

March 20, 2007

Federal Trade Commission
Office of the Secretary, Room 135-H
600 Pennsylvania Avenue, NW.
Washington, DC 20580

RE: DirectRevenue LLC, et al., FTC File No. 052 3131

I write in response to the FTC's call for comments as to *In the Matter of DirectRevenue LLC, DirectRevenue Holdings LLC, Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook*, FTC File No. 052 3131.

I commend the injunctive relief provisions of the proposed settlement. The proposed settlement appropriately requires that Direct Revenue cease showing ads to users whose installations occurred, in most or all cases, without informed consent. The proposed settlement requires that Direct Revenue obtain users' express consent for any future installations, and the proposed settlement defines express consent with appropriate rigor. Finally, the proposed settlement confirms Direct Revenue's responsibility for the actions of its distributors.

That said, I struggle to understand the size of the proposed payment to be made by Direct Revenue. The proposed settlement contemplates a payment of just \$1.5 million. Yet publicly-available documents demonstrate that this amount is far less than Direct Revenue's profits to date. Relevant documents:

- Direct Revenue's statements to the New York Attorney General (available at <http://www.benedelman.org/spyware/nyag-dr/e2.pdf#page=4>, Bates number DR349500) report 2004 revenues of \$39.3 million and Q1-Q3 2005 revenues of \$33.5 million.
- Direct Revenue's statements to the New York Attorney General (available at <http://www.benedelman.org/spyware/nyag-dr/e2.pdf#page=6>, Bates number 349502) report 2004-2005 "distribution" payments to Direct Revenue's principals totaling more than \$27.4 million.
- These distributions of profits are consistent with Direct Revenue's contemporaneous profit projections. See e.g. Direct Revenue's January 8, 2004 projections for 2004 (available at <http://www.benedelman.org/spyware/nyag-dr/e47.pdf#page=4>, Bates number DR183955), projecting 2004 profits of \$29.2 million. The preceding page, DR183954, reports 2003 profits of \$2.6 million on 2003 revenue of \$5.0 million – confirming that \$29.2 million is a reasonable estimate of 2004 profits, consistent with Direct Revenue's known 2004 revenues.

With such high revenues and with such large distributions to its principals, Direct Revenue indisputably earned substantial profits. The FTC is entitled to seek full disgorgement of these wrongfully-earned profits. On the facts at hand – software that went to exceptional lengths to invade users’ computers, bombard users with ads, and avoid removal – the FTC ought to seek this full disgorgement. I see no proper reason for Direct Revenue principals to retain their ill-gotten gains.

It currently appears that Direct Revenue is substantially scaling back distribution of its software, if not ceasing operation altogether. In my view, this cessation confirms the need for full disgorgement of profits earned by Direct Revenue and/or distributed to Direct Revenue principals. If Direct Revenue simply ceases operation now, with the small payment anticipated by the proposed settlement, then Direct Revenue principals retain the large profits they reaped at users’ expense. For the FTC to meaningfully deter future violations – by spyware makers as well as by bad actors in the many other areas within the FTC’s purview – Direct Revenue principals must give up this windfall.

I understand the low payment to reflect, in part, perceived litigation risk. But litigation risks seem low here, particularly when evidence of wrongdoing has been so diligently preserved. In addition to research conducted by the FTC and by independent spyware researchers, Direct Revenue’s own business records reveal the company’s intentionally deceptive practices. See documents at <http://www.benedelman.org/spyware/nyag-dr/>, including intentionally hindering removal (e.g. Exhibit 54, Bates DR017703, and Exhibit 59, Bates DR021262), intentionally avoiding detection (e.g. Exhibit 64, DR029402), and admitting knowledge of the risk of nonconsensual installations but specifically declining to take preventive action (e.g. Exhibit 73, DR276591 and DR276595).

Finally, I gather that the proposed low payment may reflect, in part, uncertainty as to the scope of Direct Revenue’s wrongful practices. But Direct Revenue’s records reveal that its operational practices were generally consistent across programs. For example, while Exhibit 52 (Bates DR029836) explains that one distributor’s Direct Revenue variant included an uninstaller, that document also confirms the intentional decision to withhold the uninstaller from other versions. Similarly, Direct Revenue’s failures to label ads, “torpedo” removals of other programs, and other malicious practices were generally consistent across all users. As to distribution methods, practices admittedly varied among distributors. But reviewing the video and packet log records I prepared in my lab, chronicling nonconsensual and deceptive installations of Direct Revenue software, I see proof of such behavior by ten distinct distributors (primarily large distributors). In contrast, historically, it was rare to find a “good” Direct Revenue installation, save for “showcase” installations on Direct Revenue’s own sites. These facts provide ample basis to conclude that the overwhelming majority of Direct Revenue’s users faced the improper Direct Revenue behaviors at issue.

Respectfully,

/s/

Ben Edelman