

04-CV-02371-CMP

FILED ENTERED
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NOV 24 2004 DJ
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AVENUE MEDIA, N.V.,

Plaintiff,

v.

DIRECTREVENUE, LLC;
DIRECTREVENUE HOLDINGS, LLC;
BETTERINTERNET, LLC.,

Defendants.

CV4 23710
Civil Action No.:

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF AND
DAMAGES

I. INTRODUCTION

1. This is an action for: 1) injunctive relief to restrain Defendants, DirectRevenue, LLC, DirectRevenue Holdings, LLC, and BetterInternet, LLC, (collectively, "DirectRevenue") from deleting Avenue Media's internet browser ("Internet Optimizer") from users' computers and to preserve the status quo by requiring DirectRevenue to reinstall Internet Optimizer on all customers' computers; 2) declaratory relief that DirectRevenue's conduct violated the federal Computer Fraud and Abuse Act (18 U.S.C. 1030 (A)(4) & (5)); and 3) damages in an amount exceeding \$100,00.00.

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF AND DAMAGES

Heller Ehrman White & McAuliffe LLP
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104-7098

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ORIGINAL

1 **II. PARTIES**

2 2. Plaintiff Avenue Media, N.V. is a Curacao corporation.

3 3. Defendants DirectRevenue, LLC, DirectRevenue Holdings, LLC, and
4 BetterInternet, LLC, are Delaware limited liability companies with their principal place
5 of business located at 107 Grand Street, 3rd Floor, New York, New York 10013.

6 **III. SUBJECT MATTER JURISDICTION**

7 4. This action arises under the Computer Fraud and Abuse Act ("CFAA"),
8 18 U.S.C. §1030 and state law. This court has subject matter jurisdiction over the
9 federal CFAA violations pursuant to 28 U.S.C. §§1331 (federal question) and 1332
10 (diversity). This court also has subject matter jurisdiction over the state claims
11 pursuant to 28 U.S.C. §§ 1132 (diversity) and 1367 (supplemental jurisdiction).

12 **IV. VENUE**

13 5. Venue in this court is proper pursuant to 28 U.S.C. §1391(b) because a
14 substantial part of the events or omissions giving rise to the action occurred and are
15 occurring in this judicial district.

16 **V. PERSONAL JURISDICTION**

17 6. This court may maintain personal jurisdiction over Defendant
18 DirectRevenue, which distributes and offers for distribution its products in this judicial
19 district.

20 **VI. FACTUAL BACKGROUND**

21 7. Plaintiff Avenue Media has been in the business of providing targeted
22 contextual advertising on the Internet for more than two years.

23 8. Avenue Media owns and distributes to computer users software known as
24 Internet Optimizer that connects users to a search engine known as Yoogee. Users
25 download Internet Optimizer for free, either individually or as part of a bundle of
26 software. The search engine is launched when the user conducts a search through the
27 URL bar, including initial searches that result in a page that does not exist. Advertisers
28 are given priority in the placement of the search results.

1 9. Avenue Media earns revenue when its Internet Optimizer leads users to
2 search engines which charge a fee. Avenue Media receives 40 to 60% of the fee
3 charged to the user. It also earns revenue from advertisers by providing targeted
4 contextual advertising to users through the Internet Optimizer program. Targeted
5 contextual advertising delivers advertising to users based on the searches they conduct
6 or the websites they visit. Internet Optimizer is installed on millions of computers, and
7 historically averaged about two million hits per day. Avenue Media earned revenues of
8 \$20,000 to \$25,000 daily until DirectRevenue surreptitiously uninstalled the Internet
9 Optimizer from millions of users' computers.

10 10. On information and belief, DirectRevenue is a competitor who is also in
11 the business of targeted Internet advertising. DirectRevenue also offer a free
12 downloadable search engine that prioritizes sponsored links in delivering search results.
13 DirectRevenue's software program is known by various names including "thinstall,"
14 "BI," "twaintek," "direct-revenue," and "abetterinternet."

15 11. On Monday, November 15, 2004, Avenue Media discovered that the
16 number of hits on its Internet Optimizer browser had decreased precipitously, from
17 about two million per day in the previous week, to about one million per day. On
18 further investigation, Avenue Media discovered that, upon installation of
19 DirectRevenue's competing browser software, users' computers were being instructed
20 to "uninstall" Internet Optimizer. Specifically, when the user downloads
21 DirectRevenue's browser software, a command is sent to "Kill process Optimizer.exe."
22 Upon installation, DirectRevenue's program also sends instructions for replacing
23 Avenue Media's Internet Optimizer's URL with DirectRevenue's browser's URL. The
24 same command to "kill" Internet Optimizer was directed to long-time users of the
25 browsers when the DirectRevenue's server conducted a daily update of its browser.

26 12. This deletion of Avenue Media's Internet Optimizer from millions of
27 users' computers has caused a loss of revenue to Avenue Media of between \$7,000 and
28 \$10,000 per day. Avenue Media is also sustaining continuing severe, irrevocable

1 damage to its business directly caused by Defendant's unlawful deletion of Avenue
2 Media's Internet Optimizer software from Avenue Media's customers. Avenue Media
3 has no feasible way to contact customers and reinstall the software on their computers,
4 or to regain the lost goodwill of customers and advertisers, without judicial
5 intervention.

6 13. On November 18, 2004, Avenue Media demanded that Defendant cease
7 the removal of Internet Optimizer from users' computers upon installation or update of
8 Defendant's browser. It also asked Defendant to reinstall Internet Optimizer on users'
9 computers. Defendant has failed to comply.

10 VII. FIRST CLAIM FOR RELIEF

11 Violations of Computer Fraud and Abuse Act

12 18 U.S.C. §1030 (a)(4)

13 14. Avenue Media incorporates the allegations and averments of paragraphs
14 1 through 13 above as fully set forth in this paragraph.

15 15. DirectRevenue, knowingly and with intent to defraud, exceeded its
16 authorized access to users' computers. It did so by automatically uninstalling Avenue
17 Media's Internet Optimizer upon installation or update of DirectRevenue's competing
18 browser.

19 16. DirectRevenue uninstalled Avenue Media's software from users'
20 computers in furtherance of an intended fraud. In doing so, DirectRevenue intended to
21 and succeeded in obtaining something of value in excess of \$5,000 per year (as
22 required by statute). The fees earned from the searches directed by Internet Optimizer
23 determine Avenue Media's revenue stream. DirectRevenue's conduct in commanding
24 uninstalls of Avenue Media's Internet Optimizer from users' computers directly
25 reduced by half the revenue stream to Avenue Media. Through its fraudulent activity,
26 upon information and belief DirectRevenue has obtained fees and revenues that would
27 have otherwise gone to Avenue Media. The loss is in excess of \$7,000 per day.

28 17. Defendant's activities described above constitute a violation of the

1 CFAA, 18 U.S.C. §1030(a)(4). Plaintiff Avenue Media may maintain a civil action
2 against Defendant for violations of the CFAA pursuant to 18 U.S.C. §1030(g). Avenue
3 Media is entitled to compensatory damages and injunctive and other equitable relief.

4 18. On November 18, Avenue Media demanded that DirectRevenue cease the
5 offending conduct and reinstall the Internet Optimizer software on the users'
6 computers. DirectRevenue has failed to comply. As a direct and proximate result of
7 DirectRevenue's ongoing violations, Avenue Media has suffered, and will continue to
8 suffer, substantial injuries, loss and damage to its business and goodwill in an amount
9 to be proved at trial, but not less than \$100,000 per year.

10 19. If DirectRevenue is permitted to continue its conduct, Avenue Media will
11 be irreparably harmed. Avenue Media has already lost millions of customers,
12 thousands of dollars in advertising revenue, and immeasurable customer and advertiser
13 goodwill as a result of DirectRevenue's wrongful acts. Avenue Media has no feasible
14 way of contacting customers to reinstall its wrongfully deleted software. As a result, its
15 business is being irreparably damaged. Monetary damages alone cannot compensate
16 Avenue Media for the harm that DirectRevenue is causing to Avenue Media. Avenue
17 Media is entitled to injunctive relief prohibiting DirectRevenue from continuing in the
18 violations and requiring DirectRevenue to reinstall Internet Optimizer to all of Avenue
19 Media's prior customers.

20 **VIII. SECOND CLAIM FOR RELIEF**

21 **Violations of Computer Fraud and Abuse Act**

22 **18 U.S.C. §1030(a)(5)(A)**

23 20. Avenue Media incorporates the allegations and averments of paragraphs
24 1 through 19 above as though fully set forth in this paragraph.

25 21. DirectRevenue knowingly caused the transmission of a program and, as a
26 result of such conduct, intentionally caused damage without authorization to users'
27 protected computers. DirectRevenue designed its browser installation process to
28 automatically uninstall Avenue Media's Internet Optimizer from users' computers.

1 DirectRevenue intentionally damaged users' computers by deleting Internet Optimizer.

2 22. DirectRevenue's actions described above violate 18 U.S.C.
3 §1030(a)(5)(A). Avenue Media may maintain a civil action against DirectRevenue for
4 violations of the CFAA pursuant to 18 U.S.C. §1030(g). Avenue Media is entitled to
5 compensatory damages and injunctive and other equitable relief.

6 23. On November 18, 2004, Avenue Media demanded that DirectRevenue
7 cease the conduct and reinstall the Internet Optimizer onto former users' computers.
8 DeirectRevenue has failed to comply. As a direct and proximate result of
9 DirectRevenue's ongoing violations, Avenue Media has suffered, and will continue to
10 suffer, substantial injuries, loss, and damage to its business and goodwill in an amount
11 to be proved at trial, but not less than \$100,000 per year.

12 24. If DirectRevenue is permitted to continue its conduct without
13 immediately reinstalling Internet Optimizer on users' computers, Avenue Media will be
14 irreparably harmed. Avenue Media has already lost millions of customers and
15 immeasurable customer and advertiser goodwill as a result of DirectRevenue's
16 wrongful acts. Avenue Media has no feasible way of contacting customers to reinstall
17 its wrongfully uninstalled software. As a result, its business is being irreparably
18 damaged. Monetary damages alone cannot compensate Avenue Media for the harm
19 that DirectRevenue is causing to Avenue Media. Avenue Media is entitled to
20 injunctive relief prohibiting DirectRevenue from continuing in the violations and
21 requiring DirectRevenue to reinstall Internet Optimizer to all of Avenue Media's prior
22 customers.

23 IX. THIRD CLAIM FOR RELIEF

24 Tortious Interference With Economic Relations

25 25. Avenue Media incorporates the allegations and averments of paragraphs
26 1 through 24 above as though fully set forth in this paragraph.

27 26. DirectRevenue intentionally interfered with Avenue Media's business
28 relationships, both existing and contemplated, with computer users, companies

1 operating advance search engines, and advertisers. DirectRevenue knew of Avenue
2 Media's existing or contemplated relationships, and intentionally interfered with those
3 relationships, thus causing termination of Avenue Media's relationships and
4 expectancies. DirectRevenue did so in bad faith, for an improper purpose, and using
5 improper means, causing serious irreparable damage to Avenue Media.

6 27. DirectRevenue, by programming its browser to automatically uninstall
7 Internet Optimizer from users' computers, showed it had knowledge of Avenue
8 Media's existing relationships with users, advertisers, and companies with advanced
9 search engines, and intentionally interfered with those relationships. When Internet
10 Optimizer was deleted from users' computers, Avenue Media's relationship with those
11 users, advertisers, and search engine companies was severed. Through the ensuing loss
12 of customer goodwill, Avenue Media also stands to lose contemplated business
13 relationships. Rather than competing for Avenue Media's customers through
14 legitimate means, DirectRevenue did so through improper means, by uninstalling
15 Internet Optimizer from users' computers.

16 28. DirectRevenue's actions described above constitute tortious interference
17 with contractual relationships and tortious interference with prospective advantage or
18 business expectancy.

19 **X. PRAYER FOR RELIEF**

20 29. WHEREFORE, Plaintiffs respectfully pray for the following relief:

21 A. Entry of injunctive relief prohibiting DirectRevenue from automatically
22 uninstalling Internet Optimizer upon installation or updating of DirectRevenue's
23 *competing software, and requiring DirectRevenue to reinstall Internet Optimizer on all*
24 users' computers from which it was wrongfully deleted;

25 B. Entry of a declaratory judgment that DirectRevenue's conduct violated
26 the federal Computer Fraud and Abuse Act (18 U.S.C. 1030 (A)(4) & (5));

27 C. An award to Avenue Media of damages in an amount to be proved at
28 trial, but at least \$100,000.00;

1 D. Such other and further relief as may follow from the entry of a
2 declaratory judgment; and

3 E. Any further relief that this court may deem just and proper.
4

5 November 24, 2004

Respectfully submitted,

6
7 HELLER EHRMAN WHITE & MCAULIFFE
8 LLP

9
10 By 

11 WARREN J. RHEAUME (BAR NO. 13627)

12 Plaintiff
13 AVENUE MEDIA, N.V.
14

15 SE 2064498 v1
16 11/24/04 11:33 AM (38752.6123)
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The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Avenue Media, N.V.

(b) County of Residence of First Listed Plaintiff King
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Warren J. Rheau
701 Fifth Avenue, Suite 6100, Seattle, WA 98104
(206) 447-0900

DEFENDANTS

Directrevenue, LLC; Directrevenue Holdings, LLC; Betterinternet, LLC

County of Residence of First Listed Defendant
FILED **ENTERED**
LODGED **RECEIVED**

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

Attorneys (If Known) **NOV 24 2004 DJ**

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State 1 1 DCF 1 DDF 4
- Incorporated or Principal Place of Business in This State 4 4
- Citizen of Another State 2 2 DCF 2 DDF 5
- Incorporated and Principal Place of Business in Another State 5 5
- Citizen or Subject of a Foreign Country 3 3 DCF 3 DDF 6
- Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT		TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury—Mod. Malpractice	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment	
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury Product Liability	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Anthrax	
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC	<input type="checkbox"/> 424 Copyright	<input type="checkbox"/> 430 Banks and Banking	
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 425 Patent	<input type="checkbox"/> 450 Commercial/C.C. Rates/etc.	
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Torts in Lending	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 426 Trademark	<input type="checkbox"/> 460 Deportation	
<input type="checkbox"/> 161 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 427 Other	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	
<input type="checkbox"/> 162 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 660 Occupational Safety/Health	<input type="checkbox"/> 428 Labor	<input type="checkbox"/> 480 Selective Service	
<input type="checkbox"/> 163 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 670 Labor/Mgmt. Relations	<input type="checkbox"/> 429 Social Security	<input type="checkbox"/> 490 Securities/Commodities/Exchange	
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 520 Habeas Corpus	<input type="checkbox"/> 700 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 430 Federal Tax Suits	<input type="checkbox"/> 475 Customer Challenge 12 USC 3410	
<input type="checkbox"/> 160 Other Contract		<input type="checkbox"/> 530 General	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 431 HIA (1395 ff)	<input type="checkbox"/> 485 Agricultural Acts	
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 432 Black Lung (923)	<input type="checkbox"/> 492 Economic Stabilization Act	
		<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 433 IHV C/DIWW (403(g))	<input type="checkbox"/> 493 Environmental Matters	
		<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 434 SSD Title SVI	<input type="checkbox"/> 494 Energy Allocation Act	
		<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 750 Other Labor Litigation	<input type="checkbox"/> 435 NSI (435(g))	<input type="checkbox"/> 495 Freedom of Information Act	
			<input type="checkbox"/> 760 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 436 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 496 Appeal of Fee Determination Under Equal Access to Justice	
				<input type="checkbox"/> 437 Tax (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 497 Constitutionality of State Statutes	
				<input type="checkbox"/> 438 Other	<input checked="" type="checkbox"/> 498 Other Statutory Actions	

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another district (specify)
- 6 Multi-district Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

This action comes before the court on diversity jurisdiction (28 USC §1332). Plaintiff complains of violations of 18 USC §1030.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES or ly if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

DATE

FOR OFFICE USE ONLY

RECEIPT#

AMOUNT

BY OF ATTORNEY OF RECORD

JUDGE

MAG JUDGE

DOCKET NUMBER

ORIGINAL