

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

04-CV-02371-MEM

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AVENUE MEDIA, N.V.,

Plaintiff,

v.

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

Defendant.

Case No. **04 CV 2371 C**

MEMORANDUM IN SUPPORT OF
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION

Note on Motion Calendar

Hearing Date and Time:

Oral Argument Requested

I. INTRODUCTION AND RELIEF REQUESTED

On November 14, 2004, Plaintiff Avenue Media, N.V., noticed a precipitous drop in the number of hits on its Internet Optimizer browser, from about two million per day in the previous week to about one million per day by the 14th. Avenue Media soon discovered that Defendants DirectRevenue, LLC, and BetterInternet, LLC, (collectively, "DirectRevenue") were systematically deleting Avenue Media's Internet Optimizer without users' knowledge or consent upon the installation or update of Defendant's competing browser.

Avenue Media's revenue stream is directly related to the number of hits on its

ORIGINAL

1 browser. Defendant's unauthorized deletion of Avenue Media's Internet Optimizer
2 from millions of users' computers has caused Avenue Media daily revenue losses of
3 between \$7,000 and \$10,000. Avenue Media is sustaining continuing severe,
4 irrevocable damage to its business and goodwill. This damage is directly caused by
5 Defendant's unlawful deletion of Avenue Media's Internet Optimizer software from
6 customers' computers without customers' knowledge or consent.

7 Defendant DirectRevenue's tactics violate the Computer Fraud and Abuse Act
8 (18 U.S.C. §1030 (a)(4) & (5)) and tortiously interfere with Avenue Media's
9 relationships and expectancies with customers and advertisers. Avenue Media has
10 contacted DirectRevenue, demanding an immediate end to the deletion of Internet
11 Optimizer upon installation or update of Defendant's competing browser, and
12 demanding that DirectRevenue reinstall Internet Optimizer on those computers from
13 which it was deleted. While Defendant has stated that it would cease the deletion of
14 Internet Optimizer during installation and update of its competing browser, the damage
15 has already been done. Defendant has refused to reinstall Internet Optimizer onto
16 users' computers.

17 As a result, Avenue Media is forced to seek a temporary restraining order and
18 preliminary injunctive relief, pursuant to Federal Rule of Civil Procedure 65 (a) and
19 (b), prohibiting Defendants DirectRevenue, LLC, and BetterInternet, LLC,
20 (collectively, "DirectRevenue") from continuing to delete Plaintiff's program, Internet
21 Optimizer, from users' computers upon installation of Defendant's competing program.
22 Plaintiff also seeks a temporary restraining order and preliminary injunction demanding
23 that Defendant reinstall Internet Optimizer onto users' computers from which it was
24 deleted. Absent such relief, Avenue Media will suffer irreparable harm to its business
25 and goodwill among users and advertisers.

26 II. STATEMENT OF FACTS

27 Plaintiff Avenue Media has been in the business of providing targeted
28 contextual advertising on the Internet for more than two years. Boday Decl. ¶2.

1 Avenue Media distributes a browser known as Internet Optimizer to users. *Id.* ¶2.
2 Users download the program for free, either alone or as a part of a bundle of software.
3 Internet Optimizer works in part by connecting users to a search engine known as
4 Yoogee, which leads users to search engines that charge a fee. *Id.* ¶2. Avenue Media
5 receives 40 to 60% of the fee charged by the search engines. Avenue Media also
6 provides targeted contextual advertising, which delivers advertisements for products
7 related to searches conducted or websites visited by the user. These services have
8 historically produced revenues of \$20,000 to \$25,000 per day for Avenue Media. *Id.*
9 ¶2. Defendant DirectRevenue has a browser that performs similar functions to Avenue
10 Media's Internet Optimizer. Its browser is known by various names including
11 "thinstall," "BI," "twaintek," "direct-revenue," and "abetterinternet."

12 On Monday, November 15, 2004, Avenue Media discovered that the number of
13 hits on its browser had dropped precipitously. Leslie Decl. ¶6. Lead systems
14 administrator for Avenue Media, Moses Leslie, began investigating and soon
15 discovered the reason behind the drop in hits. Defendant DirectRevenue was deleting
16 Avenue Media's Internet Optimizer from users' hard drives upon installation or
17 periodic update of DirectRevenue's competing browser. *Id.* ¶7.

18 Leslie then went to work to verify the disturbing cause of the drop in hits. On
19 reading the log of an office computer, he discovered that the computer had been
20 instructed to "uninstall" Internet Optimizer. *Id.* ¶6. When he downloaded the human
21 readable instructions, he found that instructions had been sent to the computer reading
22 "Kill process Optimizer.exe." *Id.* ¶6. Leslie then reinstalled Internet Optimizer on an
23 office computer, logging the Internet traffic from the machine. After reinstalling
24 Internet Optimizer, he installed DirectRevenue's software (thinstall.abetterinternet). *Id.*
25 ¶7. After installing DirectRevenue's program on the computer, Leslie found that the
26 Internet Optimizer software had again been deleted from the computer. *Id.* ¶7. Leslie
27 saw in the log of internet traffic that DirectRevenue's software had directed the
28 removal of Avenue Media's Internet Optimizer from the computer. *Id.* ¶7. In

1 reviewing the log, Leslie discovered that after DirectRevenue's software was installed,
2 it sent data about currently installed programs to a central server. The instructions were
3 to replace specific URLs associated with Avenue Media with DirecRevenue's URLs in
4 order to take traffic or business from Avenue Media. *Id.* ¶9.

5 This systematic deletion of Avenue Media's Internet Optimizer from millions of
6 users' computers by DirectRevenue has caused Avenue Media to lose between \$7,000
7 and \$10,000 per day in revenues. Boday Decl. ¶4. Avenue Media has no information
8 to identify which customers have had their Internet Optimizer software removed, and
9 no feasible way to contact customers and reinstall the software. *Id.* ¶5. Without the
10 intervention of the court's injunctive powers commanding DirectRevenue to reinstall
11 Internet Optimizer onto users' computers, Avenue Media's business will be irreparably
12 damaged.

13 III. STATEMENT OF ISSUE

14 Is Plaintiff Avenue Media entitled to the requested temporary restraining order
15 and preliminary injunction, so that Defendant DirectRevenue will immediately cease
16 the deletion of Avenue Media's Internet Optimizer upon installation or update of
17 DirectRevenue's software, and will immediately reinstall Internet Optimizer onto
18 users' computers from which it was wrongfully deleted?

19 IV. EVIDENCE RELIED UPON

20 Plaintiff relies upon the declarations of Moscs Leslie and Shawn Boday, their
21 attachments and exhibits, and all pleadings filed herewith.

22 V. AUTHORITY

23 Avenue Media is entitled to temporary and preliminary injunctive relief because
24 it will establish "either (1) a likelihood of success on the merits and the possibility of
25 irreparable injury or (2) the existence of serious questions going to the merits and the
26 balance of hardships tipping in its favor." *Taylor v. Honing*, 910 F.2d 627, 631 (9th
27 Cir. 1990)(internal quotations omitted); Fed. R. Civ. P. 65. In making its
28 determination, the court also considers the advancement of the public interest. *Los*

1 *Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197,
2 1200 (9th Cir. 1980)(citations omitted). Avenue Media also meets the test for the
3 issuance of a temporary restraining order, "to maintain the status quo...the last,
4 uncontested status preceding the commencement of the controversy." *Wash. Capitols*
5 *Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969). Here, absent
6 immediate relief, Avenue Media is at risk that the status quo -- its access to its users
7 and corresponding relationship with advertisers and paid search engines -- will
8 immediately unravel, irreparably injuring Avenue Media's user, advertiser, and search
9 engine relationships and position in the market.

10 **A. Avenue Media Is Likely To Prevail On The Merits By Demonstrating**
11 **That DirectRevenue's Deletion Of Internet Optimizer Violated The**
12 **Computer Fraud And Abuse Act And State Law.**

13 **1. DirectRevenue's deletion of Internet Optimizer exceeds its**
14 **authorized access to users' computers in violation of the**
15 **Computer Fraud and Abuse Act.**

16 Avenue Media is likely to prevail on its claim that DirectRevenue violated the
17 Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(4). This statute punishes whoever
18 "knowingly and with intent to defraud, accesses a protected computer without
19 authorization, or exceeds authorized access, and by means of such conduct furthers the
20 intended fraud and obtains anything of value."

21 DirectRevenue knowingly and with intent to defraud, exceeded its authorized
22 access to users' computers, and thus furthered an intended fraud and obtained
23 something of value. DirectRevenue was authorized to install its own software on users'
24 computers, not to delete other software. In so doing, the company exceeded its
25 authorized access to users' computers and obtained something of value.

26 The fees earned from the searches directed by Internet Optimizer and from
27 advertisers who deliver their content through Internet Optimizer determine Avenue
28 Media's revenue stream. DirectRevenues' conduct in commanding uninstalls of
Internet Optimizer from users' computers directly reduced by half the revenue stream

1 to Avenue Media. Avenue Media has lost more than \$7,000 per day in revenues as a
2 result of DirectRevenue's fraudulent acts. Boday Decl. ¶4. DirectRevenue is obtaining
3 at least part of the fees and revenues that would have otherwise gone to Avenue Media,
4 since some customers who would have conducted searches or received targeted
5 advertising through Internet Optimizer were forced to do so through DirectRevenue
6 instead.

7 **2. DirectRevenue's deletion of Internet Optimizer upon**
8 **installation or update of its own program caused intentional**
9 **damage to users' computers in violation of the Computer**
 Fraud and Abuse Act.

10 DirectRevenue's deletion of Internet Optimizer intentionally caused
11 unauthorized damage to users' computers, making Avenue Media likely to prevail on
12 its claim that DirectRevenue violated the Computer Fraud and Abuse Act, 18 U.S.C.
13 §1030(a)(5)(A). The statute punishes companies that knowingly cause the transmission
14 of a program that "intentionally causes damage without authorization, to a protected
15 computer."

16 DirectRevenue knew and intended to delete Internet Optimizer from users'
17 computers on installation or update of its own competing software. The code record of
18 what occurred on installation of DirectRevenue software makes this fact quite clear.
19 The instructions sent to a user's computer from DirectRevenue on installation of its
20 software read in part "Kill process Optimizer.exe / Remove registry keys." Leslie
21 Decl. ¶6. Users were unaware that such damage would occur and did not authorize it.
22 This intentional deletion of Internet Optimizer from millions of users' computers has
23 damaged Avenue Media to the tune of at least \$7,000 per day in lost revenues, totaling
24 at least \$100,000 in losses to date. These losses are well in excess of the \$5,000
25 required by statute.
26
27
28

1 **3. DirectRevenue's deletion of Internet Optimizer from users'**
2 **computers tortiously interfered with Avenue Media's**
3 **relationships and expectancies with users and advertisers.**

4 DirectRevenue took its actions in full knowledge of their effect on Avenue
5 Media's relationship with customers, companies with advance search engines, and
6 advertisers. DirectRevenue did so in bad faith, for an improper purpose, and using
7 improper means. Avenue Media will therefore also likely prevail on its claim that
8 DirectRevenue's actions constitute tortious interference with economic relations and
9 expectancies.

10 The record of traffic to and from a computer during the DirectRevenue
11 installation shows that DirectRevenue intentionally sent instructions to uninstall
12 Internet Optimizer from users' computers (the code reads "Kill process Optimizer.exe,
13 Leslie Decl. ¶6). This shows that DirectRevenue had knowledge of Avenue Media's
14 existing relationships with users, and intentionally interfered with those relationships.
15 This action also directly interfered with Avenue Media's relationships with advertisers
16 and search engine companies, who paid Avenue Media for its access to the users. The
17 resulting loss in goodwill that Avenue Media has suffered also interfered with Avenue
18 Media's business expectancies.

19 **B. Because Avenue Media's Relationship With Its Users And**
20 **Advertisers Will Be Irreparably Injured If Deletion Of Internet**
21 **Optimizer Is Not Immediately Ceased And Internet Optimizer**
22 **Reinstalled On Users' Computers, The Balance Of Equities And The**
23 **Public Interest Both Favor The Granting Of Temporary And**
24 **Preliminary Injunctive Relief.**

25 Avenue Media is likely to suffer irreparable injury if temporary and preliminary
26 injunctive relief are not granted. If DirectRevenue is not commanded to cease deletion
27 of Internet Optimizer from users' computers on installation or update of
28 DirectRevenue's software, and if they are not required to reinstall Internet Optimizer
 onto users' computers, Avenue Media will be irreparably harmed.

 The right to relief under 18 U.S.C. §1030 and state tort law is clear.

1 DirectRevenue's violations of state and federal law are causing severe, irreparable
2 harm to Avenue Media. Avenue Media is suffering monetary losses of at least \$7,000
3 per day. But more serious is the immeasurable loss of customer, advertiser, and search
4 engine company goodwill that Avenue Media is also suffering. There is no adequate
5 legal remedy for this loss of goodwill, as the loss is impossible to measure in monetary
6 terms.

7 Moreover, DirectRevenue took its actions in bad faith. Instead of competing on
8 the merits, DirectRevenue surreptitiously deleted its competitor's software from users'
9 computers. Any hardship DirectRevenue may suffer in being required to cease and
10 rectify its bad conduct will be a result of its own wrongdoing.

11 The fact that DirectRevenue claims to have stopped deleting Internet Optimizer
12 from users' computers is irrelevant. There is no guarantee that they will not resume the
13 offending practice, and the damage has already largely been done. Avenue Media has
14 lost millions of customers, as well as the advertising and search engine revenues that
15 came from those customers. Moreover, the Supreme Court has warned "to beware of
16 efforts to defeat injunctive relief by protestations of repentance and reform, especially
17 when abandonment seems tied to anticipate suit, and there is probability of
18 resumption." *United States v. Oregon State Medical Soc.*, 72 S.Ct. 690, 696, 343 U.S.
19 326, 96 (1952). The court must take into consideration the likelihood of a recurrence
20 of the problem.

21 VI. CONCLUSION

22 For the foregoing reasons, Plaintiff Avenue Media respectfully requests that this
23 Court enter the proposed Temporary Restraining Order and proposed Preliminary
24 Injunction Order, submitted with these papers.

1 November 24, 2004

Respectfully submitted,

2
3 HELLER EHRMAN WHITE & MCAULIFFE
4 LLP

5
6 By 
7 WARREN J. RHEAUME (BAR NO. 13627)

8 Plaintiff
9 AVENUE MEDIA, INC.

10 SE 2064583 v1
11 11/24/04 11:36 AM (38752.6123)