLE OF THE STATE OF NEW YORK,
by ELIOT SPITZER, Attorney General of the
State of New York,**

Petitioner,

- against -

**NETWORK ASSOCIATES, INC.
D/B/A MCAFEE SOFTWARE**

Respondent.

AFFIRMATION OF KENNETH M. DREIFACH

KENNETH M. DREIFACH, an attorney admitted to practice before the Courts of the State of New York, makes the following affirmation under penalty of perjury:

1. I am Assistant Attorney General In Charge of the Internet Bureau, in the office of ELIOT SPITZER, Attorney General of the State of New York. I am familiar with the facts and circumstances of this proceeding.
2. The facts set forth in this affirmation are based upon information contained in the files of the Internet Bureau.
3. I am making this affirmation in support of the Attorney General's accompanying Verified Petition, and application for an Order, which, *inter alia*, enjoins respondent Network Associates, Inc. ("Network Associates" or "the company") from (1) misrepresenting to consumers that they are restricted from criticizing, commenting on, reviewing,

or testing Network Associates' mass-marketed software, or (2) taking any steps to enforce such a representation or provision against consumers.

A. Background of Case

4. In the course of selling and distributing its mass-marketed consumer software products, Network Associates has represented to at least hundreds of thousands of consumers (and most likely to millions) that "rules and regulations" prohibit consumers from publishing without consent any "reviews of [the] product" or "results of any benchmark test," *i.e.*, product test, regarding Network Associates' products.

5. Network Associates has made these representations in the course of retail sales through the mail and from physical locations, and sales of software downloaded directly over the Internet. The representations, which are the subject of this Petition, are unenforceable and deceptive for several reasons, as further set forth in the accompanying Memorandum of Law.

6. These misrepresentations to consumers regarding the law and their rights under the law constitute illegal and fraudulent acts prohibited by New York's Executive Law § 63(12), and are also deceptive practices prohibited under New York GBL § 349.

B. Parties and Jurisdiction

7. This action is brought for and on behalf of the PEOPLE OF THE STATE OF NEW YORK, by ELIOT SPITZER, Attorney General of the State of New York, pursuant to the provisions of Executive Law § 63(12), GBL § 349, and his common law authority as Attorney General to represent the People of New York.

8. Network Associates is a limited liability company having its principal place of business at 3965 Freedom Circle, Santa Clara, CA 95054. The company sells and markets a

range of packaged software products, including McAfee anti-virus and firewall software, through Network Associates' McAfee product group. Its anti-virus software products are among the top selling software programs worldwide. For instance, during 1999, Network Associates' VirusScan 4.0 Classic, with an average retail price of \$32.97, sold over 660,000 units, making it the tenth highest selling retail software package worldwide. (See Exh. 1, hereto) (Eisenach, J. et al., The Digital Economy Fact Book 31 (Progress and Freedom Found., 2d Edition 2000).) Another of the company's popular software packages is its "Gauntlet" firewall software, see infra ¶¶ 17-19.

9. Network Associates markets its software products both by selling them directly over the Internet, available for downloading by consumers (including New York residents), and by selling boxed versions through the mail and at physical retail locations (including stores in New York).

C. The Censorship Clause

10. Network Associates has placed on the face of its VirusScan software diskette a warning to consumers that they do not have the right, *inter alia*, to "publish reviews" concerning the software. The company tells its consumers that so-called "rules and regulations" govern this prohibition, namely, that:

Installing this software constitutes your acceptance of the terms and conditions of the license agreement in the box. Please read the license agreement before installation. Other rules and regulations of installing this software are:

* * *

- b. The customer shall not disclose the results of any benchmark test to any third party without Network Associates' prior written approval.
- c. The customer will not publish reviews of this product without prior consent from Network

Associates, Inc.

(Hereinafter the “Censorship Clause”) (emphasis added); see Exh. 2 hereto (copy of face of VirusScan diskette, as well as of two other Network Associates software programs, McAfee Office and Netshield for Security Suite). Nowhere does the Agreement indicate what particular “rules and regulations” it is referring to.

11. Network Associates also has placed this Censorship Clause onto the download page of the company’s web site, accessible to consumers who download software from its web site. See Affidavit of Ann Bednarz ¶ 5 and attachments (annexed as Exh. 3 hereto), in which Network Associates confirmed that the Censorship Clause is “printed on our product CD, as well as on the download page on our web site.”

D. Preclusive Effect of License Agreement for Boxed Software

12. Network Associates’ License Agreement reveals yet another level of deception, as the Agreement included with boxed versions of Network Associates’ software actually precludes the company’s enforcement of the Censorship Clause.

13. Specifically, the License Agreement in the boxed VirusScan software packaging states: “This Agreement sets forth all rights for the user of the Software and is the entire agreement between the parties.” See Exh. 4 ¶ 11. It continues, “This Agreement supersedes any other communications with respect to the Software and Documentation. This Agreement may not be modified except by a written addendum issued by a duly authorized representative of McAfee.”

Id. Identical, or virtually identical, clauses appear on the installed CD disk (i.e., on the computer screen upon installation) of other Network Associates products. See also other License Agreements annexed as Exh. 5, at ¶ 11 of each (copies of two other Network Associates software

programs, McAfee Office and Netshield for Netware, printed from installed diskettes provided by Network Associates during discovery).

14. In turn, there is not a word in the License Agreement restricting a consumer's right to publish reviews of the software or results of benchmark tests. Network Associates' representation to consumers that such restrictions apply – when Network Associates' own License Agreement says they cannot – therefore is untrue on its face.

**E. Network Associates Uses the Censorship Clause
To Deceive Consumers and Chill Important Speech**

15. On its face, the Censorship Clause is designed to mislead consumers, by leading them to believe that credible and legal “rules and regulations” justify the restrictions embodied in the Clause. In fact, no such rules and regulations exist.

16. In addition to misleading consumers in this way, on at least one occasion, Network Associates has attempted to use its baseless Censorship Clause to bully reviewers out of criticizing the company's software.

17. For instance, the company tried to force Network World, an online magazine, to retract a partially negative July 1999 software review. Network World's review, titled Wanted: Safety plus simplicity had criticized certain features of the company's Gauntlet firewall software. See Affidavit of Network World Senior Editor Ann Bednarz (“Bednarz Aff.”) ¶¶ 3 - 4 and Exh. A thereto (Affidavit with attachments annexed hereto as Exh. 3).

18. When it learned of the review, Network Associates asked Network World, by e-mail dated July 27, 1999, “that the information on Gauntlet be stripped from [Network World's] online version of this review and from any reprints” and that “a correction/retraction [be] printed

in the next issue” of the magazine. See Exh. B to Bednarz Aff. (Exh. 3 hereto).

19. Network World responded in a letter, by defending its right to publish product reviews (and the substance of its conclusions), but Network Associates persisted. See id. ¶ 8 and Exh. C (Exh. 3 hereto). In a second e-mail, the company warned Network World that the magazine had “willfully violated our license agreement, particularly since [the reviewer] was informed that we were not participating.” Id. ¶ 5 and Exh. D thereto. Network Associates cited the full text of the Censorship Clause, and informed Network World that this Clause reflected the “rules and regulations of installing this software.” Id. ¶ 6. This letter was cc’d at the time to Network Associates attorney Richard Hornstein, among others. Hornstein was at the time Network Associates’ Vice President of Legal Affairs, Taxation and Corporate Development. See Exh. 6 hereto (Hornstein’s testimony before the U.S. House of Representatives Subcommittee on Telecommunications Trade and Consumer Protection, May 25, 1999). Thus, those at the highest echelons of decision-making at Network Associates were aware of these intimidation tactics.

F. Network Associates’ Failure to Disclose Responsive Documents to the Attorney General

20. It remains unclear how many other letters or other communications Network Associates sent regarding the Censorship Clause in order to intimidate reviewers, consumers, or journalists. The company has not complied fully with the Attorney General’s requests for such documentation, which are set forth at Exh. 7 hereto (copies of Attorney General subpoena dated January 30, 2001 and Exh. 8 (similar, follow-up letter dated March 30, 2001)).

21. For instance, Network Associates failed to produce to the Attorney General the Network World correspondence discussed above (which we discovered independently), though

these e-mail letters were responsive to the Attorney General's subpoena. See Exhs. 7-8.

22. Rather than produce these documents, the company has maintained, in writing, that no such documents exist – a representation which obviously is not accurate. See Exh. 9 hereto (letter from Network Associates' counsel Andrew Bridges dated September 18, 2001). Specifically, Mr. Bridges had warranted (a) Network Associates' "total lack of enforcement of the provisions," (b) that the company "never took any action against persons who published reviews . . . on the product," and (c) that it endured such "unfair and unfavorable reviews without complaint." See id. at first page.

23. In that same letter dated September 18, 2001, id. at p.3, Mr. Bridges stated, "our client does wish to convey to the Attorney General its assurance that it no longer imposes the regulations that have been at issue [i.e., the Censorship Clause]. Nor does it plan to resurrect those at any time in the future." This, too, was not accurate: on January 2, 2002, the License Agreement on the download page for VirusScan software still stated, "You shall not disclose the results of any benchmark test that you make of the Software to any third parties without McAfee' [sic] prior written consent" (see Exh. 10 at ¶ 5, License Agreement for VirusScan software, downloaded on January 2, 2002, from Network Associates' McAfee.com web site) – virtually identical to the part of the Censorship Clause that was the subject of the Attorney General's March 30, 2001 inquiry letter (see Exh. 8 hereto), and is at issue herein.

24. By letter dated August 13, 2001, responsive to the Attorney General's letter dated July 30, 2001, Mr. Bridges agreed to produce "the approximate number of software packages sold or licensed by Network Associates pursuant to the provisions we have been discussing," i.e., the Censorship Clause. See Exh. 11. Network Associates has not produced this information.

For reasons further set forth in the accompanying Memorandum of Law, this information is necessary to determine the extent of the misrepresentations herein and therefore to assess a penalty for same. The Attorney General therefore requests that this Court order an accounting, so that we may obtain this information.

G. The Public is Harmed by Network Associates’ False and Oppressive Misrepresentations

25. Consumers rely on Network Associates’ security software to protect their computers from viruses, hackers, and cyber-terrorists. It is imperative that discussion of such software be open and free – as is the public’s right to comment on any consumer product. Moreover, protecting the rights of watchdog groups, consumer rights groups, and the media to publish product reviews and results of product testing is fundamental to the development of safe and efficient products. It is thus essential, as a matter of public policy, that the industry, media and public alike be unfettered in their exercise of such legal rights.

H. Network Associates Has No Legitimate Business Justification for its Purported Restrictions

26. By contrast, the Censorship Clause protects no legitimate business interest. The software at issue does not, for instance, contain trade secrets or proprietary information. As further discussed in the accompanying Memorandum of Law, such a contention cannot pertain to products that (like Network Associates’ products) are mass-marketed on a broad retail basis. Nor, for that matter, does copyright law provide any basis for the Clause, as product reviews obviously are fair use under copyright law.

27. For reasons more fully set forth in the accompanying Memorandum of Law, the Censorship Clause and related representations described herein, and Network Associates’ actions

to enforce the Clause, violate New York Executive Law § 63(12) and GBL § 349. The Clause by its own terms violates § 63(12) as an illegal and unenforceable restrictive covenant.

28. Network Associates' further representations regarding the Clause and illusory "rules and regulations" violate both § 63(12) and GBL § 349, by purporting to apprise consumers and journalists of prohibitive "rules and regulations" which (1) do not exist, (2) by their own terms would constitute illegal and unenforceable restrictive covenants, and (3) were never presented in, and are therefore barred by, the company's boxed software License Agreement.

WHEREFORE, the Attorney General respectfully requests that the Court grant the relief sought in the Verified Petition.

Dated: February 5, 2002
New York, New York

Kenneth M. Dreifach