

RECEIVED

24 MAY 2012 09 00

DEPARTMENT OF
JUDICIAL ADMINISTRATION
KING COUNTY, WASHINGTON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

Plaintiff,

v.

REALNETWORKS, INC., a
Washington Corporation,

Defendants.

NO. 12-2-18633-2 SEA

COMPLAINT FOR INJUNCTIVE
AND OTHER RELIEF UNDER THE
CONSUMER PROTECTION ACT,
CHAPTER 19.86 RCW

COMES NOW PLAINTIFF, State of Washington, by and through its attorneys Robert M. McKenna, Attorney General, and Paula L. Selis, Assistant Attorney General, and brings this action against Defendant named herein, alleging as follows:

I. JURISDICTION AND VENUE

1.1 This Complaint is filed and these proceedings are instituted under the provisions of the Unfair Business Practices – Consumer Protection Act, Chapter 19.86 RCW.

1.2 The violations alleged in this Complaint have been made and are being committed in whole or in part in King County, Washington, by Defendant named herein.

1.3 Authority of the Attorney General to commence this action is conferred by RCW 19.86.080 and RCW 19.86.140.

II. DEFENDANT

2.1 Defendant RealNetworks, Inc. (herinafter “Real”) is incorporated in Washington, with its principal executive offices located at 2601 Elliott Ave. Seattle, WA

1 98121. Defendant Real is engaged in the business of providing of network-delivered digital
2 media applications and products that enable consumers to manage, play and share digital
3 media, including music, games, movies and other media. Real also develops and markets
4 software products and products that enable the creation, distribution and consumption of digital
5 media, including audio and video. At all times relevant to this action, Real has transacted
6 business in King County and elsewhere in the state of Washington.

7 III. NATURE OF TRADE OR COMMERCE

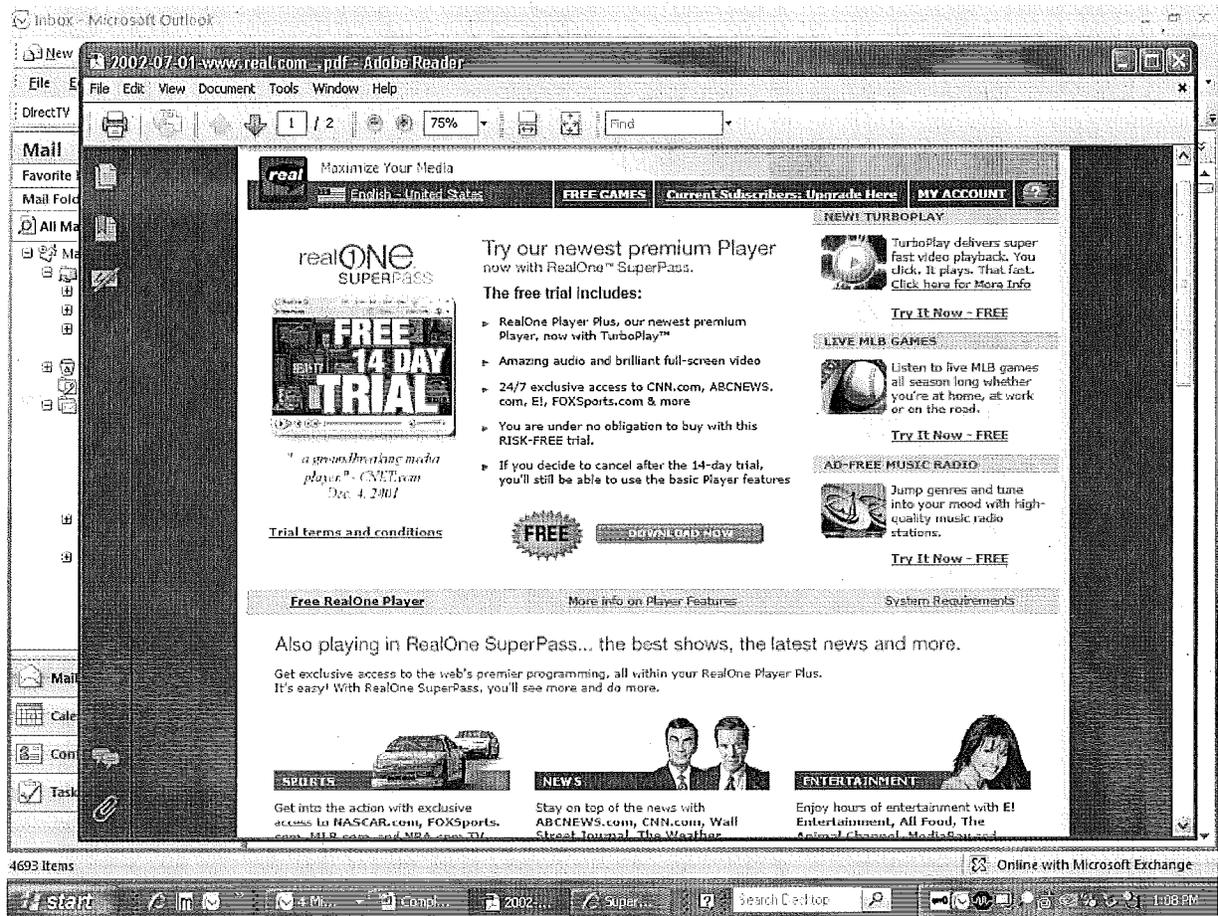
8 3.1 Defendant Real advertises, markets, and sells its digital media products to
9 consumers across the United States, as well as a number of foreign countries. Defendant offers
10 exclusive software, the RealPlayer media player, as a free download from its Real.com
11 website, which, among other services, allows consumers to stream audio and video to their
12 own computers. The RealPlayer has been downloaded by hundreds of millions of consumers
13 since its creation. Additionally, Defendant offers its products through a variety of different
14 paid subscriptions, depending on the type of media the consumer seeks to use. Those
15 subscriptions currently include SuperPass, a subscription service that provides consumers
16 access to a broad range of digital entertainment such as music, games, and live video feeds
17 from popular television programs and premium sports programming; and GameHouse, a
18 website that enables consumers to play and purchase games from Real's catalog of online and
19 downloadable games through FunPass, a subscription-based program that allows unlimited
20 game downloads or FunTickets, which for allows the consumer one free game download a
21 month, along with discounts on other games. Since 2005, Real has also offered a number of
22 other products, including but not limited to Rhapsody, a subscription-based music service that
23 offered access to a catalogue of licensed music tracks; RealPass, a subscription-based Internet
24 radio service that enabled consumers to access pre-programmed, advertising-free digital music
25 radio stations; RealOne, a media player and music "jukebox" that enabled consumers to stream
26 a variety of media formats on the Internet; RealArcade, a website-based service that offered

1 access to a catalogue of games both on a subscription basis and a purchase basis; GamePass,
2 also known as DownloadClub, a website-based service that offered access to a catalogue of
3 games on a subscription basis; and Real Broadband Essentials, an antivirus/antispyware
4 protection program. Real also operated MP3 music stores, both under the Rhapsody and
5 RealPlayer brands, where consumers could purchase and permanently download individual
6 music tracks without entering into any subscription agreements. In 2010, Real sold the
7 Rhapsody division of its services to a separate business entity, Rhapsody International Inc.

8 3.2 Real has used a variety of methods to advertise its products. The primary
9 manner in which it has advertised and continues to advertise its subscription products is
10 through the use of “free trials.” In all of these “free trials,” the consumer must affirmatively
11 contact Real to cancel prior to the conclusion of the trial to avoid being billed for the
12 subscription. The trials currently range from the fourteen day free trial for SuperPass, after
13 which the consumer is billed \$14.99 per month, <http://landing.real.com/superpass/reality-tv>,
14 April 23, 2012; to the free trial for FunPass, after which the consumer will be billed \$19.99 per
15 month, <http://www.gamehouse.com/memberships>, April 23, 2012.

16 3.3 At all times relevant to this complaint, Real’s “free trials” have been advertised
17 in a number of different contexts, including but not limited to offering “free trials” to the
18 hundreds of millions of consumers who have downloaded its free RealPlayer; offering “free
19 trials” with prominent advertising on Real’s websites; offering “free trials” for a different Real
20 product when the purchaser subscribes to another Real product on one of its websites (also
21 known as “cross-sell offers”); offering Real products through third party marketers (also
22 known as “affiliates”) who drive web traffic to Real’s product pages through specially
23 designed links and advertisements; and offering Real products through third party “distribution
24 partners” who offer Real products which can be directly ordered from the distribution partners’
25 websites.

1 3.4 Real's advertising has varied since it began marketing its subscription products.
2 At least since 2002, its advertising has in nearly all instances included offers for "free trials." See,
3 Exhibit 1, below:
4



5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20 Exhibit 1, <http://webarchive.org/web/20022007204045/http://www.real.com>, web capture of July 1, 2002.

21 3.5 Exhibit 1 is representative of Real's advertising from the period of 2002 to the
22 present, and includes an offer of a "Free 14 day trial" for the SuperPass product. The opening
23 page of its September 2010 website looked substantially similar to its advertisement in 2002:
24
25
26

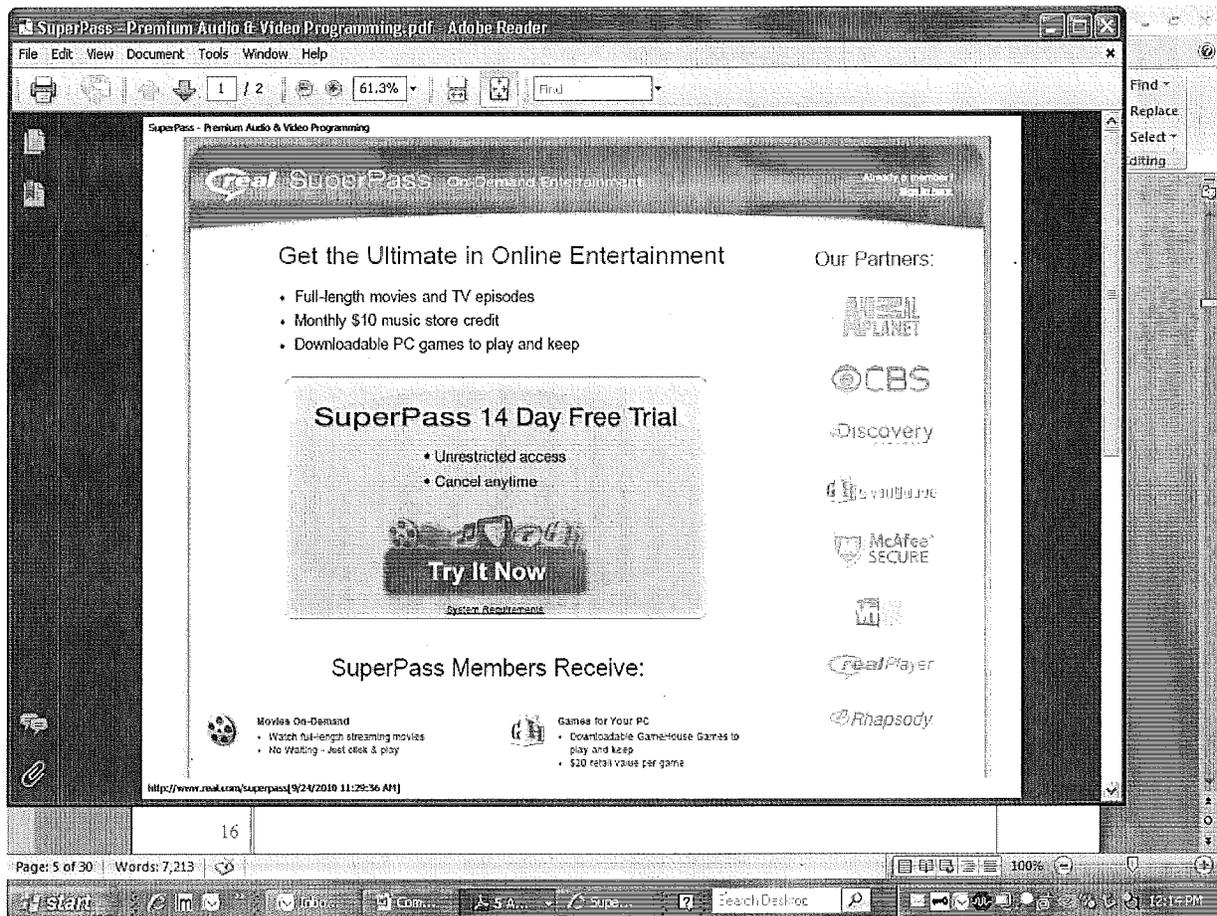


Exhibit 2, <http://real.com/SuperPass>, September 24, 2010

3.6 Since 2002, Real's disclosures regarding the terms of its free trial offers have varied, though the terms themselves have remained substantially consistent. The consumer must provide his or her credit card information at the beginning of the trial in all instances where Real offers a free trial subscription to one of its products. If the consumer fails to cancel during the course of the free trial, he or she will be billed on the credit card for an ongoing subscription to the Real product. The duration of the subscription continues until the consumer affirmatively contacts Real to cancel it.

1 **IV. FIRST CAUSE OF ACTION—FAILURE TO DISCLOSE MATERIAL TERMS**

2 4.1 Plaintiff realleges paragraphs 3.1 through 3.6 and incorporates them as if fully
3 set forth herein.

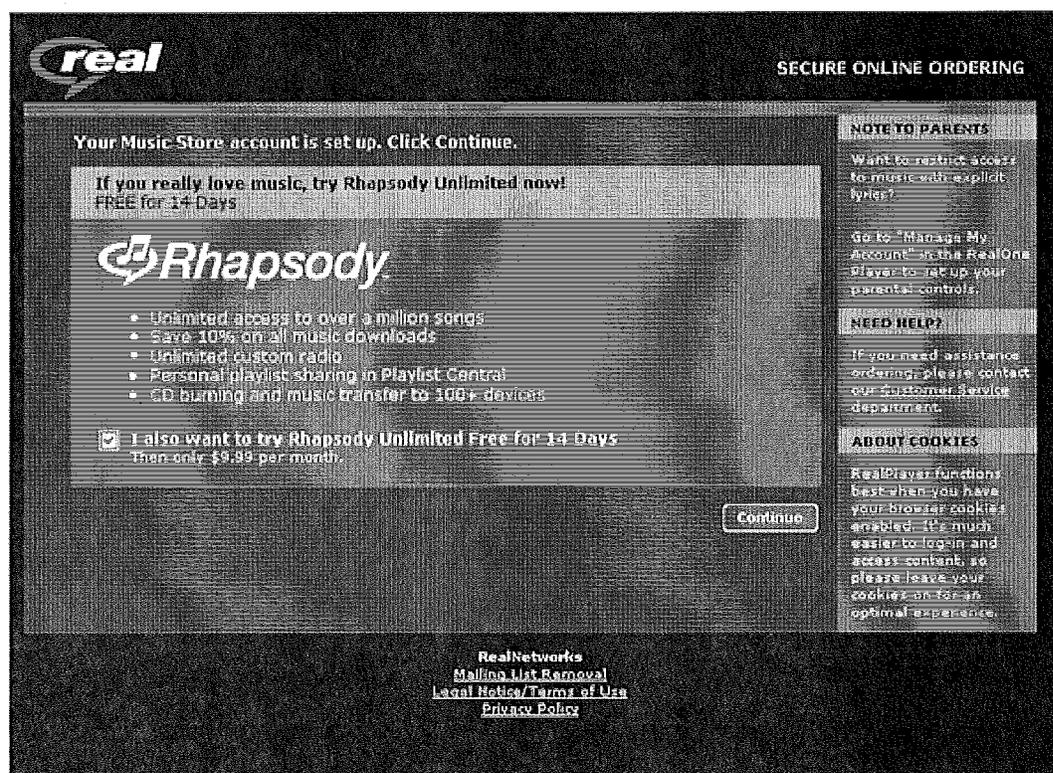
4 **A. Failure to Adequately Disclose Existence of “Free Trial” Through the Use of
5 Deceptive Pre-Checked Subscription Order Boxes.**

6 4.2 Real uses a wide variety of methods to cross-sell its products to existing or new
7 customers. For example, during the period of approximately 2002 to January 2010, when a
8 consumer purchased music from the RealPlayer store, Real would often include a pre-checked
9 box in a multiple page order path that automatically enrolled the consumer in a trial
10 subscription to Rhapsody.

11 4.3 In a typical experience, the consumer would set up a RealPlayer music store
12 account in order to purchase individual tracks of music to play on the RealPlayer device. In
13 order to set up the account, the consumer would be prompted to fill out a page with billing
14 details, including the consumer’s credit card number and expiration date. Once the billing
15 details were filled in, the consumer was prompted to complete the purchase by pressing a
16 button marked “finish.” Instead of “finishing” the purchase, the consumer was automatically
17 taken to an interstitial web page that contained a list of bulleted language touting the benefits
18 of the Rhapsody product, with a pre-checked box at the bottom. The following text appeared
19 next to the pre-checked box: “I also want to try Rhapsody Unlimited Free for 14 days.” The
20 pre-checked box was inconspicuously placed in a manner that could be easily overlooked by
21 the consumer. Additionally, the language next to the pre-checked box failed to disclose that
22 the credit card the consumer had *already* provided for the RealPlayer music purchase would be
23 the one billed for the subscription to Rhapsody, and that failure to cancel within the trial period
24 would result in an automatic charge to that credit card.

25 4.4 In fact, if the consumer failed to cancel within the trial period, the Rhapsody
26 subscription was billed to the same credit card the consumer used to purchase the RealPlayer

1 music. Unless the consumer deliberately unchecked the box, he or she would be billed for the
2 Rhapsody subscription at the conclusion of the trial period. See Exhibit 3 below, example of
3 pre-checked box solicitation page:
4



17 Exhibit 3, March 2006 solicitation.

18 4.5 If the consumer clicked on the “continue” button on the Rhapsody solicitation
19 page, he or she was taken to a purchase confirmation page that listed the “order summary” for
20 the various services the consumer had ordered, which totaled “U.S \$0.00.” The “total charges”
21 in the “order summary” deceptively failed to disclose that the charges were only for the first
22 fourteen days of service, and that the actual charges would be more if the trial was not
23 cancelled within the fourteen days. The button that prompted the consumer to confirm the
24 order was prominently placed at the top of the page, above the summary of charges. The
25 tendency of the consumer would be to simply press the button that read “confirm your order”
26 after seeing that the “total charges” amounted to “U.S \$0.00” without reading the small print at

1 the bottom of the page. That small print, inconspicuously disclosed, stated that the consumer
 2 was enrolled in the Rhapsody "free trial" and would be charged after its expiration. The
 3 following is an example of Defendant's Confirmation Page:

4  SECURE ONLINE ORDERING

5 LINKS: MY ACCOUNT | MY ORDER | HELP 3 CONFIRM ORDER

6 **Confirm your order**

7 You're just moments away from the ultimate digital music experience. Simply
 8 review your order and click to confirm!

CONFIRM YOUR ORDER

9 **Account summary**

<p>10 Your Account: 11 jlj3443@lkjl44.com 12 k k 13 k 14 k 15 seattle WA 98021 16 US</p> <p>EDIT ADD SELECT</p>	<p>Credit Card Information: 17 Visa / Delta 18 *****0010 19 Expiration Date:05/2007</p> <p>EDIT ADD SELECT</p>
--	--

20 **Order Summary**

Item		
RealRhapsody*	14-DAY FREE TRIAL*	US\$0.00
	Shipping	US\$0.00
	Tax (Applicable in US Only)	US\$0.00
	Total	US\$0.00

21 * **RealRhapsody** - You will not be charged for your participation in the RealRhapsody Trial
 22 if you cancel in the next 14 days. If you choose to continue using your RealRhapsody
 23 membership, you will be charged at the rate of US\$9.95 per month thereafter. By
 24 purchasing, you agree to the [terms of service](#).

19 Exhibit 4, Order Confirmation Page, August 2006.

20 4.6 The pre-checked box method of marketing was used for various products. For
 21 example, when consumers ordered a free trial for SuperPass, Real also included in the order
 22 path a pre-checked box which automatically subscribed the consumer to GamePass. The credit
 23 card used to purchase the SuperPass subscription was automatically charged for the GamePass
 24 subscription in such instances. Similarly, when consumers subscribed to GamePass, Real
 25 included in the order path a pre-checked box for a subscription to SuperPass. The credit card
 26 used to purchase the GamePass subscription was automatically charged for the SuperPass

1 subscription in such instances. In some of its promotions, Real included *two* pre-checked boxes
2 for trial subscriptions to two Real products when the consumer was ordering a third, such as
3 subscriptions to SuperPass and Rhapsody when the consumer was ordering GamePass. This
4 resulted in consumers finding charges on their credit cards for multiple Real subscriptions, often
5 without their knowledge.

6 4.7 Because the pre-checked box solicitations were easily missed in the context of
7 ordering a different Real product, consumers failed to realize that they were effectively signed
8 up for a subscription to a Real product for which they were obligated to pay. Through the use
9 of this marketing method, Real failed to disclose the material fact that by signing up for one
10 free trial, the consumer was considered obligated by Real to pay for other trials that
11 automatically converted to paid subscriptions.

12 **B. Failure to Adequately Disclose Material Terms in Order Path.**

13 4.8 In some instances, prior to January 2010, Real failed to adequately disclose the
14 fact that the consumer would be charged on the card provided at the time of the sign-up for the
15 free trial if he or she failed to cancel during the trial itself. When consumers navigated to
16 Real's websites in order to learn more about its products, Real offered them "free trial"
17 subscriptions which the consumers then ordered. In the context of the solicitation of "free
18 trial" subscriptions, Real in some instances failed to adequately disclose that if the consumer
19 failed to cancel during the course of the "free trial," he or she would be automatically billed
20 using the credit card information that was entered at the time of the consumer's order. Failure
21 to disclose this material fact resulted in a charge being placed on the consumer's credit card
22 without the consumer's knowledge.

23 **C. Failure to Adequately Disclose Terms of Additional Free Trial When Consumers
24 Contacted Real to Cancel Existing Subscriptions.**

25 4.9 When consumers called Real to cancel their subscriptions, customer sales
26 representatives, in some instances, attempted to convince them accept an additional free trial in

1 lieu of cancellation. In some instances, when the consumer accepted the additional free trial,
2 Real failed to disclose the material fact that the consumer was required to affirmatively cancel
3 at the end of that free trial in order to avoid being billed in the future. Accordingly, consumers
4 were billed for a subscription which they did not knowingly accept.

5 4.10 Real's failure to disclose material facts in the context of its free trial marketing
6 of products constitutes unfair and deceptive acts and practices in trade or commerce and unfair
7 methods of competition in violation of RCW 19.86, the Consumer Protection Act.

8 **V. SECOND CAUSE OF ACTION—FAILURE TO CANCEL SUBSCRIPTIONS**

9 5.1 Plaintiff realleges paragraphs 4.1 through 4.10 and incorporates them as if fully
10 set forth herein.

11 5.2 When consumers have contacted Real about unknown charges appearing on
12 their credit card bills, they were ultimately informed that the charge was for a subscription to a
13 Real product. These consumers then asked to cancel their subscriptions. In the alternative,
14 other consumers realized that they had a free trial and wanted to cancel before being charged.
15 The consumer called during the free trial period to request cancellation.

16 5.3 Though Real's terms and conditions permit cancellation at any time, in some
17 instances Real failed to cancel the consumer's subscription despite his or her request.
18 Additionally, in some instances, Real continued to bill the consumer despite telling him or her
19 that the subscription would be cancelled.

20 5.4 Real's failure to cancel consumers' subscriptions constitutes unfair and
21 deceptive acts and practices in trade or commerce and unfair methods of competition in
22 violation of RCW 19.86, the Consumer Protection Act.

23 **VI. THIRD CAUSE OF ACTION—UNFAIR AND DECEPTIVE CANCELLATION 24 PRACTICES**

25 6.1 Plaintiff realleges paragraphs 5.1 through 5.4 and incorporates them as if fully set
26 forth herein.

1 6.2 When consumers contacted Real to cancel their subscriptions, in some instances
2 they have found it difficult to do so. Real created a number of barriers to cancellation of its
3 subscription products. These barriers to cancellation included the following:

- 4 a. For all of its products except those related to games, Real required that
5 the consumer cancel his or her subscription by calling Real directly.
6 Most of Real's customers were unable to cancel online, thus limiting the
7 manner in which consumers could cancel.
- 8 b. When a consumer reached Real to cancel a subscription, he or she would
9 be asked for information which would identify the account the consumer
10 wished to cancel. In some instances, Real's customer service
11 representative would indicate that the account could not be located, even
12 when the consumer did have an account.
- 13 c. In some instances, Real would cancel one of the consumer's
14 subscriptions, but did not inform him or her that the consumer had
15 additional subscriptions for different Real products and failed to cancel
16 those subscriptions. This was particularly common when the consumer
17 had received multiple subscriptions through Real's cross-sale of its
18 products, where free trials were offered to consumers who subscribed to
19 other Real products. As a result, those consumers continued to be billed
20 for subscriptions that they had not knowingly accepted.

21 6.3 Real's imposition of logistical and substantive barriers to cancellation of
22 consumers' subscriptions constitutes unfair and deceptive acts and practices in trade or commerce
23 and unfair methods of competition in violation of RCW 19.86, the Consumer Protection Act.
24
25
26

