

# EXHIBIT 20

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In Re:

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Direct Revenue

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January 26, 2006

12:21 p.m.

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Administrative hearing of

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CHRISTOPHER DOWHAN, held at the Office

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of The Attorney General Eliot Spitzer,

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120 Broadway, New York, New York,

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pursuant to subpoena, before Joseph

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Ravenell, a Court Reporter and Notary

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Public of the State of New York.

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<p>2</p> <p>1 2 APPEARANCES: 3 4 STATE OF NEW YORK 5 Office of Attorney General Eliot Spitzer 6 120 Broadway - 3rd Floor 7 New York, New York 10271-0332 8 BY: JUSTIN BROOKMAN, ESQ. 9 KENNETH M. DREIFACH, ESQ. 10 11 DAVIS &amp; GILBERT LLP 12 Attorneys for Direct Revenue 13 and The Witness 14 1740 Broadway 15 New York, New York 10019 16 BY: NEAL H. KLAUSNER, ESQ. 17 18 EMERY CELLI BRINCKERHOFF &amp; ABADY LLP 19 Attorneys for Direct Revenue 20 and The Witness 21 545 Madison Avenue 22 New York, New York 10022 23 BY: ANDREW G. CELLI, JR., ESQ. 24 25</p>	<p>4</p> <p>1 DOWHAN 2 Q. This is a little bit different 3 from a normal deposition. This is an 4 administrative hearing conducted under 5 Executive Law 63(12). It differs from a 6 deposition in a few material ways. 7 First, you do not have the right 8 to an attorney in this proceeding. 9 However, we are allowing Mr. Klausner and 10 Mr. Celli here on the condition that they 11 not coach or otherwise interfere with the 12 questioning. However, all rights and 13 objections you have are reserved for some 14 future date. 15 Another difference is that you 16 do not get a copy of the transcript. This 17 is a confidential administrative 18 proceeding. Do you understand that? 19 A. I understand. 20 Q. Okay. I'd like to mark this as 21 Exhibit 1. 22 (AG Exhibit 1 marked for 23 identification.) 24 Q. Before we conducted this 25 hearing, we had a discussion with your</p>
<p>3</p> <p>1 2 CHRISTOPHER DOWHAN, 3 having first been duly sworn by a Notary 4 Public of the State of New York, was 5 examined and testified as follows: 6 EXAMINATION BY 7 MR. BROOKMAN: 8 Q. Can you state your name for the 9 record. 10 A. Christopher Dowhan. 11 Q. What is your current address? 12 MR. KLAUSNER: Can we put on the 13 record -- 14 MR. BROOKMAN: I will. I'll get 15 to that just in one moment. 16 Q. What is your current address? 17 A. 1392 Hunterbrook Road in 18 Yorktown Heights, New York. 19 Q. Who is your current employer? 20 A. Direct Revenue. 21 Q. Have you ever been deposed 22 before? 23 A. Yes. 24 Q. With an adware-related case? 25 A. No.</p>	<p>5</p> <p>1 DOWHAN 2 attorneys agreeing to limit the parameters 3 of this interview. 4 Have you seen this document 5 before or at least the substance of the 6 e-mail? 7 A. I don't know if I have actually 8 seen this e-mail. 9 Q. Do you want to take a moment to 10 look at it? 11 A. Sure. 12 (Witness reviews document.) 13 MR. DREIFACH: While Mr. Dowhan 14 is reviewing Exhibit 1, why don't we also 15 just put on the record what we have 16 already put in writing, which is that we 17 have agreed to limit the parameters of 18 this deposition as to issues of very 19 immediate concern, given various 20 witnesses' availability. We reserve our 21 right to call Mr. Dowhan back for a fuller 22 range of issues as is necessary. 23 A. I read it. 24 Q. Are you prepared to discuss 25 these topics today?</p>

<p style="text-align: right;">6</p> <p>1           <b>DOWHAN</b></p> <p>2     A.   Yes.</p> <p>3     Q.   Good. Can you identify the</p> <p>4   people that you spoke to today in</p> <p>5   preparation for this hearing?</p> <p>6     A.   Neal Klausner, Andrew Celli, and</p> <p>7   one another counsel whose name I can never</p> <p>8   remember.</p> <p>9     Q.   Did you speak to anyone at the</p> <p>10  company about it?</p> <p>11    A.   About the fact that I would be</p> <p>12  here or about the content?</p> <p>13    Q.   About the content.</p> <p>14    A.   No.</p> <p>15    Q.   Did you review any documents in</p> <p>16  preparation for this hearing?</p> <p>17    A.   Yes.</p> <p>18    Q.   What sorts of documents?</p> <p>19    A.   Presentations that may have been</p> <p>20  presented, created in the past, e-mail, an</p> <p>21  affidavit.</p> <p>22    Q.   Distribution contracts?</p> <p>23    A.   Yes, I did look at a</p> <p>24  distribution contract.</p> <p>25    Q.   When did you join Direct</p>	<p style="text-align: right;">8</p> <p>1           <b>DOWHAN</b></p> <p>2     A.   The people that I knew</p> <p>3   specifically were Josh and Dan. I had</p> <p>4   worked with them in the past.</p> <p>5     Q.   In what capacity had you worked</p> <p>6   with them in the past?</p> <p>7     A.   At a company called Dash.com.</p> <p>8     Q.   What was your role with</p> <p>9   Dash.com?</p> <p>10    A.   I was in charge of different</p> <p>11  aspects of development and project</p> <p>12  management.</p> <p>13    Q.   Can you be a little more</p> <p>14  specific than development and project</p> <p>15  management?</p> <p>16    A.   I was the head of an office in</p> <p>17  Maynard, Massachusetts. And in that</p> <p>18  office we created software. And project</p> <p>19  management was usually related to creating</p> <p>20  different aspects of the software,</p> <p>21  different parts of the software.</p> <p>22    Q.   Were your responsibilities with</p> <p>23  regard to developing the software or</p> <p>24  distributing the software?</p> <p>25    A.   Developing mostly.</p>
<p style="text-align: right;">7</p> <p>1           <b>DOWHAN</b></p> <p>2   Revenue?</p> <p>3     A.   I became a full-time employee in</p> <p>4   spring of 2004.</p> <p>5     Q.   Did you work for Direct Revenue</p> <p>6   in a part-time capacity previous to that?</p> <p>7     A.   As a consultant, yes.</p> <p>8     Q.   Did you have an official</p> <p>9   position earlier?</p> <p>10    A.   No.</p> <p>11    Q.   When did you first become a</p> <p>12  consultant to Direct Revenue?</p> <p>13    A.   In about June of 2003.</p> <p>14    Q.   Did you have any involvement</p> <p>15  with the company prior to that?</p> <p>16    A.   No, not that I remember.</p> <p>17    Q.   How did you obtain this job, the</p> <p>18  first consultancy job?</p> <p>19    A.   I moved to the New York area and</p> <p>20  knew some of the people, the founders, the</p> <p>21  people who worked there.</p> <p>22    Q.   By "the founders" you mean</p> <p>23  Joshua Abram, Alan Murray, Daniel Kaufman</p> <p>24  and Rodney Hook? Those are the four</p> <p>25  founders of Direct Revenue?</p>	<p style="text-align: right;">9</p> <p>1           <b>DOWHAN</b></p> <p>2     Q.   But not with distribution?</p> <p>3     A.   Not so much.</p> <p>4     Q.   Did you have any responsibility</p> <p>5   with regard to distribution?</p> <p>6     A.   I don't know if I had</p> <p>7   responsibility regarding distribution. I</p> <p>8   don't know if I had responsibility.</p> <p>9     Q.   That's fair. Between your time</p> <p>10  at Dash and when you started working for</p> <p>11  Direct Revenue, what were you doing?</p> <p>12    A.   I was looking for consulting</p> <p>13  work and traveling.</p> <p>14    Q.   Did you work in adware industry</p> <p>15  at all?</p> <p>16    A.   No.</p> <p>17    Q.   What is your current position</p> <p>18  with the company?</p> <p>19    A.   VP distribution.</p> <p>20    Q.   Has that title changed over</p> <p>21  time?</p> <p>22    A.   I don't know if I ever had a</p> <p>23  specific title prior to that title.</p> <p>24    Q.   But when you joined full time in</p> <p>25  2004, you were vice president</p>

<p style="text-align: right;">10</p> <p>1 DOWHAN</p> <p>2 distribution?</p> <p>3 A. No. Actually in the early part</p> <p>4 of 2004, I was more focused on technology.</p> <p>5 Q. What were your responsibilities</p> <p>6 then?</p> <p>7 A. Product development.</p> <p>8 Q. You developed the ad client?</p> <p>9 A. Not specifically the ad client.</p> <p>10 Q. What software did you help</p> <p>11 design?</p> <p>12 A. A tool that we called the</p> <p>13 Thinstaller. It was a piece of code to</p> <p>14 help with the installation.</p> <p>15 Q. How did it help with the</p> <p>16 installation?</p> <p>17 A. It allowed us to give code to a</p> <p>18 distributor without actually giving them</p> <p>19 the ad client. So it would check back to</p> <p>20 a server.</p> <p>21 Q. When did you move more into the</p> <p>22 distribution side?</p> <p>23 A. Let's see. In November of 2004</p> <p>24 when I started working, went back to</p> <p>25 working more with distribution.</p>	<p style="text-align: right;">12</p> <p>1 DOWHAN</p> <p>2 It was more of a global corporate role.</p> <p>3 Q. Was he involved with</p> <p>4 distribution?</p> <p>5 MR. CELLI: You are saying</p> <p>6 during the period of the consultancy?</p> <p>7 MR. BROOKMAN: That's correct.</p> <p>8 MR. CELLI: Okay.</p> <p>9 A. In as far as it was a very small</p> <p>10 office.</p> <p>11 Q. Yes?</p> <p>12 A. I guess he was involved.</p> <p>13 Q. Who was in charge of</p> <p>14 distribution back then?</p> <p>15 A. I don't know who was in charge</p> <p>16 of distribution.</p> <p>17 Q. Who had responsibility with</p> <p>18 regard to distribution?</p> <p>19 A. I was responsible for certain</p> <p>20 aspects of distribution.</p> <p>21 Q. What aspects?</p> <p>22 A. I would create pieces of code to</p> <p>23 be distributed, part of the installation</p> <p>24 code. I would look for applications to</p> <p>25 license, called consumer and value</p>
<p style="text-align: right;">11</p> <p>1 DOWHAN</p> <p>2 Q. When you were consulting, you</p> <p>3 were working more with distribution as</p> <p>4 well?</p> <p>5 A. When I was consulting, I worked</p> <p>6 with distribution.</p> <p>7 Q. Who do you report to in your</p> <p>8 current capacity?</p> <p>9 A. Our CEO.</p> <p>10 Q. Who is that?</p> <p>11 A. J.P. Maheu.</p> <p>12 Q. Who did you report to when you</p> <p>13 were a consultant working on distribution?</p> <p>14 A. I worked with the executive</p> <p>15 team. I don't know as I had a direct</p> <p>16 report.</p> <p>17 Q. By executive team, who do you</p> <p>18 mean?</p> <p>19 A. Let's see. I worked with Josh</p> <p>20 Abram. I worked with Alan Murray</p> <p>21 predominantly.</p> <p>22 Q. What was Joshua Abram's role</p> <p>23 with distribution back then?</p> <p>24 A. Distribution? I guess</p> <p>25 unspecified. I believe his title is CEO.</p>	<p style="text-align: right;">13</p> <p>1 DOWHAN</p> <p>2 applications.</p> <p>3 Q. Such as Flashtalk?</p> <p>4 A. Exactly. Things along those</p> <p>5 lines. To license and use with</p> <p>6 distribution. I would buy media. I would</p> <p>7 buy banner impressions, things along those</p> <p>8 lines, in order to promote those</p> <p>9 applications. And I would review</p> <p>10 reporting, the quality of that</p> <p>11 distribution.</p> <p>12 Q. Who dealt with the distributors</p> <p>13 during your consultancy?</p> <p>14 A. During my consultancy? I</p> <p>15 believe for the most part the distributors</p> <p>16 were -- it was more -- I want to phrase</p> <p>17 this correctly. There were not many</p> <p>18 instances that I can think of of</p> <p>19 distributors that you would deal with.</p> <p>20 There were relationships with software</p> <p>21 vendors that I would deal with or ad</p> <p>22 networks, for example, that I would deal</p> <p>23 with.</p> <p>24 Q. Those would be to distribute</p> <p>25 Flashtalk bundled with the client,</p>

<p style="text-align: right;">14</p> <p>1           <b>DOWHAN</b></p> <p>2   <b>correct?</b></p> <p>3    <b>A. Correct.</b></p> <p>4    <b>Q. What about distributors who</b></p> <p>5    <b>distributed their own programs bundled</b></p> <p>6    <b>with the ad client, such as IST, for</b></p> <p>7    <b>instance?</b></p> <p>8    <b>A. During that time frame, I don't</b></p> <p>9    <b>believe -- I don't remember what</b></p> <p>10   <b>distributors like that that we were</b></p> <p>11   <b>working with during that time frame. So</b></p> <p>12   <b>if I were to say that I dealt with them, I</b></p> <p>13   <b>can't actually think of who they are. So</b></p> <p>14   <b>I can't say really who dealt with that.</b></p> <p>15   <b>Q. You remember having distributors</b></p> <p>16   <b>during that time frame?</b></p> <p>17   <b>A. Well, a common source of -- I</b></p> <p>18   <b>don't remember having any distributors</b></p> <p>19   <b>during that time frame.</b></p> <p>20   <b>Q. Okay. Are you saying that there</b></p> <p>21   <b>were no companies like IST or Mindset or</b></p> <p>22   <b>CDT that the company was using back then</b></p> <p>23   <b>to distribute the ad client?</b></p> <p>24   <b>A. No. The majority of the</b></p> <p>25   <b>distribution was done through purchasing</b></p>	<p style="text-align: right;">16</p> <p>1           <b>DOWHAN</b></p> <p>2           <b>MR. KLAUSNER: The time period?</b></p> <p>3    <b>Are we just talking generally now?</b></p> <p>4           <b>MR. BROOKMAN: Yes, generally is</b></p> <p>5    <b>fine.</b></p> <p>6    <b>A. Yes.</b></p> <p>7    <b>Q. What is his role or has been his</b></p> <p>8    <b>role with regard to distribution?</b></p> <p>9           <b>MR. CELLI: This is Alan Murray,</b></p> <p>10   <b>right?</b></p> <p>11           <b>MR. BROOKMAN: Yes.</b></p> <p>12    <b>A. I might even need to clarify</b></p> <p>13    <b>with Dan Kaufman. So any executive within</b></p> <p>14    <b>the group may have had some input on our</b></p> <p>15    <b>distribution, depending on the aspect of</b></p> <p>16    <b>distribution in question.</b></p> <p>17    <b>Q. What does that mean?</b></p> <p>18    <b>A. If there were a question as to</b></p> <p>19    <b>some element of distribution, it would not</b></p> <p>20    <b>be unusual for a larger group other than</b></p> <p>21    <b>myself to have input on it.</b></p> <p>22    <b>Q. Do you remember having</b></p> <p>23    <b>conversations with Dan Kaufman and other</b></p> <p>24    <b>founders with regard to distribution</b></p> <p>25    <b>aspects?</b></p>
<p style="text-align: right;">15</p> <p>1           <b>DOWHAN</b></p> <p>2    <b>media and promoting an application that I</b></p> <p>3    <b>may have bundled myself.</b></p> <p>4    <b>Q. I understand that. But there is</b></p> <p>5    <b>also a large number of installations</b></p> <p>6    <b>through third parties using their own</b></p> <p>7    <b>software, correct?</b></p> <p>8           <b>MR. KLAUSNER: During what time</b></p> <p>9    <b>frame?</b></p> <p>10           <b>MR. BROOKMAN: During the</b></p> <p>11   <b>consultancy.</b></p> <p>12    <b>A. No.</b></p> <p>13    <b>Q. No? From June 2003 to the</b></p> <p>14   <b>spring 2004 you were not using companies</b></p> <p>15   <b>like Flying Crock, CDT, Mindset to</b></p> <p>16   <b>distribute the ad client?</b></p> <p>17    <b>A. There may have been some</b></p> <p>18   <b>companies that were being used.</b></p> <p>19    <b>Q. You don't know who they are?</b></p> <p>20    <b>A. No.</b></p> <p>21    <b>Q. Did Dan Kaufman have a role in</b></p> <p>22   <b>distribution?</b></p> <p>23    <b>A. Not that I remember.</b></p> <p>24    <b>Q. Alan Murray?</b></p> <p>25    <b>A. Did he have a role?</b></p>	<p style="text-align: right;">17</p> <p>1           <b>DOWHAN</b></p> <p>2    <b>A. Sure, some.</b></p> <p>3    <b>Q. We may talk a bit more about</b></p> <p>4    <b>that later. For the moment I'd like to</b></p> <p>5    <b>switch and talk about the Web site A</b></p> <p>6    <b>Better Internet.com. Are you familiar</b></p> <p>7    <b>with that Web site?</b></p> <p>8    <b>A. I am.</b></p> <p>9    <b>Q. How are you familiar with it?</b></p> <p>10   <b>A. I helped to revise its contents</b></p> <p>11   <b>at one point in I believe 2004. I am</b></p> <p>12   <b>familiar with it through distributing</b></p> <p>13   <b>content through it.</b></p> <p>14    <b>Q. Who else had responsibilities</b></p> <p>15   <b>with regard to this Web site?</b></p> <p>16    <b>A. I don't know all the people</b></p> <p>17   <b>involved. But there were also technical</b></p> <p>18   <b>responsibilities around maintaining the</b></p> <p>19   <b>Web site.</b></p> <p>20    <b>Q. Okay. And who would be</b></p> <p>21   <b>responsible for that?</b></p> <p>22    <b>A. At different times it may have</b></p> <p>23   <b>been different.</b></p> <p>24    <b>Q. Give me some people who were</b></p> <p>25   <b>involved.</b></p>

<p style="text-align: right;">18</p> <p>1           DOWHAN</p> <p>2       A. Let's see. I would say at least</p> <p>3 at some point during the company, Dan</p> <p>4 Doman or part of his technical team would</p> <p>5 have been responsible for certain aspects</p> <p>6 of the site.</p> <p>7       Q. Can you describe the site to me</p> <p>8 generally?</p> <p>9       A. It is a Web site where an</p> <p>10 individual could download a consumer-value</p> <p>11 app, which is bundled with Direct Revenue</p> <p>12 software.</p> <p>13       Q. You testified about this Web</p> <p>14 site previously in the Sotello case; is</p> <p>15 that correct?</p> <p>16       A. That is correct.</p> <p>17       Q. Okay.</p> <p>18       MR. BROOKMAN: I'm going to mark</p> <p>19 this as Exhibit AG 2.</p> <p>20       (AG Exhibit 2 marked for</p> <p>21 identification.)</p> <p>22       Q. I was going to use the</p> <p>23 screenshots from your declaration in the</p> <p>24 Sotello case. They are a little bit small</p> <p>25 and don't read so well. This is so</p>	<p style="text-align: right;">20</p> <p>1           DOWHAN</p> <p>2       Q. What were the main differences?</p> <p>3       A. The number of consumer-value</p> <p>4 applications offered, the content about</p> <p>5 the download process, the information</p> <p>6 regarding the applications being</p> <p>7 downloaded.</p> <p>8       Q. Including the ad client?</p> <p>9       A. Including the ad client. And</p> <p>10 the look and feel.</p> <p>11       Q. With regard to the information</p> <p>12 about the ad client, is it true that the</p> <p>13 earlier version of this site contained</p> <p>14 information about the bundled ad client on</p> <p>15 the main page?</p> <p>16       A. I don't remember.</p> <p>17       Q. You said there was a change.</p> <p>18 What did the other version of the site</p> <p>19 look like with regard to the information</p> <p>20 about the bundled ad client?</p> <p>21       A. I don't remember the specifics.</p> <p>22 But I remember the volume of information</p> <p>23 around the applications being downloaded</p> <p>24 changed over time. More text, less text.</p> <p>25 I remember changing text, things along</p>
<p style="text-align: right;">19</p> <p>1           DOWHAN</p> <p>2 pretty. I hope you don't mind if we use</p> <p>3 this version.</p> <p>4       A. I don't mind.</p> <p>5       Q. Do you want to take a look at it</p> <p>6 and see if it's consistent with your</p> <p>7 understanding of how that Web site</p> <p>8 operated?</p> <p>9       A. Sure.</p> <p>10       Q. Take all the time you need.</p> <p>11       (Witness reviews document.)</p> <p>12       A. This looks like an accurate</p> <p>13 representation.</p> <p>14       Q. You mentioned previously that</p> <p>15 you helped revise the content in 2004.</p> <p>16 Would that be to make the Web site look</p> <p>17 like this or were you changing the Web</p> <p>18 site from this?</p> <p>19       A. I don't remember the chronology</p> <p>20 exactly. But it was -- I don't remember</p> <p>21 the chronology of whether or not it was</p> <p>22 being made to look like this or from this.</p> <p>23       Q. Do you remember how it looked</p> <p>24 differently at different times?</p> <p>25       A. Somewhat.</p>	<p style="text-align: right;">21</p> <p>1           DOWHAN</p> <p>2 those lines.</p> <p>3       Q. Who made the decisions to add</p> <p>4 text, subtract text?</p> <p>5       A. I don't know.</p> <p>6       Q. Did you discuss it with Josh</p> <p>7 Abram?</p> <p>8       A. I may have discussed with Josh.</p> <p>9       Q. Alan? Do you remember talking</p> <p>10 about it with Alan?</p> <p>11       A. I do not remember any specific</p> <p>12 conversations with Alan.</p> <p>13       Q. Let's just maybe go through the</p> <p>14 download process and you can describe to</p> <p>15 me what is going on.</p> <p>16       A. Sure.</p> <p>17       Q. Let's start on the first page.</p> <p>18       A. Okay.</p> <p>19       Q. Which I believe is the same</p> <p>20 screen, just scrolled down.</p> <p>21       A. Okay.</p> <p>22       Q. Speak out loud about what is</p> <p>23 happening on each page, just so that we</p> <p>24 know what is going on.</p> <p>25       A. Okay. The first page, it shows</p>

<p>22</p> <p>1 DOWHAN</p> <p>2 different consumer-value applications that</p> <p>3 are available for download by clicking on</p> <p>4 a link. Or you could get more information</p> <p>5 about the application.</p> <p>6 Q. Is there any disclosure or</p> <p>7 discussion of bundled adware programs on</p> <p>8 this page?</p> <p>9 MR. DREIFACH: By "this page,"</p> <p>10 we are referring to?</p> <p>11 MR. BROOKMAN: The Better</p> <p>12 Internet home page.</p> <p>13 MR. CELLI: Page 1 of AG 2.</p> <p>14 MR. BROOKMAN: Which represents</p> <p>15 the Better Internet home page.</p> <p>16 MR. KLAUSNER: At what time?</p> <p>17 MR. BROOKMAN: I believe this is</p> <p>18 from around the winter or spring of 2005.</p> <p>19 A. Could you repeat the question.</p> <p>20 Q. Is there any disclosure about</p> <p>21 bundled ad clients on the A Better</p> <p>22 Internet.com home page?</p> <p>23 A. There is a EULA link in the</p> <p>24 lower left corner.</p> <p>25 Q. Other than that, is there any</p>	<p>24</p> <p>1 DOWHAN</p> <p>2 clicking 'Yes', you acknowledge that you</p> <p>3 have read and understand BetterInternet's</p> <p>4 Consumer Policy Agreement and agree to be</p> <p>5 bound by its terms,' signed on 5/12/2004</p> <p>6 12:46 PM and distributed by:</p> <p>7 BetterInternet."</p> <p>8 Q. That's good enough.</p> <p>9 A. You can't tell by my speaking,</p> <p>10 but there are links, the information there</p> <p>11 is linked.</p> <p>12 Q. It is underlined in blue, which</p> <p>13 is traditional for a hyperlink, correct?</p> <p>14 A. Yes.</p> <p>15 Q. Now, if the user's security</p> <p>16 settings, Internet Explorer security</p> <p>17 settings, were on low, would the user see</p> <p>18 this box?</p> <p>19 A. Not necessarily.</p> <p>20 Q. Not necessarily? Explain that.</p> <p>21 A. By setting a user's security</p> <p>22 settings to low, within a low you can</p> <p>23 adjust different settings.</p> <p>24 Q. Correct.</p> <p>25 A. But if you set to low, it would</p>
<p>23</p> <p>1 DOWHAN</p> <p>2 disclosure about bundled adware?</p> <p>3 A. None that I see.</p> <p>4 Q. Other than the link to the EULA,</p> <p>5 there is no disclosure of bundled adware</p> <p>6 programs; is that correct?</p> <p>7 A. Yes, I do not see any here.</p> <p>8 Q. All right. Now, you can flip</p> <p>9 over and describe what happens next. I'll</p> <p>10 represent that our investigator clicked</p> <p>11 the Atomic Clock download.</p> <p>12 A. After clicking on the Atomic</p> <p>13 Clock download, it opened a window, an</p> <p>14 Explorer window, with code in that window</p> <p>15 to initiate a download.</p> <p>16 Q. Okay. And what happened next?</p> <p>17 A. The code in that window prompted</p> <p>18 the modal box, the popup box.</p> <p>19 Q. The ActiveX box?</p> <p>20 A. Yes.</p> <p>21 Q. What does that modal box say?</p> <p>22 A. Verbatim or summary?</p> <p>23 Q. You can say verbatim.</p> <p>24 A. "Do you want to install and run</p> <p>25 'the latest version of Atomic Clock? By</p>	<p>25</p> <p>1 DOWHAN</p> <p>2 potentially bring down the restriction of</p> <p>3 ActiveX controls and allow ActiveX</p> <p>4 controls to run, to install.</p> <p>5 Q. Without notice to the consumer,</p> <p>6 correct?</p> <p>7 A. That's possible.</p> <p>8 Q. When you say possible, was there</p> <p>9 any time when the user would still receive</p> <p>10 notice?</p> <p>11 A. With low settings?</p> <p>12 Q. Default low, yes.</p> <p>13 A. Default low?</p> <p>14 Q. Yes.</p> <p>15 A. I don't believe so, no.</p> <p>16 Q. If the user had default low</p> <p>17 Internet security settings, the user would</p> <p>18 not see this little box, correct?</p> <p>19 A. I believe that's correct.</p> <p>20 Q. Or, alternatively, if the user</p> <p>21 had gone into the more precise settings</p> <p>22 and clicked "Enable" for signed ActiveX</p> <p>23 content, when she clicked "Download now,"</p> <p>24 she would not see this little box; is that</p> <p>25 right?</p>



<p style="text-align: right;">26</p> <p>1 <b>DOWHAN</b></p> <p>2 A. Could you say that again.</p> <p>3 Q. Within the low settings, tweaked</p> <p>4 them as you mentioned, there is an option</p> <p>5 for signed ActiveX controls, which this</p> <p>6 is. And if the person clicked "Enable"</p> <p>7 for that, then when she subsequently</p> <p>8 clicked "Download now" for the Atomic</p> <p>9 Clock, she would not receive the ActiveX</p> <p>10 box; is that correct?</p> <p>11 A. That's not my understanding. So</p> <p>12 I don't know.</p> <p>13 Q. You don't know?</p> <p>14 A. No, I don't know.</p> <p>15 Q. But for default low, no.</p> <p>16 And if the default was low,</p> <p>17 there was no box and the programs would</p> <p>18 install automatically; is that accurate?</p> <p>19 A. I believe the content would run</p> <p>20 and therefore this would install.</p> <p>21 Q. The Atomic Clock and the bundled</p> <p>22 adware client, correct?</p> <p>23 A. Yes, anything that was in this</p> <p>24 bundle.</p> <p>25 Q. Right. Was there discussion</p>	<p style="text-align: right;">28</p> <p>1 <b>DOWHAN</b></p> <p>2 A. Sorry.</p> <p>3 MR. KLAUSNER: Do you want to</p> <p>4 reask the question to focus the witness.</p> <p>5 Q. Were there ever discussions</p> <p>6 about whether the disclosures on this Web</p> <p>7 site were sufficient in order to inform</p> <p>8 consumers about the bundled adware client?</p> <p>9 A. I don't recall any discussions.</p> <p>10 Q. Do you recall communications</p> <p>11 about that subject?</p> <p>12 A. No, I don't recall.</p> <p>13 Q. You don't recall it ever coming</p> <p>14 up?</p> <p>15 A. No.</p> <p>16 Q. Why did you change this site?</p> <p>17 A. When I was involved with the</p> <p>18 changes, one aspect was to expand the</p> <p>19 number of consumer-value apps.</p> <p>20 Q. It had nothing to do with</p> <p>21 disclosure of the bundled adware client?</p> <p>22 A. In 2005 there were changes that</p> <p>23 included changing the manner of</p> <p>24 disclosure.</p> <p>25 Q. Okay. Can you describe those</p>
<p style="text-align: right;">27</p> <p>1 <b>DOWHAN</b></p> <p>2 that you recall about whether the</p> <p>3 disclosure on this site was sufficient?</p> <p>4 A. I don't remember any discussion.</p> <p>5 Q. Okay. Was there e-mails,</p> <p>6 communications, anything else talking</p> <p>7 about whether the disclosures in the site</p> <p>8 were sufficient?</p> <p>9 MR. CELLI: Can I ask a</p> <p>10 question?</p> <p>11 MR. BROOKMAN: Sure.</p> <p>12 MR. CELLI: Are you talking</p> <p>13 about -- there is a question in the</p> <p>14 context of AG 2. Are you talking about as</p> <p>15 it appears here or more generally?</p> <p>16 MR. BROOKMAN: I'm talking about</p> <p>17 as it appears here.</p> <p>18 MR. CELLI: There may be two</p> <p>19 different aspects. I don't know.</p> <p>20 MR. BROOKMAN: Either answer</p> <p>21 would be fine.</p> <p>22 MR. DREIFACH: Why don't we take</p> <p>23 one at a time.</p> <p>24 MR. CELLI: Right.</p> <p>25 MR. BROOKMAN: Okay.</p>	<p style="text-align: right;">29</p> <p>1 <b>DOWHAN</b></p> <p>2 discussions or communications to me.</p> <p>3 A. I could summarize the scope of</p> <p>4 the changes as the adoption of some new</p> <p>5 technology, specifically it was a Wise</p> <p>6 installer that changed the way in which</p> <p>7 disclosure was presented to the end-user.</p> <p>8 Q. If you can flip the page to page</p> <p>9 3 and 4 of the exhibit, wasn't this also a</p> <p>10 Wise installer?</p> <p>11 A. The bottom screen for the Atomic</p> <p>12 Clock indicates "Initializing Wise</p> <p>13 Installation Wizard."</p> <p>14 Q. So this is installed through a</p> <p>15 Wise installer?</p> <p>16 A. The consumer-value application.</p> <p>17 Q. Was installed through a Wise</p> <p>18 installer?</p> <p>19 A. Yes.</p> <p>20 Q. Look at the next two pages. Can</p> <p>21 you describe what those pages are?</p> <p>22 MR. CELLI: Pages 4 and 5 of the</p> <p>23 exhibit?</p> <p>24 MR. BROOKMAN: Yes. Pages 4 and</p> <p>25 5 of the exhibit.</p>

8 (Pages 26 to 29)

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<p style="text-align: right;">30</p> <p>1 DOWHAN</p> <p>2 A. I'm reading real quick, just to</p> <p>3 make sure I understand.</p> <p>4 Q. Take your time.</p> <p>5 (Witness reviews document.)</p> <p>6 A. These are two screens in the</p> <p>7 installation process, the second being</p> <p>8 accessed after clicking next on the first,</p> <p>9 it appears.</p> <p>10 Q. Okay.</p> <p>11 A. In the course of installing the</p> <p>12 Atomic Clock.</p> <p>13 Q. And the next two pages on page</p> <p>14 5? That is the same thing?</p> <p>15 A. Similar, yes.</p> <p>16 Q. Is there any discussion on any</p> <p>17 of these pages about the bundled adware</p> <p>18 client?</p> <p>19 (Witness reviews document.)</p> <p>20 A. Not that I see.</p> <p>21 Q. You can go back more to talking</p> <p>22 about the changes in 2005 again. Describe</p> <p>23 the difference between the installation</p> <p>24 process for the adware client with the</p> <p>25 Wise installer and what it was previously.</p>	<p style="text-align: right;">32</p> <p>1 DOWHAN</p> <p>2 Q. Who discussed it?</p> <p>3 A. I had discussed it. I don't</p> <p>4 remember with exactly who in all cases,</p> <p>5 but I certainly --</p> <p>6 Q. Did you discuss it with Josh</p> <p>7 Abram?</p> <p>8 A. I don't recall specific</p> <p>9 conversations.</p> <p>10 Q. You talked to him about it so</p> <p>11 that he was aware of this issue?</p> <p>12 A. I don't know if I ever talked to</p> <p>13 Josh about it.</p> <p>14 Q. How about Alan?</p> <p>15 A. I don't know.</p> <p>16 Q. Dan Kaufman?</p> <p>17 A. I don't know.</p> <p>18 Q. Rodney Hook?</p> <p>19 A. I believe I have talked to</p> <p>20 Rodney Hook about it.</p> <p>21 Q. Can you describe those</p> <p>22 discussions to me.</p> <p>23 A. I don't know if I could describe</p> <p>24 a specific discussion. But generally</p> <p>25 there was some discussion of the impact or</p>
<p style="text-align: right;">31</p> <p>1 DOWHAN</p> <p>2 A. The Wise installer introduced</p> <p>3 screens similar to what we see here in the</p> <p>4 Atomic Clock example, with different</p> <p>5 language that was evolving over time that</p> <p>6 we now call the short-form disclosure.</p> <p>7 Q. Did you ever consider adding</p> <p>8 short-form disclosure to the site or the</p> <p>9 installation process previously?</p> <p>10 MR. CELLI: Previous to what?</p> <p>11 MR. BROOKMAN: Previous to when</p> <p>12 he did it in 2005.</p> <p>13 A. To this site? I did not</p> <p>14 consider it. I did not.</p> <p>15 Q. There were no discussions about</p> <p>16 adding short-form or better disclosure to</p> <p>17 the site previous to the time when the</p> <p>18 changes were made in 2005?</p> <p>19 A. Not that I remember.</p> <p>20 Q. To back up for one moment with</p> <p>21 regard to how you don't see the ActiveX</p> <p>22 box if your security settings are on low,</p> <p>23 was that subject ever discussed at Direct</p> <p>24 Revenue?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">33</p> <p>1 DOWHAN</p> <p>2 what an ActiveX control would do under low</p> <p>3 security settings.</p> <p>4 Q. Is it fair to say that you</p> <p>5 thought he understood the ramifications of</p> <p>6 what low security settings could mean?</p> <p>7 A. That I thought he understood?</p> <p>8 Q. Did he seem to understand?</p> <p>9 A. I don't know. He had -- I don't</p> <p>10 know.</p> <p>11 Q. But you talked to him about this</p> <p>12 issue?</p> <p>13 A. I have talked to Rod about the</p> <p>14 issue.</p> <p>15 Q. On multiple occasions?</p> <p>16 A. I don't know how many occasion.</p> <p>17 Q. Did someone suggest that it</p> <p>18 might be a bad idea?</p> <p>19 A. What would be a bad idea?</p> <p>20 Q. That the programs could install</p> <p>21 automatically without consumer</p> <p>22 interaction.</p> <p>23 A. It's unclear to me why the</p> <p>24 security settings would be low. It's</p> <p>25 certainly possible that consumers would</p>

34

1           **DOWHAN**

2 lower security settings for -- could

3 actually lower security settings for a

4 reason. So I don't think there was a

5 value judgment placed on low meaning good

6 or bad.

7     **Q.** Okay. But did it ever seem --

8 did you ever discuss that it might be a

9 bad idea that Direct Revenue's ad client

10 would be installed in this manner when no

11 one would have the chance to learn about

12 it?

13     **A.** Again, I think -- did we ever

14 discuss it? No.

15     **Q.** Did it ever occur to you?

16     **A.** To discuss it?

17     **Q.** Did it ever occur to you that it

18 might be bad?

19     **A.** Again, I'm not sure that it

20 would be bad if the consumer chose to

21 change their security settings to low. So

22 I guess the answer is no.

23     **Q.** Okay. Did Direct Revenue ever

24 test to see how many users opened the EULA

25 before clicking yes or no?

35

1           **DOWHAN**

2     **A.** I don't know. I don't know.

3     **Q.** You don't know. Did you ever

4 hear that discussed, that idea discussed?

5     **A.** Not that I remember, no.

6     **Q.** Do you think that the

7 disclosures on this site in an ActiveX box

8 are adequate?

9     **MR. KLAUSNER:** You are looking

10 at the exhibit again?

11     **MR. BROOKMAN:** The disclosures

12 represented in AG 2.

13     **A.** Do I think the disclosures are

14 adequate? Adequate for what?

15     **Q.** To inform the consumer about the

16 bundled adware client.

17     **A.** Yes.

18     **Q.** Do you think that the average

19 consumer reads end-user license

20 agreements?

21     **A.** I don't know.

22     **Q.** Do you read end-user license

23 agreements?

24     **A.** When it's important to me.

25     **Q.** How about always?

36

1           **DOWHAN**

2     **A.** It depends.

3     **Q.** Are there times when you don't

4 read end-user license agreements?

5     **A.** I can't think of a case when I

6 don't.

7     **Q.** Do you have a standing rule that

8 you always read every word of an end-user

9 license agreement?

10     **A.** I don't have any rules around

11 that conduct actually.

12     **MR. DREIFACH:** Do you mind if I

13 follow up?

14     **MR. BROOKMAN:** Please.

15 EXAMINATION BY

16 **MR. DREIFACH:**

17     **Q.** Have you ever reached any

18 conclusion or opinion as to whether most

19 users who downloaded Direct Revenue's

20 software had actually read the EULA?

21     **A.** Did I ever conclude?

22     **Q.** Did you ever come to any

23 conclusion as to whether most users who

24 had downloaded Direct Revenue's software

25 had in fact read the EULA?

37

1           **DOWHAN**

2     **A.** No.

3     **Q.** Were you ever part of any

4 discussions as to the extent to which

5 consumers read the EULA?

6     **A.** Not that I remember.

7     **Q.** Do you recall ever reading any

8 articles, for instance a USA Today

9 article, that suggested that in fact most

10 consumers do not read EULAs?

11     **MR. KLAUSNER:** EULAs in general?

12     **MR. BROOKMAN:** EULAs in general.

13     **A.** I don't recall the article.

14     **Q.** Let's go back for just a second

15 to AG Exhibit 2. Screen one on the first

16 page advertises Flashtalk, correct?

17     **A.** Yes.

18     **Q.** When consumers going through the

19 process outlined in AG Exhibit 2 download

20 Flashtalk, it comes bundled with

21 additional software, correct?

22     **A.** Yes.

23     **Q.** What is that software?

24     **A.** The Direct Revenue ad client.

25     **Q.** In order for the consumer to

<p>38</p> <p>1 <b>DOWHAN</b></p> <p>2 know that Flashtalk came bundled with the</p> <p>3 ad client, the consumer would have had to</p> <p>4 click on the EULA, correct?</p> <p>5 MR. KLAUSNER: Obviously you</p> <p>6 can't read the consumer's mind.</p> <p>7 MR. DREIFACH: I'm going to ask</p> <p>8 counsel not to draw inferences. I think</p> <p>9 it was a very clear question. I can</p> <p>10 rephrase it if you would like. I think</p> <p>11 that the record is clear.</p> <p>12 <b>Q. Is there anything within Exhibit</b></p> <p>13 <b>2, apart from what is in the EULA, that</b></p> <p>14 <b>indicates that a consumer who was</b></p> <p>15 <b>downloading Flashtalk is also getting the</b></p> <p>16 <b>Direct Revenue ad client?</b></p> <p>17 <b>A. I don't know if this is the</b></p> <p>18 <b>comprehensive representation of the site</b></p> <p>19 <b>and whether or not there were other</b></p> <p>20 <b>references on the site. But the EULA</b></p> <p>21 <b>would be one place that would have that</b></p> <p>22 <b>information.</b></p> <p>23 <b>Q. So are you suggesting that it's</b></p> <p>24 <b>your recollection that the Better Internet</b></p> <p>25 <b>site disclosed the ad client in places</b></p>	<p>40</p> <p>1 <b>DOWHAN</b></p> <p>2 the content of A Better Internet as it has</p> <p>3 appeared over the past two years?</p> <p>4 <b>A. Generally, yes.</b></p> <p>5 <b>Q. And why don't you take a moment</b></p> <p>6 <b>to go over this exhibit again, and then</b></p> <p>7 <b>tell us if this is a fair and accurate</b></p> <p>8 <b>representation of how A Better Internet</b></p> <p>9 <b>existed during is it 2004?</b></p> <p>10 MR. BROOKMAN: Probably early</p> <p>11 2005.</p> <p>12 <b>Q. And if this is missing anything</b></p> <p>13 <b>based on your recollection, tell us.</b></p> <p>14 <b>Because based on what we are representing,</b></p> <p>15 <b>this is full and accurate, based on the</b></p> <p>16 <b>time that we downloaded it. So please go</b></p> <p>17 <b>over it and tell us if there is any step</b></p> <p>18 <b>here that's missing in the process that</b></p> <p>19 <b>Exhibit 2 takes us through.</b></p> <p>20 MR. CELLI: Can I actually have</p> <p>21 a word with you guys outside the presence</p> <p>22 of the witness? Would that be okay?</p> <p>23 MR. DREIFACH: Yes.</p> <p>24 MR. CELLI: I don't want to say</p> <p>25 anything in front of the witness and I</p>
<p>39</p> <p>1 <b>DOWHAN</b></p> <p>2 other than the EULA?</p> <p>3 <b>A. Yes.</b></p> <p>4 <b>Q. Where was that disclosure?</b></p> <p>5 <b>A. On HTML pages.</b></p> <p>6 MR. DREIFACH: I don't</p> <p>7 understand.</p> <p>8 BY MR. BROOKMAN:</p> <p>9 <b>Q. You believe there are other web</b></p> <p>10 <b>pages on here that disclosed the bundled</b></p> <p>11 <b>ad client?</b></p> <p>12 <b>A. I don't know if this is the</b></p> <p>13 <b>comprehensive site. But I know that in</b></p> <p>14 <b>addition to EULAs, there would also be</b></p> <p>15 <b>disclosure on HTML pages.</b></p> <p>16 <b>Q. Besides the HTML page for the</b></p> <p>17 <b>EULA?</b></p> <p>18 <b>A. Yes.</b></p> <p>19 <b>Q. That was always the case?</b></p> <p>20 <b>A. No.</b></p> <p>21 <b>Q. No. It may have been the case</b></p> <p>22 <b>here; it may not have been the case here?</b></p> <p>23 <b>A. Correct.</b></p> <p>24 BY MR. DREIFACH:</p> <p>25 <b>Q. Are you generally familiar with</b></p>	<p>41</p> <p>1 <b>DOWHAN</b></p> <p>2 don't want to say anything on the record.</p> <p>3 On this question I have something I would</p> <p>4 like to discuss with you.</p> <p>5 MR. DREIFACH: Okay.</p> <p>6 MR. CELLI: Just for a second</p> <p>7 while he looks at this.</p> <p>8 (Discussion off the record.)</p> <p>9 BY MR. BROOKMAN:</p> <p>10 <b>Q. You can scratch the last</b></p> <p>11 <b>question. We will move on to different</b></p> <p>12 <b>material.</b></p> <p>13 <b>A. Okay.</b></p> <p>14 <b>Q. Do you believe that it's</b></p> <p>15 <b>deceptive to omit mention of the ad client</b></p> <p>16 <b>anywhere except for in a EULA or perhaps</b></p> <p>17 <b>other HTML pages that are not shown to the</b></p> <p>18 <b>user?</b></p> <p>19 <b>A. Do I believe that it's</b></p> <p>20 <b>deceptive?</b></p> <p>21 <b>Q. Yes.</b></p> <p>22 <b>A. No.</b></p> <p>23 <b>Q. With the disclosure you see</b></p> <p>24 <b>represented here before you, do you</b></p> <p>25 <b>believe that a consumer going through this</b></p>

<p style="text-align: right;">42</p> <p>1           DOWHAN</p> <p>2 process gives her affirmative consent to</p> <p>3 Direct Revenue to install its ad client?</p> <p>4     A. I don't know.</p> <p>5     Q. Are you familiar with the term</p> <p>6 "affirmative consent"?</p> <p>7     A. I've heard it.</p> <p>8     Q. Have you ever discussed the term</p> <p>9 "affirmative consent," not with your</p> <p>10 lawyers but with anybody else?</p> <p>11     A. No, not that I recall.</p> <p>12     Q. Do you think when the user goes</p> <p>13 through this download process that she is</p> <p>14 consenting to the installation of the</p> <p>15 Direct Revenue ad client?</p> <p>16     A. I believe so.</p> <p>17     Q. Why do you think that?</p> <p>18     A. Because there is information</p> <p>19 about the ad client in the -- I just think</p> <p>20 so. I mean I believe that --</p> <p>21     Q. You can continue with your</p> <p>22 reason.</p> <p>23     A. I think that the consumer has</p> <p>24 access to enough information within the</p> <p>25 context of one of these downloads.</p>	<p style="text-align: right;">44</p> <p>1           DOWHAN</p> <p>2 Our investigator did not see in this</p> <p>3 process any other disclosure. So is the</p> <p>4 point of this ActiveX screen to obtain the</p> <p>5 user's affirmative consent?</p> <p>6     A. I understand and believe that</p> <p>7 this was the path and the only information</p> <p>8 accessible. But I couldn't say for sure</p> <p>9 if that's the intention in this case is to</p> <p>10 get the end-user's affirmative consent.</p> <p>11     Q. Weren't you involved in</p> <p>12 designing this site?</p> <p>13     A. I was involved in updating the</p> <p>14 site.</p> <p>15     Q. Who else was involved?</p> <p>16     A. I don't remember specifically</p> <p>17 who.</p> <p>18     Q. You have no idea who else was</p> <p>19 involved in redesigning this site or</p> <p>20 designing this site?</p> <p>21     A. Actually I remember who was</p> <p>22 involved with the graphics, who was</p> <p>23 involved with putting together like the</p> <p>24 HTML, things along those lines.</p> <p>25     Q. But she wasn't the person</p>
<p style="text-align: right;">43</p> <p>1           DOWHAN</p> <p>2     Q. You think access to information</p> <p>3 about the ad client is sufficient to</p> <p>4 constitute notice?</p> <p>5     A. I guess it depends on what the</p> <p>6 access is.</p> <p>7     Q. But this access you think is</p> <p>8 sufficient?</p> <p>9         MR. CELLI: AG 2?</p> <p>10        MR. BROOKMAN: Yes.</p> <p>11     Q. Access through a linked EULA in</p> <p>12 an ActiveX modal.</p> <p>13     A. Personally me, I think so.</p> <p>14     Q. Was the purpose of including</p> <p>15 this link in the ActiveX modal to obtain</p> <p>16 the user's consent to install the ad</p> <p>17 client?</p> <p>18     A. Since I don't know if there was</p> <p>19 other information available to the user in</p> <p>20 this case, I don't know if this is</p> <p>21 comprehensive, I'm not sure if that was</p> <p>22 the sole intention in this case or the</p> <p>23 intention is solely based around that.</p> <p>24     Q. I'm representing to you that our</p> <p>25 investigator went through these steps.</p>	<p style="text-align: right;">45</p> <p>1           DOWHAN</p> <p>2 actually deciding what disclosures were,</p> <p>3 was she?</p> <p>4     A. I don't know.</p> <p>5     Q. Were you the person who decided</p> <p>6 what disclosures would be made?</p> <p>7     A. No.</p> <p>8     Q. Who was?</p> <p>9     A. I don't know.</p> <p>10     Q. Is it your position that Direct</p> <p>11 Revenue is entitled to put whatever terms</p> <p>12 it wants in a license agreement?</p> <p>13         MR. KLAUSNER: You are asking</p> <p>14 for?</p> <p>15         MR. BROOKMAN: Just his belief,</p> <p>16 whether it's fair or not.</p> <p>17     Q. Is it fair game for Direct</p> <p>18 Revenue to put whatever terms it likes in</p> <p>19 the license agreement?</p> <p>20     A. I don't know.</p> <p>21     Q. Does it seem fair to you?</p> <p>22         MR. KLAUSNER: Does what seem</p> <p>23 fair?</p> <p>24         THE WITNESS: Yeah.</p> <p>25     Q. Putting any theoretical term in</p>

<p>46</p> <p>1 DOWHAN</p> <p>2 a license agreement. Do you think Direct</p> <p>3 Revenue has that right?</p> <p>4 A. Let's see. I think that you</p> <p>5 could present terms to a user. And if the</p> <p>6 user is open to those terms, you could</p> <p>7 make any offering you want.</p> <p>8 Q. So is it your position that you</p> <p>9 can put any term you want in a license</p> <p>10 agreement as long as a consumer has the</p> <p>11 opportunity to review it?</p> <p>12 A. I haven't really thought about</p> <p>13 what "any term" means. So I'm hesitant to</p> <p>14 say yes or no without giving it thought.</p> <p>15 Q. Is it a close call? You are not</p> <p>16 sure? Can you think of any terms that</p> <p>17 would not be fair to put in a license</p> <p>18 agreement?</p> <p>19 A. No.</p> <p>20 Q. You can't think of any terms</p> <p>21 that would be unfair to put in a linked</p> <p>22 license agreement?</p> <p>23 A. No. But that doesn't mean that</p> <p>24 there aren't some. It's just that I can't</p> <p>25 think of them. And if something was</p>	<p>48</p> <p>1 DOWHAN</p> <p>2 A. I specifically did not</p> <p>3 distribute code to the users.</p> <p>4 Q. But the company did?</p> <p>5 A. I don't know the company</p> <p>6 distributed code for Top Moxie.</p> <p>7 Q. You are telling me here today</p> <p>8 that you are not aware of Direct Revenue</p> <p>9 distributing Top Moxie software programs?</p> <p>10 Is that your testimony?</p> <p>11 A. No. I'm saying that since I did</p> <p>12 not do the actual distribution of it --</p> <p>13 Q. You never saw reports about Top</p> <p>14 Moxie software being distributed?</p> <p>15 A. I saw reports about Top Moxie.</p> <p>16 Q. What did those reports say?</p> <p>17 A. The reports would talk about the</p> <p>18 either downloads or check-ins or things</p> <p>19 along those lines.</p> <p>20 Q. Do you know what Top Moxie</p> <p>21 software did?</p> <p>22 MR. KLAUSNER: I'm not following</p> <p>23 this line of questioning with respect to</p> <p>24 whether it fits within today's parameters.</p> <p>25 MR. BROOKMAN: I just want to</p>
<p>47</p> <p>1 DOWHAN</p> <p>2 presented to the user, the user accepted</p> <p>3 them, it's hard for me to say what is okay</p> <p>4 and what is not okay in that circumstance.</p> <p>5 Q. Okay. Are you familiar with the</p> <p>6 company Top Moxie?</p> <p>7 A. Yes.</p> <p>8 Q. Who are they?</p> <p>9 A. I don't know how to describe who</p> <p>10 they are. I know that Direct Revenue had</p> <p>11 some relationship with them.</p> <p>12 Q. Would it be fair to call Top</p> <p>13 Moxie an adware company?</p> <p>14 A. I don't know if they would be</p> <p>15 called adware.</p> <p>16 Q. What would you call them?</p> <p>17 A. I don't know what I would call</p> <p>18 them. I probably wouldn't call them</p> <p>19 anything.</p> <p>20 Q. Did Direct Revenue distribute</p> <p>21 Top Moxie software?</p> <p>22 A. I don't know if it was -- if we</p> <p>23 distributed Top Moxie software.</p> <p>24 Q. Was there any code from Top</p> <p>25 Moxie that you distributed to your users?</p>	<p>49</p> <p>1 DOWHAN</p> <p>2 talk about the disclosure of Top Moxie</p> <p>3 just for background. I'm just curious if</p> <p>4 he could just tell me briefly what Top</p> <p>5 Moxie software did.</p> <p>6 MR. KLAUSNER: Okay.</p> <p>7 A. I don't really know how the</p> <p>8 software works.</p> <p>9 Q. I don't need to know the exact</p> <p>10 technical parameters. I just want a basic</p> <p>11 description of what it did.</p> <p>12 A. I guess the short answer is no,</p> <p>13 I don't know.</p> <p>14 Q. Did it show popup ads?</p> <p>15 A. I'm going to back up a little</p> <p>16 and say I don't know -- I know of a</p> <p>17 company called Top Moxie. I don't know</p> <p>18 what Top Moxie software is, whether they</p> <p>19 create software or own software. So it's</p> <p>20 hard for me to comment on exactly what</p> <p>21 that software does.</p> <p>22 Q. Are you aware of a software that</p> <p>23 is generally referred to as Top Moxie</p> <p>24 software?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">50</p> <p>1           <b>DOWHAN</b></p> <p>2       <b>Q.</b> For example, your e-mails often</p> <p>3 refer to Top Moxie software; isn't that</p> <p>4 right?</p> <p>5       <b>A.</b> I don't know.</p> <p>6       <b>Q.</b> But you have referred to Top</p> <p>7 Moxie software before.</p> <p>8       <b>A.</b> I understand the concept of Top</p> <p>9 Moxie's software.</p> <p>10      <b>Q.</b> You don't know what it is?</p> <p>11      <b>A.</b> But to be complete, I don't know</p> <p>12 what Top Moxie owns or what --</p> <p>13           MR. DREIFACH: Okay. But you</p> <p>14 understand the concept of Top Moxie</p> <p>15 software.</p> <p>16      <b>Q.</b> I don't care if you know who</p> <p>17 owns it. I don't know who owns it, and I</p> <p>18 don't particularly care. Let's for</p> <p>19 shorthand refer to it as Top Moxie's</p> <p>20 software. Do you think you understand</p> <p>21 what that means?</p> <p>22      <b>A.</b> I think.</p> <p>23      <b>Q.</b> Can you describe to me what you</p> <p>24 think the Top Moxie software is, can you</p> <p>25 describe to me what it does?</p>	<p style="text-align: right;">52</p> <p>1           <b>DOWHAN</b></p> <p>2       <b>Q.</b> When Direct Revenue distributed</p> <p>3 404 ad client, what notice was given to</p> <p>4 the consumer?</p> <p>5       <b>A.</b> I don't know.</p> <p>6       <b>Q.</b> You are not aware of any</p> <p>7 additional notice that went to the</p> <p>8 consumer?</p> <p>9           MR. KLAUSNER: Additional from</p> <p>10 what?</p> <p>11           MR. BROOKMAN: Strike the</p> <p>12 question.</p> <p>13      <b>Q.</b> You have no idea what notice was</p> <p>14 given to consumers about 404 ad clients?</p> <p>15      <b>A.</b> No.</p> <p>16      <b>Q.</b> For example, in Exhibit AG 2,</p> <p>17 would users who went through this download</p> <p>18 process also receive a 404 ad client or</p> <p>19 redirect client from Direct Revenue?</p> <p>20      <b>A.</b> I don't know.</p> <p>21      <b>Q.</b> Did Direct Revenue ever</p> <p>22 distribute 404 ad clients to users who</p> <p>23 downloaded software from Better</p> <p>24 Internet.com?</p> <p>25      <b>A.</b> Again, I don't know.</p>
<p style="text-align: right;">51</p> <p>1           <b>DOWHAN</b></p> <p>2      <b>A.</b> No.</p> <p>3      <b>Q.</b> You don't know?</p> <p>4      <b>A.</b> I don't know.</p> <p>5      <b>Q.</b> You have no idea what Top Moxie</p> <p>6 software does?</p> <p>7      <b>A.</b> I do not.</p> <p>8      <b>Q.</b> Are you familiar with the term</p> <p>9 "404 redirect"?</p> <p>10      <b>A.</b> Yes.</p> <p>11      <b>Q.</b> Do you know what a 404 redirect</p> <p>12 application is?</p> <p>13      <b>A.</b> Yes.</p> <p>14      <b>Q.</b> For background, let's establish</p> <p>15 what it is. Did Direct Revenue distribute</p> <p>16 404 redirect applications?</p> <p>17      <b>A.</b> I'm going to say yes.</p> <p>18      <b>Q.</b> You are not sure?</p> <p>19      <b>A.</b> Well, to be complete, I didn't</p> <p>20 do the distribution.</p> <p>21      <b>Q.</b> I know you didn't physically</p> <p>22 install the code on every single computer.</p> <p>23 But you are aware that Direct Revenue</p> <p>24 distributed 404 ad clients?</p> <p>25      <b>A.</b> Yes.</p>	<p style="text-align: right;">53</p> <p>1           <b>DOWHAN</b></p> <p>2 <b>BY MR. DREIFACH:</b></p> <p>3      <b>Q.</b> Who would know this? Who would</p> <p>4 know the answer to those last two</p> <p>5 questions?</p> <p>6      <b>A.</b> I'm not sure.</p> <p>7      <b>Q.</b> Would Josh Abram?</p> <p>8      <b>A.</b> I don't know.</p> <p>9      <b>Q.</b> It's possible that no one at the</p> <p>10 company would know whether 404 redirect</p> <p>11 was distributed from these Web sites?</p> <p>12           MR. KLAUSNER: He can only</p> <p>13 testify about his own knowledge. I don't</p> <p>14 understand that last question.</p> <p>15           MR. DREIFACH: Help us out if we</p> <p>16 want an answer to this question, since you</p> <p>17 were involved with distribution.</p> <p>18      <b>A.</b> I'm not saying that nobody</p> <p>19 knows. But if you are asking about</p> <p>20 specific times and specific download</p> <p>21 processes within Better Internet, I don't</p> <p>22 know who would know. I know that I don't</p> <p>23 know.</p> <p>24 <b>BY MR. BROOKMAN:</b></p> <p>25      <b>Q.</b> Let's get past this stuff.</p>

1 **DOWHAN**

2 Let's talk about Direct Revenue's  
3 distribution of its consumer-value  
4 applications through ad networks. You are  
5 familiar with this topic?

6 A. Yes.

7 Q. It's true that Direct Revenue  
8 distributed its programs such as Atomic  
9 Clock and Flashtalk through advertising  
10 buys through ad networks?

11 A. Yes.

12 Q. And these programs would in turn  
13 come bundled with an ad client?

14 A. Yes.

15 MR. BROOKMAN: Let's mark this  
16 as AG 3.

17 (AG Exhibit 3 marked for  
18 identification.)

19 Q. Is this a representative picture  
20 of an ActiveX advertisement for the  
21 Flashtalk program?

22 A. I'm just reading through it.

23 Q. Take your time.

24 (Witness reviews document.)

25 A. I can't see everything that's

1 **DOWHAN**

2 Q. What words changed?

3 A. The words that are in blue, the  
4 hyperlinked text in the box.

5 Q. Okay. What did they change to  
6 or from?

7 A. I don't think I'm going to know  
8 specifics off the top of my head.

9 Q. You don't have to know  
10 specifically. You can talk generally.

11 A. The phrasing would have changed  
12 based on different applications being  
13 promoted.

14 Q. That's fair.

15 A. And possibly other wordsmithing.

16 Q. Was the ad client ever disclosed  
17 or described specifically in the ActiveX  
18 modal box?

19 A. I don't know.

20 Q. Do you ever remember an ActiveX  
21 modal box that specifically referenced,  
22 disclosed or described the ad client?

23 A. I don't remember one, if it did.

24 BY MR. DREIFACH:

25 Q. Was it unusual for an ActiveX

1 **DOWHAN**

2 behind the popup window. I'm not sure if  
3 it's representative.

4 Q. Is this the sort of ActiveX  
5 advertisement that Direct Revenue ran?

6 A. Again, I can't actually see the  
7 advertisement. So I'm not sure.

8 Q. How about the ActiveX modal  
9 window? Does that look familiar to you?

10 A. Yes.

11 Q. Is that consistent with the way  
12 Direct Revenue's ActiveX modal boxes  
13 looked?

14 MR. KLAUSNER: At a particular  
15 point in time?

16 MR. BROOKMAN: This was signed  
17 on May 2, 2005.

18 MR. KLAUSNER: Okay.

19 A. It looks like an ActiveX window  
20 that we would have, could have created.

21 Q. Did the ActiveX disclosure  
22 change over time?

23 A. Yes.

24 Q. How did it change?

25 A. The wording.

1 **DOWHAN**

2 box to not specifically reference or  
3 describe the ad client? Was that unusual,  
4 in the context of Direct Revenue's  
5 distribution of its ad client?

6 MR. KLAUSNER: Do you  
7 understand?

8 MR. DREIFACH: It's a fair  
9 question.

10 A. I believe I do understand the  
11 question. I think the most accurate  
12 response is I don't know if there was a  
13 usual versus unusual or a normal or  
14 anything along those lines. So it would  
15 be hard for me to comment on whether or  
16 not it would be unusual for that.

17 Q. Are you aware of occurrences in  
18 which an ActiveX box that distributed the  
19 ad client did not specifically reference  
20 the ad client?

21 A. Am I aware of an instance of  
22 that?

23 Q. Yes.

24 A. Similar to this here, there were  
25 instances where the ad client may not have



<p style="text-align: right;">58</p> <p>1                   DOWHAN</p> <p>2   been referenced.</p> <p>3    Q.   Tell us about those instances,</p> <p>4   please. Identify those instances.</p> <p>5    A.   I couldn't say specific --</p> <p>6    Q.   Did it happen more than once?</p> <p>7    A.   Did it? Did what happen more</p> <p>8   than once?</p> <p>9       MR. DREIFACH: Would you read</p> <p>10   back the prior questions.</p> <p>11       (The record was read.)</p> <p>12   A.   I don't know of the specific</p> <p>13   occasions what applications were being</p> <p>14   promoted or things along those lines when</p> <p>15   it would or would not have been referenced</p> <p>16   in an ActiveX disclosure.</p> <p>17   Q.   Do you know whether or not it</p> <p>18   happened on other occasions beyond the</p> <p>19   specific ActiveX box that is referenced in</p> <p>20   Exhibit 3?</p> <p>21   A.   I don't remember the specifics</p> <p>22   of the disclosure in the ActiveX boxes.</p> <p>23   Q.   Do you have any information at</p> <p>24   all that would suggest that Exhibit 3,</p> <p>25   specifically referencing the modal box,</p>	<p style="text-align: right;">60</p> <p>1                   DOWHAN</p> <p>2    Q.   Okay. What sort of media buys</p> <p>3   did you do?</p> <p>4    A.   Sure. Buy banner ads or</p> <p>5   possibly popup ads or possibly search</p> <p>6   engine keyword terms.</p> <p>7    Q.   And so is it your belief that</p> <p>8   this ActiveX box was generated by a banner</p> <p>9   or a popup ad?</p> <p>10   A.   I don't know.</p> <p>11   Q.   How could it have been</p> <p>12   distributed?</p> <p>13   A.   How could the ActiveX have been</p> <p>14   distributed?</p> <p>15   Q.   Yes.</p> <p>16   A.   By a link through a banner ad or</p> <p>17   in conjunction with a popup ad or through</p> <p>18   a search engine keyword result.</p> <p>19   Q.   I'll submit to you that when we</p> <p>20   went to this Web site, we did not interact</p> <p>21   at all and this is what came up on our</p> <p>22   screen. So what could have done that to</p> <p>23   us?</p> <p>24   A.   An active -- well, I guess a lot</p> <p>25   of things could have done that. But I</p>
<p style="text-align: right;">59</p> <p>1                   DOWHAN</p> <p>2   was not a customary means by which Direct</p> <p>3   Revenue's ad client was distributed?</p> <p>4    A.   Was it customary at a certain</p> <p>5   period of time?</p> <p>6       MR. DREIFACH: Would you read</p> <p>7   back the question.</p> <p>8       (The question was read.)</p> <p>9    A.   I don't have information to say</p> <p>10   that it was not customary.</p> <p>11       MR. DREIFACH: Okay.</p> <p>12   BY MR. BROOKMAN:</p> <p>13   Q.   I have a couple of more</p> <p>14   questions on this subject. Then maybe we</p> <p>15   can take a break.</p> <p>16       MR. KLAUSNER: Sure.</p> <p>17   Q.   Apart from ActiveX</p> <p>18   advertisements like the one featured here,</p> <p>19   what other sorts of media buys did you do</p> <p>20   to distribute your consumer value</p> <p>21   applications?</p> <p>22   A.   Sorry. One more time.</p> <p>23       (The question was read.)</p> <p>24   A.   I don't equate an ActiveX box</p> <p>25   with a media buy.</p>	<p style="text-align: right;">61</p> <p>1                   DOWHAN</p> <p>2   will offer that these ActiveX modals are</p> <p>3   the result of code within a page.</p> <p>4    Q.   The code came from a banner ad</p> <p>5   or perhaps a popup ad behind it?</p> <p>6    A.   Possibly. I don't know.</p> <p>7    Q.   And if the user's security</p> <p>8   settings were on low, the user would not</p> <p>9   see this popup ad? I'm sorry. Let me</p> <p>10   rephrase.</p> <p>11       If the user's security settings</p> <p>12   were on low, the user would not see the</p> <p>13   ActiveX modal?</p> <p>14   A.   Assuming that nothing else had</p> <p>15   been changed about their individual</p> <p>16   ActiveX settings or anything along those</p> <p>17   lines.</p> <p>18   Q.   Assuming that the user's</p> <p>19   settings were on default low.</p> <p>20   A.   I believe that that's true.</p> <p>21   Q.   The user would not see this</p> <p>22   ActiveX screen?</p> <p>23   A.   If they were -- I guess it would</p> <p>24   depend on browsers and things along those</p> <p>25   lines.</p>

16 (Pages 58 to 61)

1 DOWHAN

2 Q. If the user used let's say  
3 Internet Explorer and the settings were on  
4 default low, the user would not see this  
5 screen?

6 A. And, again, it is possible  
7 operating systems and things along those  
8 lines -- it's hard for me to say  
9 definitively about something like that.

10 The code doesn't work in all --  
11 Q. If this code works as it's  
12 supposed to work, the user would not see  
13 the ActiveX security warning, and the  
14 programs would be installed automatically;  
15 isn't that correct?

16 A. If the security settings were  
17 set to automatically allow ActiveX  
18 controls, that's correct, you would not  
19 see that.

20 MR. BROOKMAN: Thank you.

21 MR. DREIFACH: I think I could  
22 probably save an hour by clearing  
23 something up. Could we go back to Exhibit  
24 2. Now, this is off the record.

25 (Discussion off the record.)

1 DOWHAN

2 have particular surprise around the issue.  
3 Q. Was it unusual for Direct  
4 Revenue's software to be distributed in a  
5 manner in which disclosure of the ad  
6 client occurred in the EULA and nowhere  
7 else?

8 A. I don't know if it was unusual.

9 Q. But it happened?

10 A. I believe that disclosure  
11 through the EULA in an ActiveX box  
12 happened.

13 Q. And do you know how many times  
14 it happened ballpark?

15 A. Not really.

16 Q. Let me rephrase. Do you know  
17 roughly, let's say within a factor of a  
18 million, how many ad clients were  
19 installed through download processes  
20 whereby disclosure of the ad client was  
21 through the EULA?

22 A. I couldn't even offer a guess.  
23 I could be off by much more than a  
24 million. I have no idea.

25 Q. If we were to tell you that in

1 DOWHAN

2 BY MR. DREIFACH:

3 Q. Going back to AG Exhibit 2,  
4 please take another moment to review it  
5 again and refamiliarize yourself with it.  
6 I believe you testified that in the  
7 sequence represented in Exhibit 2,  
8 disclosure of the ad client would have  
9 occurred through the linked EULA, correct?

10 A. That is one area where a  
11 consumer could get or a downloader could  
12 get access to that information.

13 Q. Okay. Does it surprise you to  
14 see an instance in which the disclosure of  
15 the ad client is done through a linked  
16 EULA but does not appear on the home page  
17 or in the descriptions of the bundled  
18 software?

19 You may want that repeated back  
20 to you.

21 A. No. But I may want to think  
22 about my answer.

23 I guess my response should be  
24 that I would prefer to know more about the  
25 context of how this was done. I don't

1 DOWHAN

2 the majority of cases, Direct Revenue's  
3 software was in fact distributed through  
4 download processes in which disclosure of  
5 its software was made solely in the EULA,  
6 would you have any information or  
7 recollection or documents or evidence to  
8 refute or deny that?

9 A. Not that I can think of. I  
10 don't know, I guess, is the answer.

11 Q. Is it fair to assume that you  
12 believed that it was appropriate for  
13 disclosure of the ad client to be made in  
14 the EULA?

15 A. I didn't think much about the  
16 appropriateness of where the disclosure  
17 should be made, just that disclosure  
18 should be made.

19 Q. So you thought that disclosure  
20 should be made?

21 A. That was the contractual  
22 obligation that our distributors made to  
23 us, that they would disclose our terms to  
24 the consumer prior to downloading.

25 Q. So you are saying that you

<p style="text-align: right;">66</p> <p>1 <b>DOWHAN</b></p> <p>2 didn't have a particular value judgment as</p> <p>3 to whether that disclosure was made in the</p> <p>4 EULA or in another means?</p> <p>5 A. I did not have a value judgment</p> <p>6 around that.</p> <p>7 Q. So long as disclosure was made,</p> <p>8 be it in an EULA or elsewhere on the site,</p> <p>9 that was in your mind, quote unquote,</p> <p>10 "disclosure" sufficient to constitute</p> <p>11 consent?</p> <p>12 A. I believe that disclosure was a</p> <p>13 requirement 100 percent, nothing unclear</p> <p>14 about that. But I relied on the fact that</p> <p>15 in a contract with the distributors that</p> <p>16 they had the disclosure part of the</p> <p>17 equation that I did not think about the</p> <p>18 specifics of that disclosure.</p> <p>19 Q. So there was no process, for</p> <p>20 instance, whereby distributors were told</p> <p>21 how to make this disclosure, correct?</p> <p>22 MR. CELLI: Can I interrupt for</p> <p>23 a second? We have been talking about ADI</p> <p>24 which is their Web site. Now we are</p> <p>25 talking about a different subject.</p>	<p style="text-align: right;">68</p> <p>1 <b>DOWHAN</b></p> <p>2 question with a time period in mind or</p> <p>3 not.</p> <p>4 (The question was read.)</p> <p>5 A. None that I know of.</p> <p>6 Q. So as far as you were concerned,</p> <p>7 if the disclosures used the same -- strike</p> <p>8 that. If the distributors used the same</p> <p>9 disclosure methods set forth in Exhibit 2,</p> <p>10 that was appropriate and fulfilled their</p> <p>11 obligations, correct, as far as you were</p> <p>12 concerned?</p> <p>13 MR. KLAUSNER: Period of time?</p> <p>14 Any period of time?</p> <p>15 Q. During all periods of time in</p> <p>16 which you were with the company.</p> <p>17 A. I didn't make any correlation</p> <p>18 between the two.</p> <p>19 Q. I don't quite understand. I</p> <p>20 think that's probably a yes.</p> <p>21 A. Actually I was thinking it was a</p> <p>22 no. But we should clarify. Disclosure by</p> <p>23 distributors, I did not have an assessment</p> <p>24 of this was adequate or the term that you</p> <p>25 used. I didn't have that assessment or</p>
<p style="text-align: right;">67</p> <p>1 <b>DOWHAN</b></p> <p>2 MR. DREIFACH: We are talking</p> <p>3 about things that are clearly smack dab</p> <p>4 within the four corners.</p> <p>5 MR. CELLI: Absolutely. I</p> <p>6 agree. You said earlier that when you</p> <p>7 were done with a particular area, we would</p> <p>8 have a break.</p> <p>9 MR. DREIFACH: Yes. Can I just</p> <p>10 finish this?</p> <p>11 MR. CELLI: It's up to you. You</p> <p>12 said 15 minutes ago or Justin said there</p> <p>13 would be a break.</p> <p>14 MR. DREIFACH: Okay. I'll keep</p> <p>15 it short.</p> <p>16 MR. KLAUSNER: Before you</p> <p>17 formulate your question.</p> <p>18 MR. DREIFACH: I'm trying to get</p> <p>19 out of here, because I know you guys said</p> <p>20 three o'clock. And I'm trying to kind of</p> <p>21 keep this as clean and efficient as</p> <p>22 possible. If you want to stay until 5:00,</p> <p>23 I'll give you a half-hour break.</p> <p>24 MR. KLAUSNER: I was going to</p> <p>25 say decide whether you formulate your</p>	<p style="text-align: right;">69</p> <p>1 <b>DOWHAN</b></p> <p>2 value judgment about that disclosure.</p> <p>3 Q. Do you know, and I'm finishing</p> <p>4 this, do you know whether anyone at the</p> <p>5 company was in a position to make that</p> <p>6 value assessment?</p> <p>7 A. I don't know.</p> <p>8 MR. DREIFACH: Okay. Why don't</p> <p>9 we take a break.</p> <p>10 (Recess: 1:51 to 2:00 p.m.)</p> <p>11 BY MR. BROOKMAN:</p> <p>12 Q. I want to move on to what we</p> <p>13 started to get into at the end of the</p> <p>14 prior session. We talked about your</p> <p>15 distributors and subdistributors. Why</p> <p>16 don't you tell us a bit more about what</p> <p>17 your job responsibilities are with regard</p> <p>18 to distributors and subdistributors.</p> <p>19 A. At what time period?</p> <p>20 Q. Since you have been vice</p> <p>21 president for distribution.</p> <p>22 A. I was -- my group, I guess, was</p> <p>23 responsible for driving distribution of</p> <p>24 consumer-value applications with Direct</p> <p>25 Revenue ad client or our monetization</p>

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1                   DOWHAN

2 applications.

3     Q. You deal directly with

4 distributors?

5     A. Either me or somebody that

6 worked with me or for me would deal with

7 distributors.

8     Q. Who works for you?

9     A. During the time since becoming

10 VP of distribution, I would work with Mia

11 and Wendy.

12     Q. Are they still with the company?

13     A. Wendy is.

14     Q. Mia is no longer with the

15 company?

16     A. No longer with the company.

17     Q. When did she leave?

18     A. I don't remember the exact date.

19 Last year, later in the year.

20     Q. Later in the year last year.

21 After you became vice president?

22     A. Yes.

23     Q. To be clear again, so my notes

24 are right, what time did you become vice

25 president of distribution?

71

1                   DOWHAN

2     A. Roughly November of 2004.

3     Q. 2004, okay. I think you said

4 2005 the first time around.

5     A. My mistake.

6     Q. That makes a lot more sense.

7         Just to move around, what were

8 your responsibilities towards distributors

9 before, previously when you were a

10 consultant?

11     A. I don't recall working directly

12 with distributors when I was a consultant.

13     Q. But you know that Josh dealt

14 directly with distributors?

15     A. No.

16     Q. Do you know of anyone at the

17 company who dealt directly with

18 distributors?

19     A. During the time that I was a

20 consultant?

21     Q. Yes.

22     A. No.

23     Q. How about during the time when

24 you were not a consultant but not vice

25 president for distribution?

1                   DOWHAN

2     A. During that time?

3     Q. Yes. Who dealt with the

4 distributors?

5     A. I believe Mia, who worked with

6 distributors.

7     Q. And Wendy dealt more with

8 advertising network buys?

9     A. Could be both.

10     Q. She dealt with distributors as

11 well?

12     A. Yes. Actually the same is true

13 for either.

14     Q. Who did Wendy and Mia report to

15 before you got to your current position?

16     A. Let's see. We never really had

17 an org chart. So regarding Mia, I don't

18 really know. Regarding Wendy, I hired

19 her. So she reported to me.

20     Q. She has been at the company

21 since November of 2004?

22     A. I believe it was January 2005

23 when she joined.

24     Q. Fair enough. How does Direct

25 Revenue find its distributors?

1                   DOWHAN

2     A. I guess some we find, some might

3 approach us.

4     Q. Okay. The ones you find, how do

5 you find them?

6     A. I don't know if I could come up

7 with an example other than relationships

8 from being in the industry, maybe know

9 people who do this.

10     Q. So they get recommended to you?

11     A. Not specifically to me, I guess.

12     Q. Okay. Do the founders tell you

13 to reach out to certain parties? Have

14 they in the past?

15     A. Yes.

16     Q. Can you give me some examples?

17     A. A company called Morpheus.

18     Q. Any other examples?

19     A. Kazaa, a company called Sharman

20 Networks. I believe that's the company

21 name for the people who own.

22         MR. CELLI: Kazaa.

23     Q. Any other examples you can think

24 of?

25     A. No, not that I can think of.

<p style="text-align: right;">74</p> <p>1           <b>DOWHAN</b></p> <p>2     <b>Q.</b> Who dealt with distributors</p> <p>3 before you were the vice president of</p> <p>4 distribution? Do you know?</p> <p>5     <b>A.</b> I know Mia interacted with</p> <p>6 distributors.</p> <p>7     <b>Q.</b> Do you know anyone else who did?</p> <p>8     <b>A.</b> No.</p> <p>9           MR. BROOKMAN: I'm going to mark</p> <p>10 this as Exhibit AG 4.</p> <p>11           (AG Exhibit 4 marked for</p> <p>12 identification.)</p> <p>13     <b>Q.</b> Do you recognize this document?</p> <p>14     <b>A.</b> Not the specific one. But...</p> <p>15     <b>Q.</b> But you recognize this type of</p> <p>16 document?</p> <p>17     <b>A.</b> This type of document.</p> <p>18 Insertion order with Better Internet's</p> <p>19 logo on it.</p> <p>20     <b>Q.</b> Is this a standard document for</p> <p>21 you?</p> <p>22     <b>A.</b> Sorry. I'm just reading.</p> <p>23     <b>Q.</b> Please, take your time.</p> <p>24           (Witness reviews document.)</p> <p>25     <b>A.</b> It has many elements of an</p>	<p style="text-align: right;">76</p> <p>1           <b>DOWHAN</b></p> <p>2 governs distribution obligations.</p> <p>3     <b>Q.</b> What document is that?</p> <p>4     <b>A.</b> I forget the name of that</p> <p>5 document. It is something to the effect</p> <p>6 of a distribution agreement or contract.</p> <p>7     <b>Q.</b> Can you look at the last</p> <p>8 paragraph of this --</p> <p>9     <b>A.</b> Sure.</p> <p>10     <b>Q.</b> -- document for me.</p> <p>11     <b>A.</b> The standard distribution terms.</p> <p>12     <b>Q.</b> Okay. Now, you said that it</p> <p>13 accompanies this. Is it physically</p> <p>14 attached?</p> <p>15     <b>A.</b> In this case, no.</p> <p>16     <b>Q.</b> Okay. But is it usually?</p> <p>17     <b>A.</b> I don't know if it was usually</p> <p>18 attached.</p> <p>19     <b>Q.</b> Do you attach it when you sign</p> <p>20 one of these?</p> <p>21     <b>A.</b> I did not, no.</p> <p>22     <b>Q.</b> Do you know if Josh attached it?</p> <p>23     <b>A.</b> I don't.</p> <p>24     <b>Q.</b> You can't think of a time when</p> <p>25 you attached it, though?</p>
<p style="text-align: right;">75</p> <p>1           <b>DOWHAN</b></p> <p>2 insertion order that would be used</p> <p>3 throughout the course of --</p> <p>4     <b>Q.</b> Is the insertion order the</p> <p>5 operative document between Direct Revenue</p> <p>6 and a distributor?</p> <p>7     <b>A.</b> When you say operative?</p> <p>8     <b>Q.</b> Is this what the parties sign</p> <p>9 when they decide to do a distribution</p> <p>10 deal? Is that fair to say?</p> <p>11     <b>A.</b> It was a document to be signed.</p> <p>12     <b>Q.</b> Why don't you tell me what</p> <p>13 happens when a party wants to become a</p> <p>14 distributor for Direct Revenue.</p> <p>15     <b>A.</b> Sure. And this may vary in</p> <p>16 different cases.</p> <p>17     <b>Q.</b> Absolutely.</p> <p>18     <b>A.</b> But after engaging with an</p> <p>19 individual or company around distribution</p> <p>20 terms, economic terms, how much and how</p> <p>21 payment would be made, what the consumer-</p> <p>22 value application might be, things along</p> <p>23 those lines, an insertion order would be</p> <p>24 created. And there is also another</p> <p>25 document that accompanies this that</p>	<p style="text-align: right;">77</p> <p>1           <b>DOWHAN</b></p> <p>2     <b>A.</b> I can think of a case where</p> <p>3 something was modified from the standard</p> <p>4 agreement, where it was referenced and I</p> <p>5 believe attached.</p> <p>6     <b>Q.</b> Talk to me about that instance.</p> <p>7     <b>A.</b> I don't know much more about the</p> <p>8 event other than I do remember having a</p> <p>9 deviation from a standard agreement.</p> <p>10     <b>Q.</b> Who was the partner?</p> <p>11     <b>A.</b> I don't know.</p> <p>12     <b>Q.</b> When was this about? When did</p> <p>13 this occur generally?</p> <p>14     <b>A.</b> I honestly don't remember when.</p> <p>15     <b>Q.</b> Do you remember what term was</p> <p>16 changed?</p> <p>17     <b>A.</b> I don't.</p> <p>18     <b>Q.</b> Did the terms have anything to</p> <p>19 do with disclosure?</p> <p>20     <b>A.</b> Not that I remember.</p> <p>21     <b>Q.</b> A moment ago you said when the</p> <p>22 parties negotiate the consumer-value</p> <p>23 application that's going to be</p> <p>24 distributed, is that just for Direct</p> <p>25 Revenue's distribution of their own</p>

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<p>76</p> <p>1 DOWHAN</p> <p>2 consumer-value applications or for</p> <p>3 distributors' consumer-value presumable</p> <p>4 applications?</p> <p>5 A. It could be for either.</p> <p>6 Q. Is it generally the practice to</p> <p>7 negotiate what software of the distributor</p> <p>8 will be bundling the ad client?</p> <p>9 A. No.</p> <p>10 Q. Is that unusual?</p> <p>11 A. No.</p> <p>12 Q. It happens both ways?</p> <p>13 A. Yes.</p> <p>14 Q. There are times when there is no</p> <p>15 discussion about what software will be</p> <p>16 bundling the ad client?</p> <p>17 A. I don't know if there are times</p> <p>18 if there is no discussion of it.</p> <p>19 Q. You don't know. Is there always</p> <p>20 discussion about what software will be</p> <p>21 bundling the ad client?</p> <p>22 A. No, I'm not saying that there is</p> <p>23 always discussion. I just don't know of</p> <p>24 an event where no discussion was made</p> <p>25 around the content.</p>	<p>80</p> <p>1 DOWHAN</p> <p>2 Q. Do you have a general sense of</p> <p>3 when? Summer? Fall?</p> <p>4 A. Summer-ish.</p> <p>5 MR. CELLI: Did you explain the</p> <p>6 whole policy? I felt that Justin may have</p> <p>7 inadvertently cut you off. You said that</p> <p>8 with a new distributor, you look at their</p> <p>9 consumer-value application. Is there more</p> <p>10 to the policy?</p> <p>11 THE WITNESS: There is more to</p> <p>12 the policy.</p> <p>13 Q. Let me hear about it.</p> <p>14 MR. CELLI: You asked him about</p> <p>15 it. Then you cut him off. I know you</p> <p>16 didn't mean to.</p> <p>17 THE WITNESS: We would get</p> <p>18 screenshots of -- sorry. First we would</p> <p>19 give to them a short-form disclosure,</p> <p>20 examples of the text to be used and how</p> <p>21 it's displayed, Wise installers, for</p> <p>22 example, get screenshots from them of the</p> <p>23 distribution unit.</p> <p>24 Q. Anything else to this policy</p> <p>25 that you want to tell us about?</p>
<p>77</p> <p>1 DOWHAN</p> <p>2 Q. Was it usually the case that you</p> <p>3 discussed what the application is going to</p> <p>4 be?</p> <p>5 A. No, I wouldn't say it's usual.</p> <p>6 Q. Okay. Do you know what the</p> <p>7 application was for Integrated Search</p> <p>8 Technologies?</p> <p>9 A. No.</p> <p>10 Q. Is it usually included on an</p> <p>11 insertion order?</p> <p>12 A. I don't believe so. But I don't</p> <p>13 know for sure.</p> <p>14 Q. Are there any policies in place</p> <p>15 in regard to third-party software that</p> <p>16 will be bundling the ad client?</p> <p>17 A. Yes.</p> <p>18 Q. What is the policy?</p> <p>19 A. When engaging with a new</p> <p>20 distributor, we would determine what</p> <p>21 application they are going to be promoting</p> <p>22 as a consumer-value app. And --</p> <p>23 Q. Okay. How long has this policy</p> <p>24 been in place?</p> <p>25 A. Since sometime in 2005.</p>	<p>81</p> <p>1 DOWHAN</p> <p>2 A. No.</p> <p>3 Q. What policy was in place before</p> <p>4 this policy was enacted?</p> <p>5 A. What policy was in place before</p> <p>6 that policy was enacted specific to?</p> <p>7 Q. Specific to the things you are</p> <p>8 talking about, short-form disclosure,</p> <p>9 screenshots, knowing about consumer-value</p> <p>10 application. Was there a prior policy?</p> <p>11 A. Let's see. There were -- I</p> <p>12 don't know if I would say that there were</p> <p>13 specific policies around those aspects of</p> <p>14 distribution.</p> <p>15 Q. There were not specific policies</p> <p>16 in regard to those aspects of</p> <p>17 distribution. Is that fair to say?</p> <p>18 A. I guess I would prefer if you</p> <p>19 would repeat the whole thing back to me so</p> <p>20 that I understand what I'm agreeing to.</p> <p>21 Q. With regard to seeing</p> <p>22 screenshots from your distributors, with</p> <p>23 regard to knowing what their software</p> <p>24 application was, in regard to short-form</p> <p>25 disclosure, is it fair to say there was no</p>

<p style="text-align: right;">82</p> <p>1           <b>DOWHAN</b></p> <p>2 Direct Revenue policy with regard to those</p> <p>3 aspects of distribution prior to this</p> <p>4 policy you are testifying about now?</p> <p>5     A. We did not always know what</p> <p>6 specific application or content might be</p> <p>7 the promotional vehicle.</p> <p>8     Q. I understand that. But there</p> <p>9 was no policy in place, was there?</p> <p>10    A. When engaging with a</p> <p>11 distribution partner, I wouldn't say that</p> <p>12 there was a specific policy.</p> <p>13    Q. There was no policy?</p> <p>14    A. There was no policy that</p> <p>15 required receiving screenshots from</p> <p>16 distributors prior to engaging with them.</p> <p>17    Q. Was there a policy with regard</p> <p>18 to short-form disclosure?</p> <p>19    A. No.</p> <p>20    Q. Was there a policy in regard</p> <p>21 to --</p> <p>22    A. Not that I know of, I should</p> <p>23 say.</p> <p>24    Q. Fair enough. Was there a policy</p> <p>25 with regard to knowing what software they</p>	<p style="text-align: right;">84</p> <p>1           <b>DOWHAN</b></p> <p>2     Q. At any time prior? Not</p> <p>3 immediately prior, but at any time prior</p> <p>4 to the policy enacted in the summer of</p> <p>5 2005?</p> <p>6     A. I may be overinterpreting</p> <p>7 short-form disclosure.</p> <p>8 <b>BY MR. BROOKMAN:</b></p> <p>9     Q. What do you mean by short-form</p> <p>10 disclosure?</p> <p>11    A. It was a term that came around</p> <p>12 when we -- that I was aware of when we</p> <p>13 started working with the NAI, groups like</p> <p>14 Truste and interacting with Esther Dyson,</p> <p>15 and people along these lines were getting</p> <p>16 together to agree on certain types of</p> <p>17 phrasing. And to my knowledge, that</p> <p>18 became what I call the short-form</p> <p>19 disclosure. So that may be -- I don't</p> <p>20 know if --</p> <p>21    Q. Whether or not you called it</p> <p>22 short-form disclosure previously, you did</p> <p>23 not have a standard operating procedure of</p> <p>24 providing short-form disclosure, whether</p> <p>25 you called it that or not, to distributors</p>
<p style="text-align: right;">83</p> <p>1           <b>DOWHAN</b></p> <p>2 were bundling your ad client with?</p> <p>3     A. I guess the short answer is no,</p> <p>4 not a specific policy.</p> <p>5     Q. You can give us a long answer if</p> <p>6 you would like.</p> <p>7     A. I don't know if there is a long</p> <p>8 answer either. I'm trying to short of</p> <p>9 efficiently answer.</p> <p>10    Q. Okay.</p> <p>11    A. A policy? No, not that I could</p> <p>12 point to that I remember.</p> <p>13    Q. Was there a standard operating</p> <p>14 procedure, standard practice?</p> <p>15       <b>MR. CELLI: Of?</b></p> <p>16       <b>MR. BROOKMAN:</b> With regard to</p> <p>17 any of the three elements.</p> <p>18    Q. With regard to short-form</p> <p>19 disclosure, was there a standard practice</p> <p>20 of providing short-form disclosure to your</p> <p>21 distributors?</p> <p>22    A. During what time period?</p> <p>23    Q. Prior to the official policy.</p> <p>24    A. Not that I know of.</p> <p>25 <b>BY MR. DREIFACH:</b></p>	<p style="text-align: right;">85</p> <p>1           <b>DOWHAN</b></p> <p>2 prior to this policy?</p> <p>3     A. So I'll maybe answer this a</p> <p>4 little differently. We would give the</p> <p>5 distributor, in addition to having a</p> <p>6 signed contract with them, we would give</p> <p>7 them our EULA so that they could uphold</p> <p>8 the terms of the contract to be able to</p> <p>9 show --</p> <p>10    Q. Isn't that the opposite of</p> <p>11 short-form disclosure?</p> <p>12    A. I don't know. I think maybe</p> <p>13 it's a loaded term, short-form disclosure.</p> <p>14    Q. Okay.</p> <p>15    A. Disclosure? We would give</p> <p>16 them -- in addition to having a contract</p> <p>17 signed, we would give them a link to our</p> <p>18 EULA.</p> <p>19    Q. How would you give it to them?</p> <p>20 You would e-mail it to them?</p> <p>21    A. E-mail it to them or whatever</p> <p>22 form we would normally communicate.</p> <p>23    Q. Fine.</p> <p>24       <b>MR. BROOKMAN:</b> Let's mark this</p> <p>25 as AG 5.</p>

1 DOWHAN  
2 (AG Exhibit 5 marked for  
3 identification.)  
4 Q. Do you recognize this document?  
5 A. It looks familiar, yes.  
6 Q. What is it?  
7 A. Standard distribution agreement  
8 of Better Internet.  
9 Q. Your lawyers have represented to  
10 us that this is how the standard  
11 distribution agreement looked prior to May  
12 of 2005. Is that consistent with your  
13 understanding?  
14 MR. BROOKMAN: You can interrupt  
15 me if that's not what you told us.  
16 MR. KLAUSNER: Well, this  
17 version is dated March 31, 2004. I can't  
18 represent that it was the only version.  
19 MR. BROOKMAN: I believe your  
20 letter of January 17 identified this as --  
21 MR. KLAUSNER: The only one?  
22 MR. BROOKMAN: I don't have the  
23 letter on me.  
24 MR. DREIFACH: This is what you  
25 attached to I think Exhibit 9 to that

1 DOWHAN  
2 A. I believe that when it was  
3 altered in at least one case that it was  
4 signed to acknowledge deviation from the  
5 norm. But I don't believe that it was  
6 normally -- I don't really know if it was  
7 normally signed. But the --  
8 Q. But as vice president of  
9 distribution, you should know -- don't you  
10 know that this is not normally signed?  
11 MR. KLAUSNER: I think he may  
12 have cut you off as far as the insertion  
13 order. You should get that on the record.  
14 A. But the insertion order is  
15 signed.  
16 Q. I understand that. The  
17 insertion order is signed. Is the  
18 standard distribution agreement separately  
19 signed?  
20 MR. DREIFACH: As a matter of  
21 standard operating procedure?  
22 A. I don't believe so.  
23 Q. Is there any other document  
24 signed between you and the distributor on  
25 a normal basis?

1 DOWHAN  
2 letter purporting to --  
3 MR. KLAUSNER: It is a standard  
4 distribution agreement. As I sit here  
5 today, I'm not able to represent that this  
6 is was the only version in effect prior to  
7 the date in '05 that you identified. But  
8 why don't you ask the witness the  
9 question.  
10 BY MR. BROOKMAN:  
11 Q. Is this the standard  
12 distribution agreement referred to in the  
13 insertion order which is Exhibit 4?  
14 (Witness reviews documents.)  
15 A. With the assumption that this is  
16 the agreement that would be found at  
17 A Better Internet.com/terms, yes.  
18 Q. Okay. With that understanding.  
19 A. Yes.  
20 Q. Did distributors ever sign this  
21 document?  
22 A. I don't know.  
23 Q. Well, you were the vice  
24 president for distribution. Don't you  
25 know if they signed this document or not?

1 DOWHAN  
2 A. The insertion order.  
3 Q. The insertion order and that's  
4 it; is that right?  
5 A. I can't think of any other  
6 document. There might be something else.  
7 But I think this --  
8 Q. So distributors don't actually  
9 have to even look at this agreement; is  
10 that right?  
11 MR. KLAUSNER: Objection to  
12 form. I know that's not permitted.  
13 MR. DREIFACH: Can I with  
14 permission?  
15 BY MR. DREIFACH:  
16 Q. What steps did the company take  
17 or has the company taken at any time since  
18 you have been vice president of  
19 distribution, what steps, if any, has the  
20 company taken to ensure that distributors  
21 review this document, the document  
22 reflected as Exhibit 5?  
23 A. To ensure that they reviewed it?  
24 I don't know of any steps that are taken  
25 other than the fact that we require the



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1 **DOWHAN**

2 distributor to sign the document that says

3 they agreed to them.

4 And I would offer that I don't

5 know if you had a printed version doesn't

6 mean that you have reviewed it. So I'm

7 not sure how you would know. I'm not sure

8 what you mean.

9 Q. Are you saying that steps have

10 been taken at any time to ensure that the

11 distributor does in fact have a written

12 copy of the distribution agreement?

13 A. No, I am not sure that the

14 distributor had a written copy.

15 Q. So for purposes of clarity, let

16 me ask again. What steps, if any, did

17 Direct Revenue take during your tenure of

18 VP of distribution to ensure that your

19 distributors actually read the standard

20 distribution agreement, apart from the

21 fact that they had to sign the insertion

22 order referencing that distribution

23 agreement?

24 A. Apart from that? None that I

25 know of. But I think that's --

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1 **DOWHAN**

2 Q. Is it fair --

3 MR. KLAUSNER: Wait a minute.

4 Let him finish.

5 MR. DREIFACH: I didn't mean to

6 interrupt.

7 A. I think that's a clear

8 indication, the signature on the insertion

9 order seems to be a clear indication that

10 they are agreeing to these terms, and

11 therefore they have to be familiar with

12 them.

13 Q. My question is somewhat

14 different. My question is not asking

15 about the substance of the insertion

16 order. My question is asking about what

17 steps Direct Revenue took with respect to

18 a separate factual situation.

19 And I believe your testimony is

20 that the only step that Direct Revenue

21 took while you were vice president of

22 distribution to ensure that your

23 distributors reviewed the distribution

24 agreement was to have them sign the

25 separate insertion order. Am I correctly

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1 **DOWHAN**

2 summarizing your testimony? You can have

3 that read back.

4 A. I believe I understand. And

5 there were no other processes to

6 separately verify.

7 MR. DREIFACH: Thank you.

8 BY MR. BROOKMAN:

9 Q. Did you have conversations with

10 your distributors about the notice and

11 consent of the provisions of this

12 document?

13 A. Not that I --

14 Q. You can't recall a single

15 instance of talking to a distributor about

16 the notice and consent provisions of this

17 document?

18 MR. CELLI: Which document?

19 MR. BROOKMAN: The standard

20 distribution agreement.

21 A. Of this document, no.

22 Q. Can you go ahead and read

23 paragraph 2.2.

24 A. "Registration. Company

25 represents and warrants that the Product

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1 **DOWHAN**

2 will not be installed until after each

3 potential Registered User has agreed to

4 (by means of legally valid affirmative

5 consent): (a) an end-user license

6 agreement (EULA) provided by BI or (b) a

7 EULA that provides BI with rights,

8 limitations or liability and other terms

9 and conditions that are equivalent to

10 those set forth in BI's standard EULA.

11 Without limiting the foregoing, Company

12 represents and warrants that each

13 potential Registered User will be

14 specifically informed that they are

15 downloading the Product prior to the time

16 such download commences and will receive

17 any other disclosures as required by law.

18 Each Registered User will be assigned a

19 unique identifier that will be used as the

20 basis for the payments to be made herein."

21 Q. What do you mean by the term

22 "affirmative consent"?

23 A. I don't mean --

24 MR. KLAUSNER: What does he mean

25 or what does he understand? Any way you

<p style="text-align: right;">94</p> <p>1 DOWHAN</p> <p>2 want to style it.</p> <p>3 Q. What do you understand</p> <p>4 affirmative consent to mean in this</p> <p>5 paragraph?</p> <p>6 A. Basically, I'm not a lawyer.</p> <p>7 I'm a layperson. I don't really have an</p> <p>8 understanding of the term "affirmative</p> <p>9 consent."</p> <p>10 Q. How about the phrase</p> <p>11 "specifically informed"? Do you have an</p> <p>12 understanding of what that phrase meant?</p> <p>13 A. No.</p> <p>14 Q. Do you ever have discussions</p> <p>15 about these notice provisions within the</p> <p>16 company?</p> <p>17 A. Not that I recall.</p> <p>18 Q. Did you ever discuss notice</p> <p>19 provisions with Joshua Abrams?</p> <p>20 A. Not that I recall.</p> <p>21 Q. Alan Murray?</p> <p>22 A. It would be true for any of the</p> <p>23 four.</p> <p>24 Q. Okay. Did you have</p> <p>25 conversations with your distributors about</p>	<p style="text-align: right;">96</p> <p>1 DOWHAN</p> <p>2 short-form disclosure and Wise installer</p> <p>3 install process, things along those lines,</p> <p>4 with some examples given to the</p> <p>5 distributors.</p> <p>6 Q. That is the policy you were</p> <p>7 referring to earlier?</p> <p>8 A. Yes, I believe so.</p> <p>9 Q. Prior to those conversations,</p> <p>10 did you ever have any conversations with</p> <p>11 your distributors about notice and</p> <p>12 consent?</p> <p>13 A. None that I can remember.</p> <p>14 Q. Do you know if anyone else at</p> <p>15 the company had conversations with the</p> <p>16 distributors about notice and consent?</p> <p>17 A. No, none that I know of.</p> <p>18 Q. What steps did you take to</p> <p>19 ensure that your distributors complied</p> <p>20 with these notice and consent provisions?</p> <p>21 A. First, and probably most</p> <p>22 importantly, we had them sign a contract</p> <p>23 that would require them to show the terms</p> <p>24 to the end-user.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">95</p> <p>1 DOWHAN</p> <p>2 these notice and consent provisions?</p> <p>3 A. No. No distributor asked me</p> <p>4 about this provision or what it meant or</p> <p>5 anything along those lines.</p> <p>6 Q. And you never proactively talked</p> <p>7 to a distributor about them?</p> <p>8 A. No, I never.</p> <p>9 Q. You never talked about --</p> <p>10 A. Not that I remember, no.</p> <p>11 Q. Apart from the legal language or</p> <p>12 the terms of this agreement, did you talk</p> <p>13 about notice and consent provisions in</p> <p>14 general with your distributors?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. Tell me about those</p> <p>17 conversations.</p> <p>18 A. In reference to a document that</p> <p>19 we created and distributed to the</p> <p>20 distributors summer of 2005, there were at</p> <p>21 least some follow-up questions about the</p> <p>22 document.</p> <p>23 Q. Can you describe this document</p> <p>24 for me.</p> <p>25 A. It is an example of our</p>	<p style="text-align: right;">97</p> <p>1 DOWHAN</p> <p>2 A. In addition -- I'm sorry, I'm</p> <p>3 going to reask what policies or what</p> <p>4 processes were you asking?</p> <p>5 Q. What steps would you take to</p> <p>6 ensure that your distributors complied</p> <p>7 with the notice and consent provisions?</p> <p>8 A. So yes, primary probably -- the</p> <p>9 main ones is make sure that we had</p> <p>10 contractual obligation with those</p> <p>11 distributors to do so.</p> <p>12 And then following that, we</p> <p>13 would review forums, blogs, to see whether</p> <p>14 or not there were any complaints or</p> <p>15 breaches that we would follow up on. If</p> <p>16 we found that there was a complaint, we</p> <p>17 would basically use a QA lab environment</p> <p>18 to verify whether it was valid or not; and</p> <p>19 if so, we would shut off the distribution</p> <p>20 from the servers.</p> <p>21 We created some technology to</p> <p>22 help us in efforts to ensure that we could</p> <p>23 at least verify distribution and that it</p> <p>24 was not being installed through an</p> <p>25 exploit, for example, which would be lack</p>

<p style="text-align: right;">98</p> <p>1 DOWHAN</p> <p>2 of notice.</p> <p>3 Q. Is this the Canary program?</p> <p>4 A. Canary.</p> <p>5 Q. Did the Canary program ever</p> <p>6 catch anybody?</p> <p>7 A. The Canary program or at least</p> <p>8 the way in which Canary -- I don't know if</p> <p>9 Canary specifically, because there might</p> <p>10 have been different names to it. But the</p> <p>11 type of technology about crawling URLs I</p> <p>12 believe did at least point to or help us</p> <p>13 identify some bad behavior which would</p> <p>14 have subsequently been turned off. We</p> <p>15 would also use it --</p> <p>16 Q. Can you think of any specific</p> <p>17 instances?</p> <p>18 A. I can't, no. We would also use</p> <p>19 Canary to crawl URLs, load URLs into a</p> <p>20 browser that were sort of known bad URLs</p> <p>21 from blog sites that would say these are</p> <p>22 sites that use exploits. So we would</p> <p>23 search through those to make sure that we</p> <p>24 were not part of a bundle or download that</p> <p>25 was happening through one of these</p>	<p style="text-align: right;">100</p> <p>1 DOWHAN</p> <p>2 that their install attempts would no</p> <p>3 longer be allowed from our server. And</p> <p>4 basically we would follow up with them.</p> <p>5 If they could correct the behavior, prove</p> <p>6 that this is something that they had</p> <p>7 stopped, then we could reassess reengaging</p> <p>8 with them.</p> <p>9 Q. When was this process put in</p> <p>10 place?</p> <p>11 A. I guess I would call it an</p> <p>12 informal process.</p> <p>13 Q. Okay.</p> <p>14 A. A version of the informal</p> <p>15 process that was being used was put to</p> <p>16 paper at some point. But I don't remember</p> <p>17 exactly when.</p> <p>18 Q. Any other steps that you took to</p> <p>19 ensure that your distributors complied</p> <p>20 with these provisions?</p> <p>21 A. None other than those.</p> <p>22 Q. Did you have meetings about this</p> <p>23 issue, about distributors complying with</p> <p>24 notice and consent provisions?</p> <p>25 A. None that I remember.</p>
<p style="text-align: right;">99</p> <p>1 DOWHAN</p> <p>2 exploits.</p> <p>3 We set up a call center,</p> <p>4 customer help desk to field questions. If</p> <p>5 somebody had a problem, we would field</p> <p>6 them through that mechanism.</p> <p>7 We would set up an internal</p> <p>8 process to handle issues. If a complaint</p> <p>9 arose or if from the result of a blog</p> <p>10 posting or something along those lines, we</p> <p>11 would set up a process for being able to</p> <p>12 shut these off, things along those lines.</p> <p>13 Q. Describe this process to me.</p> <p>14 A. If, for example, there was a</p> <p>15 posting, we will use as an example, where</p> <p>16 there was some expectation of lack of</p> <p>17 disclosure for a download, we would give</p> <p>18 that information to a small QA type of</p> <p>19 group, in a lab type of environment to try</p> <p>20 to reproduce the behavior. If we couldn't</p> <p>21 reproduce it, we would essentially watch</p> <p>22 this and try to better understand where it</p> <p>23 came from. If we could reproduce it, then</p> <p>24 we would shut off that distributor, call</p> <p>25 them, contact them, somehow let them know</p>	<p style="text-align: right;">101</p> <p>1 DOWHAN</p> <p>2 Q. Do you remember talking about it</p> <p>3 with the founders?</p> <p>4 A. No discussions that I remember.</p> <p>5 Q. My question is any discussions</p> <p>6 with any of the founders about your</p> <p>7 distributors complying with notice and</p> <p>8 consent provisions.</p> <p>9 A. Nothing specific. It was</p> <p>10 generally understood that we expected</p> <p>11 distributors to comply. I don't remember</p> <p>12 any conversations around it.</p> <p>13 BY MR. DREIFACH:</p> <p>14 Q. Who expected the distributors to</p> <p>15 comply? You said "we."</p> <p>16 A. I guess I should say I expected</p> <p>17 distributors to comply with the</p> <p>18 contractual obligations.</p> <p>19 Q. When you were the vice president</p> <p>20 of distribution, you expected the</p> <p>21 distributors to comply?</p> <p>22 A. Yes.</p> <p>23 Q. And you expected the</p> <p>24 distributors to comply with paragraph 2.2</p> <p>25 of the distribution agreement?</p>

<p style="text-align: right;">102</p> <p>1           <b>DOWHAN</b></p> <p>2       A. The whole distribution</p> <p>3 agreement.</p> <p>4       Q. And if they didn't comply, was</p> <p>5 there any sense of what you would do to</p> <p>6 remedy that?</p> <p>7       A. Yes. I don't want to go over</p> <p>8 too much of the same ground if it's not</p> <p>9 helpful. But a lot of what I described in</p> <p>10 a previous answer about shutting them off</p> <p>11 if we determined that they did not comply.</p> <p>12       Q. And how was -- if we have to get</p> <p>13 into specifics, we will get into</p> <p>14 specifics. I'm trying to short-circuit it</p> <p>15 a bit. How generally was the evaluation</p> <p>16 made as to whether or not the distributors</p> <p>17 were in compliance? In other words, who</p> <p>18 would have made that determination as to</p> <p>19 whether the distributors, based on their</p> <p>20 practices, were in compliance with the</p> <p>21 agreement?</p> <p>22       A. It could be various individuals</p> <p>23 within the company.</p> <p>24       Q. I'm going to have to ask you,</p> <p>25 obviously, to be more specific than that.</p>	<p style="text-align: right;">104</p> <p>1           <b>DOWHAN</b></p> <p>2 myself.</p> <p>3       Q. What about prior to let's say</p> <p>4 June 2005, which I believe is roughly when</p> <p>5 JP joined the company. Who would make</p> <p>6 that determination?</p> <p>7       A. A group -- it could have been a</p> <p>8 group of any of the executives that were</p> <p>9 there during an infraction.</p> <p>10       Q. We can go over the specifics,</p> <p>11 but it will take us long after three</p> <p>12 o'clock. So I'm doing this really to</p> <p>13 benefit your side of the table.</p> <p>14       MR. CELLI: His best</p> <p>15 recollection. That's all.</p> <p>16       Q. Do you recall any instances in</p> <p>17 particular in which it was determined that</p> <p>18 distributors did not comply with 2.2?</p> <p>19       A. Do I recall any specific</p> <p>20 instances?</p> <p>21       Q. Yes.</p> <p>22       A. I recall instances. I don't</p> <p>23 know how much detail I will know off the</p> <p>24 top of my head, but I certainly recall</p> <p>25 instances where we determined from</p>
<p style="text-align: right;">103</p> <p>1           <b>DOWHAN</b></p> <p>2       A. Let's see. The specific cases</p> <p>3 that we are talking about, though, are</p> <p>4 whether or not when we found a breach like</p> <p>5 a security exploit, who would make that</p> <p>6 determination?</p> <p>7       Q. I'm not narrowing the question</p> <p>8 that way. And you just testified about a</p> <p>9 particular purported manner of trying to</p> <p>10 ensure compliance. And I'm following up</p> <p>11 on that to test what we are really talking</p> <p>12 about.</p> <p>13       So one thing that you testified</p> <p>14 about was that if you, I believe you said</p> <p>15 "we," determined that a particular</p> <p>16 distributor was not complying with the</p> <p>17 agreement, for instance, not complying</p> <p>18 with provision 2.2, you would or you might</p> <p>19 cut them off. And I'm asking you to give</p> <p>20 me some specifics about that. Who would</p> <p>21 make that determination as to whether or</p> <p>22 not a distributor was complying?</p> <p>23       A. Different people. Usually a</p> <p>24 group setting. Examples would be Dan</p> <p>25 Doman; JP, the CEO; Andrew Reiskind;</p>	<p style="text-align: right;">105</p> <p>1           <b>DOWHAN</b></p> <p>2 following up on postings and things along</p> <p>3 those lines that they were not in</p> <p>4 compliance.</p> <p>5       Q. And leaving out the particular</p> <p>6 companies, which we can get back to, which</p> <p>7 provisions was it determined they were not</p> <p>8 in compliance with?</p> <p>9       A. Rather than interpreting this,</p> <p>10 I'm just going to describe what the</p> <p>11 problem was. It was around the disclosure</p> <p>12 to the end-user prior to download.</p> <p>13       Q. Were you involved in any of</p> <p>14 these determinations as to whether</p> <p>15 distributors were not in compliance?</p> <p>16       A. Yes.</p> <p>17       Q. Is it fair to say that you were</p> <p>18 involved in determinations as to whether</p> <p>19 or not affirmative consent had been</p> <p>20 obtained?</p> <p>21       A. Affirmative consent, I don't</p> <p>22 know whether or not I should be asking for</p> <p>23 clarification around affirmative consent</p> <p>24 in this case. Because I don't --</p> <p>25       Q. That's the phrase in the</p>

<p style="text-align: right;">106</p> <p>1 DOWHAN</p> <p>2 paragraph. So that's the phrase I'm</p> <p>3 using.</p> <p>4 A. So it's fair to say that the</p> <p>5 concern was over the disclosure of the</p> <p>6 EULA and showing the access to the EULA to</p> <p>7 the end-user. That was the issue.</p> <p>8 Q. And what in the contract</p> <p>9 required a distributor to provide a user</p> <p>10 with access to the EULA?</p> <p>11 A. Yes.</p> <p>12 Q. No, that's a question. I mean</p> <p>13 that's not a yes or no: What phrase in</p> <p>14 the EULA required --</p> <p>15 MR. BROOKMAN: You mean the</p> <p>16 distribution agreement?</p> <p>17 MR. DREIFACH: Sorry. Let me</p> <p>18 begin again.</p> <p>19 Q. What phrase in the distribution</p> <p>20 agreement required a distributor to</p> <p>21 provide users with access to a EULA?</p> <p>22 MR. KLAUSNER: You know --</p> <p>23 MR. DREIFACH: Come on.</p> <p>24 MR. KLAUSNER: I haven't said</p> <p>25 anything yet.</p>	<p style="text-align: right;">108</p> <p>1 DOWHAN</p> <p>2 determinations?</p> <p>3 A. That in one of the ones that I'm</p> <p>4 remembering that an exploit was being used</p> <p>5 and no disclosure of the Better Internet</p> <p>6 EULA was made that we could seed to the</p> <p>7 consumer. And so that we deemed</p> <p>8 inadequate.</p> <p>9 Q. Is it fair -- putting aside any</p> <p>10 legal issues, I'm not asking you for a</p> <p>11 legal opinion, is it fair for me to assume</p> <p>12 that it was the company's policy and</p> <p>13 understanding that this distribution</p> <p>14 agreement required its distributors to</p> <p>15 provide users with access to the EULA?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And is it correct for me</p> <p>18 to assume that a distributor that provided</p> <p>19 access to a EULA and provided no other</p> <p>20 prior indication of the ad client was</p> <p>21 meeting the minimum requirements of this</p> <p>22 distribution agreement?</p> <p>23 A. I don't know. I believe that</p> <p>24 that's asking me to interpret part of</p> <p>25 this, if I'm understanding the question.</p>
<p style="text-align: right;">107</p> <p>1 DOWHAN</p> <p>2 MR. DREIFACH: Let's keep it</p> <p>3 that way.</p> <p>4 A. I don't feel comfortable trying</p> <p>5 to interpret a legal document sitting</p> <p>6 here.</p> <p>7 Q. Mr. Dowhan, you have testified</p> <p>8 to determinations being made about</p> <p>9 instances in which EULAs have been</p> <p>10 violated. I have for purposes of</p> <p>11 convenience -- standard distribution</p> <p>12 agreements being violated. For purposes</p> <p>13 of convenience, I've really cut to the</p> <p>14 chase here. We can go over this all</p> <p>15 again. But it is correct that you made</p> <p>16 determinations and you were present in</p> <p>17 which determinations were made in which</p> <p>18 the company determined that provision 2.2</p> <p>19 was being violated by distributors. True</p> <p>20 or false?</p> <p>21 A. The company determined that</p> <p>22 disclosure to the consumer was inadequate,</p> <p>23 disclosure of the terms and conditions of</p> <p>24 the EULA to the consumer was inadequate.</p> <p>25 Q. And what was the basis of those</p>	<p style="text-align: right;">109</p> <p>1 DOWHAN</p> <p>2 Q. What were your responsibilities</p> <p>3 as vice president of distribution? Your</p> <p>4 responsibilities did involve dealing</p> <p>5 with --</p> <p>6 A. To secure contracts with</p> <p>7 distributors, find consumer-value</p> <p>8 applications to promote. But not</p> <p>9 specifically to interpret this.</p> <p>10 Q. So is it fair for me to assume,</p> <p>11 then, that you played no role in</p> <p>12 determining whether or not distributors</p> <p>13 were complying with 2.2 of the agreement?</p> <p>14 Because you don't understand what 2.2 of</p> <p>15 the agreement means.</p> <p>16 A. So your first question about --</p> <p>17 Q. Let's split it up. I don't want</p> <p>18 to be difficult with this. But is it fair</p> <p>19 for me to assume that you don't have an</p> <p>20 understanding of what 2.2 in the</p> <p>21 distribution agreement requires of</p> <p>22 distributors?</p> <p>23 (Witness reviews document.)</p> <p>24 A. I don't have a legal</p> <p>25 interpretation.</p>

<p style="text-align: right;">110</p> <p>1           <b>DOWHAN</b></p> <p>2       <b>Q.</b> And I'm not asking for a legal</p> <p>3 interpretation. I'm asking for -- certain</p> <p>4 agreements require certain entities to do</p> <p>5 certain things.</p> <p>6       <b>A.</b> Mm-hmm.</p> <p>7       <b>Q.</b> And that's a matter of</p> <p>8 understanding the terms in those</p> <p>9 agreements. I'm not asking for a legal</p> <p>10 interpretation of the validity or legal</p> <p>11 meaning of any particular agreement.</p> <p>12       I'm asking you to confirm that</p> <p>13 you don't have an understanding of what</p> <p>14 specific steps provision 2.2 of the</p> <p>15 distribution agreement requires</p> <p>16 distributors to take. Either you don't</p> <p>17 have an understanding or if you do have an</p> <p>18 understanding, I'm asking you to tell me</p> <p>19 what it is.</p> <p>20       <b>A.</b> I have an understanding that</p> <p>21 they have an obligation to give the</p> <p>22 consumer access to the EULA.</p> <p>23       <b>Q.</b> Okay. In addition to giving the</p> <p>24 consumer access to the EULA, is there</p> <p>25 anything else required by section 2.2?</p>	<p style="text-align: right;">112</p> <p>1           <b>DOWHAN</b></p> <p>2 will move on.</p> <p>3       Tell me what you did, maybe you</p> <p>4 answered this already, what did you do</p> <p>5 with regard -- let me start over. How did</p> <p>6 you police the subdistributors of your</p> <p>7 distributors?</p> <p>8       <b>A.</b> I believe that my previous</p> <p>9 answer covered the methods. I could</p> <p>10 review it.</p> <p>11       MR. DREIFACH: I'm going to run</p> <p>12 out and get some water. Does anybody want</p> <p>13 anything?</p> <p>14       MR. KLAUSNER: I'm fine.</p> <p>15 Thanks.</p> <p>16 BY MR. BROOKMAN:</p> <p>17       <b>Q.</b> So in addition to the things</p> <p>18 that you mentioned previously, you didn't</p> <p>19 do anything else to police your</p> <p>20 distributors' use of subdistributors?</p> <p>21       <b>A.</b> Let's see. I would offer that</p> <p>22 distributors were hesitant to offer</p> <p>23 information about their affiliates or</p> <p>24 subdistributors. So we didn't always have</p> <p>25 access to --</p>
<p style="text-align: right;">111</p> <p>1           <b>DOWHAN</b></p> <p>2       <b>(Witness reviews document.)</b></p> <p>3       MR. DREIFACH: Let him answer</p> <p>4 the question. We are getting you out</p> <p>5 here. We are getting this done, Neal. We</p> <p>6 are really going to ask you to leave. So</p> <p>7 please.</p> <p>8       MR. KLAUSNER: I haven't said</p> <p>9 anything.</p> <p>10       MR. CELLI: He is going to</p> <p>11 answer the question.</p> <p>12       THE WITNESS: Let me reread it.</p> <p>13       <b>(Witness reviews document.)</b></p> <p>14       <b>(The question was read.)</b></p> <p>15       <b>A.</b> Not in my understanding.</p> <p>16 BY MR. BROOKMAN:</p> <p>17       <b>Q.</b> By access to the EULA, would a</p> <p>18 link to your EULA be sufficient, in your</p> <p>19 understanding?</p> <p>20       <b>A.</b> In a layperson's understanding?</p> <p>21 A link would be access.</p> <p>22       <b>Q.</b> So that would be sufficient?</p> <p>23       <b>A.</b> Sufficient for what, I guess is</p> <p>24 going to be my --</p> <p>25       <b>Q.</b> To meet the terms. Fine, we</p>	<p style="text-align: right;">113</p> <p>1           <b>DOWHAN</b></p> <p>2       <b>Q.</b> How do you know that?</p> <p>3       <b>A.</b> In the case where we might have</p> <p>4 identified through the process described</p> <p>5 previously that an affiliate of a</p> <p>6 distributor may have been responsible for</p> <p>7 an exploit or something along those lines,</p> <p>8 that they were worried about protecting</p> <p>9 their assets I guess is the best way to</p> <p>10 describe it, so that Direct Revenue could</p> <p>11 not work directly with a Web site that</p> <p>12 they would broker. So the policing was</p> <p>13 done through the forums and things along</p> <p>14 those lines.</p> <p>15       <b>Q.</b> But you did ask your</p> <p>16 distributors for information about</p> <p>17 subdistributors who used exploits?</p> <p>18       <b>A.</b> I don't know if we asked for</p> <p>19 information. But we needed to -- we</p> <p>20 wanted to confirm that they were shut off</p> <p>21 in the event that there was a problem.</p> <p>22       <b>Q.</b> Which of your distributors did</p> <p>23 you talk to about this?</p> <p>24       <b>A.</b> I know there were some. But I</p> <p>25 can't think of the names off the top of my</p>

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1 **DOWHAN**  
2 head.  
3 Q. Can you think of when these  
4 discussions might have occurred?  
5 A. Through -- I don't know  
6 specifically I guess is the best.  
7 Q. Did you ever talk to a  
8 distributor about a subdistributor's  
9 activities prior to the date of our  
10 subpoena?  
11 A. I'm sorry. One more time.  
12 Q. We served a subpoena on Direct  
13 Revenue in late May of 2005. I'm asking  
14 you whether you ever contacted a  
15 distributor about a subdistributor's  
16 behavior prior to that date.  
17 MR. CELLI: What was the date?  
18 MR. BROOKMAN: Late May 2005. I  
19 believe that's correct. Correct me if I'm  
20 wrong.  
21 A. Yes, I believe so.  
22 Q. Do you remember which ones?  
23 A. Let's see. I don't remember the  
24 communications with them. I guess, sorry,  
25 could you repeat the question.

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1 **DOWHAN**  
2 (The question was read.)  
3 A. I don't remember which companies  
4 specifically.  
5 Q. But you do remember specifically  
6 that it happened prior to. Did it happen  
7 in 2004?  
8 A. It may have.  
9 Q. You are not sure?  
10 A. I'm not sure.  
11 BY MR. DREIFACH:  
12 Q. Are there any documents that  
13 might refresh your recollection as to  
14 that?  
15 A. I don't know.  
16 BY MR. BROOKMAN:  
17 Q. Do you know what a dialer  
18 program is?  
19 A. I heard of a dialer program.  
20 Q. What is your understanding of  
21 what a dialer program is?  
22 A. It's a program -- my  
23 understanding is that it's a program that  
24 allows consumers to use an alternate form  
25 of payment, alternate to a credit card,

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1 **DOWHAN**  
2 for example, in order to access content,  
3 things along those lines. You could  
4 connect with a dialer to a pay-per-minute  
5 number to access content. That's my  
6 understanding.  
7 Q. Did Direct Revenue bundle its  
8 programs for with dialer programs?  
9 A. I don't know.  
10 Q. Are you aware of any instances  
11 where Direct Revenue bundled its ad client  
12 through a third party's dialer program?  
13 A. Not that I know of.  
14 Q. Do you remember any discussion  
15 about bundling Direct Revenue's ad client  
16 with dialer programs?  
17 A. Not that I know of.  
18 Q. Are you aware of any instances  
19 where Direct Revenue's adware was pushed  
20 to another distributor's already-  
21 established software base?  
22 A. We purchased -- did an asset  
23 purchase of I guess Lycos, in which case  
24 we acquired desktops through a purchase.  
25 Q. Other than Lycos, are you aware

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1 **DOWHAN**  
2 of any other instances where you were  
3 pushed to another party's base?  
4 A. Not that I can think of.  
5 Q. How about iDownload? Are you  
6 familiar with the company iDownload?  
7 A. I am.  
8 Q. Are you aware of any instance  
9 where Direct Revenue was pushed to an  
10 iDownload base?  
11 A. I don't remember.  
12 Q. How about Kanoodle?  
13 A. No.  
14 Q. Cydoor?  
15 A. No.  
16 Q. Mindset Interactive?  
17 A. No.  
18 Q. No recollection. Okay.  
19 MR. BROOKMAN: I think I'm done.  
20 MR. DREIFACH: I just have a  
21 couple of questions that might already be  
22 in bits and pieces on the record.  
23 BY MR. DREIFACH:  
24 Q. You have been the vice president  
25 of distribution since when?

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1           **DOWHAN**  
2     A.   Roughly November of 2004.  
3     Q.   And before then what was your  
4     title, if any?  
5     A.   I don't think I had one.  
6     Q.   And you were not working prior  
7     to November '04 in any capacity involving  
8     distributions?  
9     A.   In the early stages?  
10    Q.   Let's say for the year prior to  
11    November '04.  
12    A.   Sorry. One more time.  
13    Q.   Prior to November '04 when you  
14    became VP of distributions, you were not  
15    working on the distributions end of Direct  
16    Revenue?  
17    A.   Focused on technology and some  
18    of the technology related to distribution.  
19    Q.   Once you became VP of  
20    distributions in November of 2004, as a  
21    matter of standard operating procedure,  
22    did you sign the insertion orders or did  
23    someone else?  
24    A.   I signed insertion orders.  
25    Although I don't know if I signed them

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1           **DOWHAN**  
2     all.  
3     Q.   Did you sign most of them?  
4     A.   I believe so.  
5     Q.   And if you didn't sign the  
6     insertion orders, who would have? Would  
7     that have been Mia or Wendy?  
8     A.   It's possible. But I don't  
9     recollect any examples. I don't know of  
10    any examples. So it's hard for me to say  
11    who would have signed them, if they  
12    were --  
13    Q.   But you signed most of the  
14    insertion orders?  
15    A.   I don't know of any insertion  
16    orders that were done by the company that  
17    weren't signed by me.  
18    Q.   So as far as you know, you  
19    signed all of the insertion orders?  
20    A.   Of all the ones that I saw, I  
21    believe I signed --  
22    Q.   Is it fair to say that your  
23    responsibilities in general included  
24    signing insertion orders?  
25    A.   Yes.

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1           **DOWHAN**  
2     Q.   Okay. How many insertion  
3     orders, more or less, have you signed  
4     since November of 2004, ballpark?  
5     A.   I don't know. But tens.  
6     Q.   Between 50 and 100?  
7     A.   It could be less than 50. I  
8     don't know. In the tens, as opposed to in  
9     the hundreds and not single digits.  
10    Q.   How many individual  
11    distributors -- let me back up. Just for  
12    the record, it will be helpful to have  
13    what your full duties as VP of  
14    distribution are. So why don't you list  
15    them. Let me amend that. Your duties as  
16    VP of distribution since November of '04.  
17    And if there has been any change, please  
18    note that.  
19    A.   To engage with companies to  
20    license content for promotion.  
21    Q.   And when we say "companies," are  
22    we referring to Direct Revenue's  
23    distributors?  
24    A.   They may be distributors or not.  
25    Somebody who simply has content is

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1           **DOWHAN**  
2     possible.  
3     Q.   So in addition to engaging with  
4     those third parties for distribution of  
5     Direct Revenue's software, what have your  
6     other duties been since November '04?  
7     A.   I would help on the technical  
8     side of distribution, just the process of  
9     how an install would work, to receive and  
10    review reports about distribution.  
11    Q.   Those reports are generally  
12    authored by who?  
13    A.   Automated often. Raw statistics  
14    often. Raw numbers I guess I should say.  
15    Q.   Any other duties?  
16    A.   Sorry. I'm trying to think of  
17    areas as opposed to minutia and detail of  
18    daily --  
19    Q.   Let's break it down a bit. What  
20    about engaging with companies for purposes  
21    of distributing the ad client? What were  
22    your duties with respect to that area?  
23    A.   To secure contracts with  
24    distributors, to promote --  
25    Q.   I apologize for interrupting.



<p style="text-align: right;">122</p> <p>1 DOWHAN</p> <p>2 Was there anyone else at the company who</p> <p>3 also had that duty or was that more or</p> <p>4 less your exclusive role, to secure</p> <p>5 contracts with distributors?</p> <p>6 A. I don't know if it was</p> <p>7 exclusively my role, but it happened often</p> <p>8 with --</p> <p>9 Q. You were the go-to guy with</p> <p>10 respect to getting the contracts with the</p> <p>11 third parties?</p> <p>12 A. The people I worked closely</p> <p>13 with.</p> <p>14 Q. You were the go-to guy with</p> <p>15 respect to signing the insertion orders?</p> <p>16 A. That was one of my roles</p> <p>17 definitely.</p> <p>18 Q. And if distributors had any</p> <p>19 questions or comments or complaints, they</p> <p>20 would have most likely directed them to</p> <p>21 you?</p> <p>22 A. Not necessarily directed to me.</p> <p>23 Q. But most likely, because you</p> <p>24 were the person who was engaging with</p> <p>25 them?</p>	<p style="text-align: right;">124</p> <p>1 DOWHAN</p> <p>2 you?</p> <p>3 A. My group. Yes, my group was the</p> <p>4 primary, yes.</p> <p>5 Q. And I said this would be the</p> <p>6 last question. This will be the last</p> <p>7 question. Is it fair to assume that you</p> <p>8 had frequent contact with the people</p> <p>9 working under you Mia Simons and Wendy</p> <p>10 Miller?</p> <p>11 A. Yes.</p> <p>12 Q. Daily basis?</p> <p>13 A. For the most part.</p> <p>14 MR. DREIFACH: We do have a</p> <p>15 number of other questions that we may very</p> <p>16 well at some future point need to raise</p> <p>17 with Mr. Dowhan at a future date. But in</p> <p>18 deference to the roughly three o'clock</p> <p>19 dismissal time that we have promised you</p> <p>20 and out of courtesy to you and the client,</p> <p>21 we will end today's hearing session. We</p> <p>22 will not be closing the record. And we</p> <p>23 reserve the right to call Mr. Dowhan back</p> <p>24 for any or no purpose in the future.</p> <p>25 MR. CELLI: We certainly</p>
<p style="text-align: right;">123</p> <p>1 DOWHAN</p> <p>2 A. Not necessarily as a client</p> <p>3 management type of role.</p> <p>4 Q. Well, who else did the</p> <p>5 distributors deal with at the company in</p> <p>6 the usual course of business besides you</p> <p>7 or people working under you?</p> <p>8 A. Me or people working with me? I</p> <p>9 don't know if they would have interacted</p> <p>10 with others. But there were small and</p> <p>11 large distributors. And some may not have</p> <p>12 been within the realm of who I would have</p> <p>13 interacted with on a given day.</p> <p>14 Q. But is it fair to assume that</p> <p>15 you would have at least have been apprised</p> <p>16 of communications or contracts or disputes</p> <p>17 with distributors?</p> <p>18 A. I believe so.</p> <p>19 Q. Because you were the primary</p> <p>20 point of contact with most distributors</p> <p>21 most of the time? And I think this is the</p> <p>22 last question.</p> <p>23 MR. CELLI: Do you mean him</p> <p>24 personally?</p> <p>25 Q. You or the people working under</p>	<p style="text-align: right;">125</p> <p>1 DOWHAN</p> <p>2 appreciate the courtesy. Of course, we</p> <p>3 reserve our rights. But you are the</p> <p>4 principal. So if we are dismissed.</p> <p>5 (Time noted: 3:15 p.m.)</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11 CHRISTOPHER DOWHAN</p> <p>12</p> <p>13 Subscribed and sworn to before me</p> <p>14 this day of , 2006.</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

1  
2 LITIGATION SUPPORT INDEX  
3  
4  
5  
6 DIRECTION TO WITNESS NOT TO ANSWER  
7 Page Line Page Line  
8  
9 (None)  
10  
11  
12 REQUEST FOR PRODUCTION OF DOCUMENTS  
13 Page Line Page Line  
14  
15 (None)  
16  
17  
18 INFORMATION TO BE FURNISHED  
19 Page Line Page Line  
20  
21 (None)  
22  
23  
24  
25

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