

Dissenting Statement of Commissioner Jon Leibowitz
In the Matter of DirectRevenue LLC, et al., File No. 0523131, Docket No. C-4194

The consent order in this matter, to which the Commission has now accorded final approval, includes strong injunctive relief that will put an end to practices that allowed DirectRevenue to foist unwanted software on untold millions of consumers. The injunctive provisions, like those in *Zango, Inc., f/k/a 180 Solutions, Inc.*, will serve as a model to adware companies in future. But the \$1.5 million in monetary relief that the Commission obtained as part of the consent order is a disappointment because it apparently leaves DirectRevenue's owners lining their pockets with more than \$20 million from a business model based on deceit. Ben Elgin with Brian Grow, *The Plot To Hijack Your Computer*, Business Week Online, available at www.businessweek.com/magazine/content/06_29/b3993001.htm?chan=search (July 17, 2006).

According to the Commission's complaint, DirectRevenue downloaded adware on consumers' computers – in many cases without notice and consent. In other instances, to entice consumers into downloading its nuisance adware that plagued consumers' computers with pop-ups, it even bundled the adware with software that was supposed to *block* pop-ups– the height of cynicism and disingenuousness. Moreover, the respondents went to great lengths to ensure that consumers could not uninstall this unwanted software, even employing ingenious (and malicious) technologies such as code that would reinstall it if the consumer attempted to remove it.

Even apart from the hundreds of thousands of hours people spent closing all of these pop-up ads, how many people lost important data because respondents' malware crashed their computer? How many people fruitlessly spent time trying to uninstall it? How many people junked perfectly good computers that were so burdened with unwanted adware that they were useless? One consumer captured the frustration and anger that consumers no doubt felt as they tried to deal with DirectRevenue's malware: “‘You people are EVIL personified,’ Kevin Horton wrote... ‘I would like the four hours of my life back I have wasted trying to get your stupid uninvited software off my now crippled system.’” *The Plot To Hijack Your Computer, supra*. Given the number of unwitting DirectRevenue “customers” – according to the New York Attorney General's complaint there were more than 150 million software installs, which likely served up literally billions of pop-ups¹ – Mr. Horton's experience could not have been unusual. Some of the troubles came home to roost: the software made the computer of one of DirectRevenue's own employees crash four times in one day, and the company had to send someone to fix a computer belonging to one of the company's venture capital investors. *Id.*

¹ On a separate note, I want to commend the New York Attorney General's office for its recent ground-breaking settlements – which included monetary relief – with Priceline, Travelocity, and Cingular Wireless in the context of its litigation against DirectRevenue. Among other things, the settlements require the companies to do due diligence before advertising via adware, and periodically follow up to see how their online ads are being delivered. These settlements are important because advertising dollars fuel the demand side of the nuisance adware problem by giving companies like DirectRevenue and their affiliates and sub-affiliates the incentive to expand their installed base, with or without consumers' consent.

I recognize that staff was able to negotiate comprehensive injunctive relief that will halt these illegal practices once and for all. The consent order, among other things, requires DirectRevenue to co-brand advertisements it serves and provide an effective method to uninstall their software – steps that should allow consumers unhappy with the pop-ups to identify their source and remove the software that generates them. Other provisions ensure that consumers get to choose whether they want the software in the first place. I also recognize that, in litigating this matter, staff would have been presented with novel issues that could pose risks.

That said, I cannot support a consent order that requires the respondents – particularly Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook, the officers and owners of DirectRevenue – to pay a total of only \$1.5 million. Venture capitalists poured more than \$20 million into DirectRevenue,² and between the companies' ad revenues and the venture capital money, millions of dollars flowed into the owners' pockets – \$23 million, according to Business Week. *See The Plot To Hijack Your Computer, supra*. Settlement always involves compromise, and staff must weigh the advantages of a settlement with the risks and costs of litigation. But in cases like this, I would rather go to trial and risk losing than settle for a compromise that makes an FTC action just a cost of doing business.

² See, e.g., Brad Stone, *Invasion of the PC Snatchers*, Newsweek (Dec. 13, 2006), available at <http://www.msnbc.msn.com/id/6653413/site/newsweek/>.