

## **ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT**

### ***In the Matter of DirectRevenue LLC, DirectRevenue Holdings LLC, Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook, FTC File No. 052 3131***

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from proposed respondents DirectRevenue LLC, DirectRevenue Holdings LLC, Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook, individually and as officers of DirectRevenue LLC (together, “the respondents”). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

### **General Allegations**

The respondents develop, market, and distribute via Internet downloads advertising software programs (“adware”) – including programs with the names Aurora, Ceres, A Better Internet, OfferOptomizer, Twaintec, and Best Offers – that monitor consumers’ Internet use in order to display targeted pop-up ads. This matter concerns allegations that the respondents: (1) directly, and through a network of numerous affiliates and sub-affiliates, installed their adware on consumers’ computers without adequate notice or consent; (2) through affiliates and sub-affiliates, installed their adware on consumers’ computers entirely without notice or authorization; and (3) made their adware difficult for consumers to identify, locate, and remove.

The Commission’s complaint alleges that in numerous instances the respondents, either directly or through their affiliates and sub-affiliates, purported to offer content to the public, such as games, screen-savers, peer-to-peer file sharing software, and/or computer utility programs (“lureware”) and bundled the respondents’ adware with that content. The complaint further alleges that consumers often have been unaware that the respondents’ adware would be installed on their computers because it was not adequately disclosed to them that downloading the lureware would result in installation of the respondents’ adware. Often, no reference to the adware was made on websites offering the lureware or in the install windows. In other instances, information about the effects of the respondents’ adware could only be ascertained, if at all, by clicking on one or more inconspicuous hyperlinks to reach multi-page user agreements containing such information. These inconspicuous hyperlinks were located in the corner of website homepages or in modal boxes provided by the computer’s operating system.

The Commission’s complaint also alleges that in numerous instances, the respondents, through affiliates and sub-affiliates, installed the respondents’ adware on consumers’ computers entirely without notice or authorization. The complaint cites as an example unauthorized

installations conducted by the respondents' sub-affiliate, Seismic Entertainment Productions, Inc., via an executable file that exploited a vulnerability in Windows Media Player.

The Commission's complaint further alleges that the respondents made identifying, locating, and removing their adware extremely difficult for consumers. Among other practices, the respondents: failed to identify the name or source of the adware in pop-up ads to enable consumers to locate the adware on their computers; stored adware files in locations on consumers' hard drives that are rarely accessed by consumers, such as in the core systems software folders; failed to list the adware in the Windows Add/Remove utility (a customary location for user-initiated uninstall of software programs); where the adware was listed in the Windows Add/Remove utility, listed it under names resembling core systems software or applications; installed technology on consumers' computers to reinstall the adware when it had been uninstalled by consumers through the Windows Add/Remove utility or deleted by anti-spyware or anti-adware programs; and when a separate uninstall tool was provided, required consumers to follow a ten-step procedure including downloading additional software and deactivating firewalls, thereby exposing computers to security risks.

### **Deception Allegation**

The Commission's complaint alleges that by offering content over the Internet such as browser upgrades, utilities, games, screensavers, peer-to-peer file sharing software and/or entertainment content, without disclosing adequately that this content was bundled with the respondents' adware, the respondents committed a deceptive practice. The bundling of the respondents' adware, which monitors consumers' Internet use and causes them to receive pop-up advertisements, would be material to consumers in their decision whether to download the other software programs and/or content.

### **Unfairness Allegations**

The Commission's complaint also alleges that it was an unfair practice for the respondents to install on consumers' computers, entirely without their knowledge or authorization, adware that could not be reasonably identified, located, or removed by consumers. In addition, the complaint alleges that it was an unfair practice, in and of itself, for the respondents not to provide consumers with a reasonable means to identify, locate, and remove the respondents' adware from their computers. The complaint further alleges that these practices have caused or are likely to cause substantial consumer injury that is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or competition.

### **The Proposed Consent Order**

The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future and to halt continuing harm caused by the respondents' prior unlawful practices.

Part I of the proposed order prohibits the respondents from displaying any advertisement to, or otherwise communicating with, any consumer's computer on which the respondents' adware was installed prior to October 1, 2005 ("legacy program"). Part I permits the respondents, within thirty days of entry of the final order, to send a maximum of three notices to legacy program users informing them: that, pursuant to the FTC settlement, they will no longer receive any advertising or communication from the respondents; how they may affirmatively authorize the respondents to continue serving advertisements if consumers so choose; and how they may fully remove the respondents' adware from their computers. If consumers fail to respond to the notice, the adware will remain inactive.

Parts II and III prohibit the respondents from, or assisting others in, installing software onto any computer by exploiting security vulnerabilities or downloading or installing any software program or application without consumers' express consent. "Express consent" is defined in the proposed order to require clear and prominent disclosure of material terms prior to and separate from any end user license agreement, and to require consumer activation of the download or installation by clicking a button or a substantially similar action.

Part IV requires the respondents to establish, implement, and maintain a clearly disclosed, user-friendly mechanism through which consumers can report and the respondents can timely address complaints regarding the respondents' practices.

Part V requires the respondents to establish, implement, and maintain a comprehensive program that is reasonably designed to require affiliates to obtain express consent before installing the respondents' software onto consumers' computers. Part V also contains sub-parts mandating certain measures the respondents must take to monitor their distribution network.

Part VI requires the respondents to identify advertisements served via the respondents' adware in order for consumers to easily locate the source of the advertisement, easily access the respondents' complaint mechanism, and access directions on how to uninstall such adware.

Part VII requires the respondents to provide reasonable and effective means for consumers to uninstall the respondents' adware.

Part IX requires the respondents to pay \$1.5 million to the Commission. This payment may be used in the Commission's sole discretion to provide appropriate relief, which may include, but is not limited to, the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive acts or practices. If the Commission determines that such relief is wholly or partially impracticable, any or all such funds shall be paid to the United States Treasury.

Part X requires the respondents to cooperate with the Commission in this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Complaint.

The remaining order provisions govern record retention (Part VIII), order distribution (Part XI), ongoing reporting requirements (Parts XII and XIII), filing a compliance report (Part XIV). Part XV provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.