

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK: TRIAL TERM PART 49
3 - - - - - X
4 STATE OF NEW YORK, et al,

5
6 Petitioners,

7
8 - against -

9 DIRECT REVENUE, LLC, et al,

10 Respondents.

11 - - - - - X
12 Index Number: 401325/06
13 60 Centre Street
14 New York, New York
15 October 20, 2006

16 BEFORE:

17 HONORABLE HERMAN CAHN, Justice.

18 APPEARANCES:

19 STATE OF NEW YORK
20 OFFICE OF THE ATTORNEY GENERAL
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And

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Appearances

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THEODORE LUKEW
OFFICIAL COURT REPORTER

Proceedings

1 THE COURT: All right. Counsel, I
2 note that the motion that I'm hearing now is
3 basically motion number 003, which is a motion
4 to dismiss.

5 Notwithstanding that, I would like
6 in order to have the matter a little bit more
7 rationally presented, I would like the
8 Plaintiff in this case, State of New York, to
9 argue first basically to tell me on the record
10 exactly what the petition or what the
11 proceeding is about.

12 MR. CHRISTIE: Yes, your Honor.
13 Sure.

14 The Respondents' entire business is
15 a creation and distribution of these
16 incredibly abusive spyware programs. Once you
17 get on the program, it will track every web
18 site that the user uses, everything you type
19 on the computer, typed on the web, and based
20 on the information, the program will generate
21 a stream of paths, and any time you are on
22 line any time you turn the computer on, it
23 will keep track of what you are doing on
24 line.

25 These programs hide. They are

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1 hidden in secret files from the user and evade
2 any formal way in a conventional matter to
3 delete the software, and it will reinstall
4 itself against your wishes.

5 This software also provides
6 Respondents permanent access to your
7 computer. Any time they want access to your
8 computer in the future, they will be able to
9 do that.

10 Using this permanent software, they
11 also will install other spyware programs.
12 They will install pop-ups in addition to their
13 own programs. They will also install programs
14 that redirect your web searches away from your
15 chosen default search engine to Direct
16 Revenues search engine.

17 THE COURT: How do I get Direct
18 Revenue's spyware off of my computer?

19 MR. CHRISTIE: There are a couple of
20 ways. One way is to farm it out to a
21 third-party to do the dirty work for them.

22 Another thing they do, they will
23 promise consumers other programs, other free
24 programs, they will, on their own web sites,
25 add advertisements on the web. They will

Proceedings

1 promise free games or screen savers, just
2 download them for free. These programs are
3 Trojan horses. They advertise a program, they
4 decide they want a screen saver, Direct
5 Revenue will install that screen saver and
6 also install, secretly installed spyware
7 programs.

8 Now they have the opportunity in
9 describing the screen saver and games to say,
10 we are giving you this software, in exchange
11 for that you will also get this program so the
12 consumer can make informed decisions whether
13 to do that or not. Their advertisements for
14 their screen savers, and games are Trojan
15 horse programs that make no mention about the
16 spyware program.

17 THE COURT: I presume Direct Revenue
18 is not the only company or firm which does
19 this kind of thing?

20 MR. CHRISTIE: There are a couple of
21 other companies. There are a number of other
22 companies in this area, a relatively new
23 industry.

24 THE COURT: Okay. Has there been
25 similar proceedings brought either in this

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1 state or other states or Federal proceedings
2 brought against other companies against Direct
3 Revenue?

4 MR. CHRISTIE: A class action case
5 against Direct survived the motion to dismiss
6 in the State of Illinois. That case was
7 eventually settled.

8 This office brought a case against a
9 spyware company, Intermittent Media. That
10 settled for \$8.25 million. The FTC has
11 brought a number of actions like our action
12 against a number of spyware companies for the
13 same precise packages alleged in this action.
14 They were settled.

15 THE COURT: In connection with these
16 cases which were settled, both here and in the
17 State of New York and the FTC case, was there
18 a stipulation requiring the Respondents not to
19 do certain things and to do certain things?

20 MR. CHRISTIE: Yes, your Honor.

21 THE COURT: Do I have those
22 stipulations submitted?

23 MR. CHRISTIE: I believe a couple of
24 them are referenced to in our papers. They
25 are only referenced and available on line.

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1 Our office will be able to collect them.

2 THE COURT: Would you?

3 MR. CHRISTIE: Absolutely.

4 THE COURT: Having said that, who
5 wants to argue the motion. ?

6 MR. GOLDSTONE: I'm happy, to your
7 Honor. My name is David Goldstone.

8 THE COURT: Keep your voice up.

9 MR. GOLDSTONE: My name is David
10 Goldstone. I'll speak today on behalf of all
11 of the Respondents.

12 I'm also here today with Neal
13 Klausner of the Emery Celli law firm which has
14 represented Direct Revenue for a number of
15 years, including the company on its currently
16 consumer disclosure practices.

17 We are here today on a motion to
18 dismiss. And, your Honor, I would like to
19 give you a little background on Direct
20 Revenue.

21 Direct Revenue is an Internet
22 advertisement business. It is essentially
23 like a publisher of a newspaper like the
24 Village Voice. The Village Voice gives away a
25 free newspaper with articles and information,

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1 and is able to do that because it shows
2 advertisements to consumers.

3 And that advertisement is part of
4 the Village Voice's business. It's a business
5 practice. It's very common, and particularly
6 on the Internet. You can get a lot of -- you
7 can read the New York Times for free on the
8 Internet because they are showing you ads.

9 What Direct Revenue gives people for
10 free is computer software programs. And its
11 most popular computer software program they
12 gave away for free is a program to let people
13 use their computer as a telephone and make
14 long distance calls, international calls for
15 free.

16 And how Direct Revenue is able to
17 give away software like that for free, the way
18 it's able to do that, because it shows people
19 ads. When Direct Revenue gives the service
20 for free, it never took a dime. No allegation
21 that a nickel was taken from any consumer.
22 Just like the Village Voice, take the freebie,
23 you get the ads.

24 The AG clouded a couple of issues
25 the way he described it. I want it to be

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1 absolutely clear to your Honor, the kind of
2 consumer disclosure the AG is objecting to is
3 historic. The practices described in the
4 petition haven't been used in the company in
5 over a year. The company, as your Honor
6 recognizes, there's many companies in this
7 industry presenting ads on the Internet.

8 THE COURT: Does the company, and
9 this is one of the things that turn me, I sign
10 up for or I buy from, I pick up a freebie from
11 Direct Revenue. Besides showing me ads, does
12 Direct Revenue also publish information about
13 me or my use of my computer to other people?

14 MR. GOLDSTONE: No, your Honor. And
15 another important --

16 THE COURT: That's what he said.

17 MR. GOLDSTONE: Your Honor, he uses
18 the loaded term like spyware. In fact, was
19 looking for spyware when the Attorney General
20 conducted their investigation. Spyware like
21 your Honor recognizes it, is software that
22 collects information about you and uses it to
23 publish to other people to get into your bank
24 accounts, read your e-mail. Direct Revenue
25 has no allegation --

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1 THE COURT: You made it easy for
2 me. Because you compared it to the Village
3 Voice, it's a newspaper. I pick it up, and
4 whatever is in that paper that I pick up, I
5 have in my home, if I bring it into my home.
6 But whatever is in it, I keep out. Now the
7 same thing here. When I pick up your program,
8 I don't know, your freebie, what else am I
9 picking up?

10 MR. GOLDSTONE: When you, when you
11 get the software program, you also get
12 advertisements, and that you are clearly and
13 conspicuously told -- first of all, you never
14 get advertisements unless you get the
15 freebie. And there is no allegation --

16 THE COURT: I'm picking up the
17 freebie. You said the freebie is free
18 telephone service.

19 MR. GOLDSTONE: Right.

20 THE COURT: Service similar to a
21 telephone. So I get the freebie. I get ads?

22 MR. GOLDSTONE: Right.

23 THE COURT: Do you pick up
24 information about my use of my computer?

25 MR. GOLDSTONE: Your Honor, the

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1 allegations are that we're showing ads to the
2 user, and that the ads were not disclosed in
3 advance. And in fact that's why I brought the
4 screen shots for your Honor. I can show your
5 Honor the screen.

6 THE COURT: Go ahead.

7 MR. GOLDSTONE: Your Honor, before
8 you get anything, you are presented with a box
9 that comes up on your screen, that comes up,
10 and it is a clear choice for the consumer, yes
11 or no. These are called buttons at the bottom
12 of the box. If the person clicks no, they
13 never get a single ad. That's undisputed.
14 The box is labeled security.

15 This, by the way, is the
16 Petitioner's own Exhibit that he submitted,
17 Exhibit B-5. And just to blow it up so it
18 will be easier for your Honor to read. It
19 says --

20 THE COURT: Do you think it's easier
21 for me to see? .

22 MR. GOLDSTONE: I'll read it.

23 "Do you want to install and run the
24 latest version of flash talk."

25 That's the telephone.

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1 " By clicking yes, you acknowledge
2 that you have read and understood
3 BetterInternet's customer policy agreement."

4 BetterInternet is the policy
5 agreement, the terms of the agreement.

6 " And agree to be bound by its
7 terms."

8 And a person who clicks -- you can
9 see it in blue. And if you click on the blue,
10 then this is the concurrent policy agreement
11 that comes right up. And it says to the
12 consumer, it mentions advertising, the second
13 Paragraph. This is the first screen that
14 comes up. The first screen that the user sees
15 and says right here, in bold.

16 Section 2, functionality. Section 1
17 is acceptance of the agreement. Section 2 is
18 functionality. And again, functionality.

19 This software delivers advertising
20 as well as various promotional messages to
21 your computer screen while you view Internet
22 web pages.

23 Again, anybody who wants to click no
24 doesn't get it. People have the opportunity
25 at their leisure to read this. They don't --

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1 there's no pressure. They don't have to
2 accept it right then.

3 And there's a case in the Second
4 Division of Moore vs. Microsoft where there is
5 a case brought under the exact same
6 provisions, General Business Law 349, where
7 they accused Microsoft. Because Microsoft was
8 using a kind of contract. This is known in
9 the industry as a click-wrap agreement,
10 because you accept it by clicking. Millions
11 are using it every day. That why we have an
12 amicus in. Because that confirms click-wrap
13 is a standard way of doing business on the
14 Internet.

15 Your Honor, the requirements are
16 that we clearly disclose.

17 THE COURT: Okay. But now what do I
18 get? I click yes, yes, I read it, what do I
19 get?

20 MR. GOLDSTONE: What you'll get are
21 ads. This is what you get. You get
22 software. This case isn't about software.
23 This is what they object to. And every ad
24 that was presented, again, your Honor, the
25 Petitioner's own Exhibit, every ad has a red

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1 section in the upper right hand corner.
2 Anyone who doesn't want an ad can just click
3 the X, immediately goes away.

4 Now if people, if people want to
5 know, you see the poll in the upper right hand
6 corner. It's hard to see. It's clear to you
7 on the screen. It says -- that's one of the
8 brand names that was used, like the moon,
9 Jupiter and Pluto.

10 You see in the upper right hand
11 corner, there's a question mark. So if you
12 have a question, if you have a question, why
13 am I getting this ad? If you forgot you
14 clicked yes, you are unsure, you click on the
15 question mark -- and, your Honor, just to be
16 clear, this is not Petitioner's Exhibit. This
17 is what came up. And I gave Petitioner a copy
18 of this. If there is any dispute, I haven't
19 heard it.

20 This is what came up. You click on
21 that question mark. It says service in the
22 upper right hand corner. It has the same
23 logo, and specifically says, tell you why you
24 are seeing the ad because you received
25 software. Then it says if you do choose to

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1 uninstall Ceres contextual advertising,
2 software, it can be safely and completely
3 removed by going to this web site. See
4 www.mypctuneup.com to get the uninstall tool.

5 They say we should provide an
6 electronic trash can to throw out the
7 software. It is undisputed that Direct
8 Revenue is providing a trash can.

9 And go back to the contract we were
10 looking at before, your Honor. I showed you
11 the first screen before. Now you scroll down
12 with your computer on the second screen.
13 Talked about Section 2 with functionality.
14 Section 3 -- again, Petitioner's Exhibit.
15 Section 3, "uninstall and remove software."
16 It says in the contract you may uninstall the
17 software at any time by visiting
18 www.mypctuneup.com.

19 There's no dispute that Direct
20 Revenue installed a special web site it
21 provided software on that web site so the
22 software can be removed. There's no dispute
23 that that software worked.

24 Your Honor, the petitioner is saying
25 that Direct Revenue should have provided an

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1 electronic trash can. Your Honor, it did
2 provide an electronic trash can.

3 THE COURT: You told me that.

4 But you see, in your whole argument,
5 you avoided something that the Attorney
6 General has said which is what I asked you
7 about. Is there anything published about the
8 user to anyone else?

9 MR. GOLDSTONE: Okay, your Honor.

10 THE COURT: Is there information the
11 user selected, which is basically what the
12 Attorney General is pointing to, which
13 basically is what the Attorney General has
14 alleged.

15 MR. GOLDSTONE: That allegation,
16 notwithstanding what the assistant said
17 earlier today, that allegation is found
18 nowhere in the petition or the affirmation.
19 There is no allegation of any of that
20 information.

21 MR. CHRISTIE: Our complaint is
22 tracking information about ads. The ads
23 software itself watches everything you do.

24 THE COURT: Wait a minute. If he
25 indeed, or if Direct Revenue offered me

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1 something, I'm the user, offers me something,
2 but if you want, if you want to pick it up and
3 you use it, we're going to show you ads.
4 We'll keep showing you ads until you tell us
5 to stop by pushing on these things, what is
6 wrong with that?

7 MR. CHRISTIE: If they did that
8 clearly and conspicuously, we probably will
9 not have a problem with the majority of their
10 practice. But they don't say to consumers
11 we're going to give you future flash talk in
12 exchange for that, we'll give you spyware.
13 They don't show it conspicuously at the same
14 time. They show an ad and no mention of the
15 spyware at all in the licensing agreement.

16 THE COURT: Wait a minute. You
17 called it spyware. And then when your
18 adversary says wait a minute, none of this is
19 alleged in their papers.

20 Forget spyware. It's not spyware
21 unless you tell me different.

22 MR. CHRISTIE: The term, FTC
23 describes spyware is a program on your
24 computer without you knowing about it, or
25 software that gets in your computer and tracks

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1 information about you back to someone else.

2 THE COURT: Counsel has said, and
3 please correct me and correct him if what he
4 is saying is not so. You said you do not
5 allege that anything that Direct Revenue has
6 done, publishes or broadcasts anything about
7 the user, on the user's computer.

8 MR. CHRISTIE: That's not what we
9 are alleging.

10 THE COURT: The only thing that you
11 are alleging is that they are now furnishing
12 ads.

13 MR. CHRISTIE: That's right. They
14 are watching you.

15 THE COURT: And your only real
16 complaint is that the ads ought to be, or
17 somewhere there ought to be some information
18 or something that is more readable or more
19 visible to a consumer to be able to turn that
20 off.

21 MR. CHRISTIE: Not knowing about it
22 in the first place, up front, conspicuously
23 what the terms of the transaction are. It's
24 bedrock principal the terms of the transaction
25 should be disclosed conspicuously. You cannot

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1 bury the terms of the transaction in a license
2 fee.

3 THE COURT: What about the example
4 of the newspaper, the Village Voice?

5 MR. CHRISTIE: You take the Village
6 Voice, you don't like it, you can throw it
7 away.

8 THE COURT: You click on this, you
9 don't like it, you punch "X".

10 MR. CHRISTIE: Consumers are not
11 going to remember Paragraph 4 of a license
12 agreement they may have or may not clicked
13 on. There's no other way to get rid of it.
14 The various majority of users get rid of
15 software, they go to the ad remove file which
16 software provides. Nearly every software you
17 click on it, and it's gone. That's not what
18 they did. They were removed. They found that
19 too many people were removing their software
20 removed it and got rid of it. They invented
21 pot.

22 THE COURT: I asked the Attorney
23 General before if there were other
24 proceedings. And he said there were some
25 proceedings in front of the Federal, FTC I

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1 think it was, here in New York, which was
2 settled. Were you involved in that?

3 MR. GOLDSTONE: No, I was not. We
4 haven't handled any of those proceedings.

5 THE COURT: Are you familiar with
6 any of those?

7 MR. GOLDSTONE: Yes, I am.

8 THE COURT: What were the terms that
9 were agreed upon?

10 MR. GOLDSTONE: Your Honor, most
11 significantly, in a case called
12 advertising.com, a case was settled with the
13 FTC with no damages whatsoever.

14 THE COURT: I know. But did the
15 Respondents agree to do anything, make any
16 changes?

17 MR. CHRISTIE: Yes, your Honor. The
18 Respondents agreed to stop distributing
19 advertising software without disclosing it in
20 the advertising licensing agreement is one of
21 the ways they distribute it.

22 THE COURT: Let him finish. The
23 Respondent agreed to do anything else.

24 MR. GOLDSTONE: Your Honor, I'm not
25 actually familiar with the details of the

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1 injunctive relief. All these cases proceeded
2 by settlement.

3 THE COURT: I would like you to get
4 me a copy of all those stipulations of the
5 settlement agreement.

6 MR. CHRISTIE: Absolutely.

7 THE COURT: With a copy to your
8 adversary.

9 When he gets it, I presume he will
10 have it and present it to me within the next
11 week or so. If you want to comment on it in a
12 brief letter, you may.

13 MR. GOLDSTONE: Just to be clear,
14 you are looking for the government enforcement
15 proceedings.

16 THE COURT: The government
17 enforcement proceedings and the State of New
18 York case.

19 MR. CHRISTIE: The enforcement
20 proceedings by us, there is also a class
21 action case against Direct Revenue.

22 THE COURT: I wasn't asking about
23 the class action. I was asking about the FTC
24 case.

25 MR. CHRISTIE: Yes, your Honor.

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1 THE COURT: Three of us.

2 MR. CHRISTIE: That's right.

3 THE COURT: Those three I wanted.

4 And I want whatever done in New York State.

5 MR. CHRISTIE: Absolutely.

6 MR. GOLDSTONE: Just to be clear, as
7 I mentioned earlier, the practice is that we
8 culled from the Petitioner's Exhibit all
9 previous practices that are over a year old.
10 And the company's current practices are not
11 being disputed in this case.

12 THE COURT: Fine. So tell me what
13 is the company's current practices.

14 MR. GOLDSTONE: The current
15 practices are much more accessive consumer
16 disclosure which the Petitioner has no dispute
17 with.

18 THE COURT: Is that so?

19 MR. CHRISTIE: I have not reviewed
20 in detail their current disclosures.

21 THE COURT: Okay. I'm a consumer.
22 Today I put on my PC. I'm asked to agree to
23 the telephone service, whatever. I click on
24 whatever I'm supposed to click on. How do I
25 get off of it?

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1 MR. GOLDSTONE: How do you?

2 THE COURT: Get off.

3 MR. GOLDSTONE: Well, this web site

4 --

5 THE COURT: I am talking about
6 today.

7 MR. GOLDSTONE: Click on that web
8 site, again as I mentioned, every single ad
9 that comes up --

10 THE COURT: But that's what you said
11 it was a year ago. I'm asking what's today.

12 MR. GOLDSTONE: Oh, today.

13 Today the company still has a
14 question mark. Still the company's firm
15 practice. And in addition to that, the
16 Petitioner mentioned a removed functionality.
17 The company added that functionality.

18 THE COURT: Where is functionality
19 found?

20 MR. GOLDSTONE: If you click on this
21 "start" button, a menu pops up. And then
22 there is a menu that says "control settings."
23 And then you click on control settings. And
24 then another box pops up. And the company's
25 view is the question mark was the simplest way

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1 of disclosure. Petitioner has had a different
2 view. But that doesn't make it a deceptive
3 practice.

4 THE COURT: Wait a minute. Have you
5 reviewed their current practice?

6 MR. CHRISTIE: I have not, your
7 Honor.

8 THE COURT: Okay. We're going to
9 take this as a, I'm going take this as a
10 submission.

11 In the next week or so when you are
12 getting me those other materials, why don't
13 you also review their current practices. And
14 in the letter in which you are going to
15 submit, send me a submission. You will also
16 send me a letter or brief on their current --
17 maybe their current practices are such that
18 you are satisfied with.

19 MR. CHRISTIE: Once with their
20 current practices they continued to show ads
21 effective a year ago. A year ago they did not
22 get disclosure of their program. Once it gets
23 installed, it's installed. They did not
24 notify them after the fact.

25 THE COURT: Why don't you look at it

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and then tell me. Thank you. Thank you.

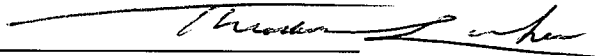
MR. GOLDSTONE: Your Honor, we are happy to go into just a couple other matters.

THE COURT: I said thank you. We are finished. That's a polite way of saying thank you.

Someone order this. Okay.

* * *

I hereby certify the foregoing is a true and correct transcript of the proceedings had in this matter.



Theodore Lukew
Official Court Reporter