

## "Free" Software Offer Found to be a Deceptive Trade Practice

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The Federal Trade Commission filed suit against Think All Publishing, LLC, a 'free' software provider. Think All offered software on its website, claiming to charge only a nominal shipping fee. Upon checking out of Think All's site, three 'bonus' software CDs were automatically added to the purchaser's cart. The bonus CDs carried hidden terms stating that the purchaser would be charged for the CDs unless they were returned within ten days. The FTC filed the lawsuit after receiving several complaints from Think All's customers who were surprised by the hidden terms and charges on their credit cards. The FTC filed a motion for preliminary injunction against Think All to stop the company from engaging in these practices. After conducting a hearing, a federal magistrate judge recommended that the FTC's motion be granted, finding that Think All's practices violated the FTC Act. In light of this decision, providers of software should be clear and upfront about the terms of any free or trial offers. Instead of hiding the terms, they should be made easily accessible to current and potential customers. Businesses looking to take advantage of free software offers should carefully review the terms under which the software is being offered, including any expiration period after which the software is no longer free.

Correction: The February 1, 2007 Information Technology Law Update inaccurately reflected the court's holding in the case of *Wentworth v. Settlement Funding*. The court held that a company's use of its competitor's trademarked term as search engine metatags and as the basis for a 'sponsored link' in search engine results did not cause consumer confusion and, therefore, did not constitute trademark infringement. Nevertheless, businesses using third parties' trademarked terms as search engine metatags are cautioned that the court could have easily found the element of confusion was satisfied.