THE CENTER FOR DEMOCRACY & TECHNOLOGY'S PUBLIC COMMENTS
NOVEMBER 20, 2006

In the Matter of Zango, Inc., formerly known as 180solutions, Inc., Keith Smith, and Daniel Todd, File No. 052 3130

We would like to thank the Federal Trade Commission for the opportunity to comment on its recently announced settlement agreement with Zango, Inc.. We are hopeful that our comments will provide the FTC with useful feedback as you review this crucial case.

I. Comments on the Terms of the Settlement

The Center for Democracy & Technology would like to commend the FTC for achieving in the Zango case a landmark settlement in the realm of Internet law enforcement. This agreement sends a strong message that the FTC is ready and willing to take on Internet businesses that engage in deceptive and unfair practices regardless of the size or success of those businesses. There are three aspects of the settlement that CDT finds to be particularly valuable.

The first of these is the requirement that Zango cease showing advertisements to users who acquired Zango's software prior to January 1, 2006. CDT has implored Zango over the past three years to deal with its vast base of users who did not consent to downloading Zango's software by either terminating these users or allowing them to opt in to receiving ads from Zango. The cut-off date for legacy users set by the FTC largely accomplishes this.

Second, in a technology enforcement space that is replete with gray areas, the FTC has been clear in its definition of "express consent" and the requirement that Zango obtain express consent before installing software. By demanding that Zango conspicuously display all relevant information outside of its EULA, the FTC has finally set a disclosure standard that can be applied across the software industry, for the benefit of consumers. Not only will Zango be forced to retreat from deceptive or absent disclosures, but all downloadable software vendors will need to take note of this new standard.

The third particularly meaningful element of the settlement is the premise that Zango is responsible for the affiliates that act on its behalf. Zango has not been alone in shirking

1

The third particularly meaningful element of the settlement is the premise that Zango is responsible for the affiliates that act on its behalf. Zango has not been alone in shirking responsibility by blaming affiliates – software vendors across the industry have long sought to avoid their own culpability, and the FTC has made it clear that this practice must come to an end. By requiring Zango to both reform its own practices and contractually force those reforms down through its chain of affiliates, the FTC has set a new high standard for affiliate relationships in software distribution.

II. Cause for Concern

Although we are pleased with the terms of the settlement, we are concerned that Zango, even in its press reaction to the settlement, made deceptive statements about its recent behavior. As we suggested in our petition in January 2006, in our experience of working with Zango we have repeatedly found that the company's behavior does not match its rhetoric. In a press release issued on November 3, 2006, Zango claimed that it "has met or exceeded the key notice and consent standards detailed in the FTC consent order since at least January 1, 2006." CDT has seen much evidence to the contrary, and it alarms us that Zango's deceptive ways have continued from the very outset of the announcement of the settlement.

In Appendix A we document three examples of how Zango has failed to meet the standards set in section VI of the settlement order, the per-advertisement notice provision. None of the advertisements documented in Appendix A identify the program causing the display of the advertisement, nor do they provide a hyperlink to a webpage that provides uninstallation and complaint mechanism instructions. In fact, they provide absolutely no information that would allow consumers to correlate the advertisements' origins to Zango's software.

The first advertisement documented in Appendix A was displayed by Zango software on November 10, 2006, one week *after* the announcement of the settlement and the release of Zango's press statement. The other two examples are from September 2006.

CDT possesses documentation of 36 other similar examples that we collected during September and October 2006 (which we would be glad to share at the request of the FTC). Although we only collected advertisements on a consistent basis during those two months of this year, we found that until late October as many as 10% of the ads displayed by our Zango Search Assistant software lacked all forms of notice required by section VI. Thus, we have reason to believe that many more ads that did not conform to section VI were displayed throughout the preceding months of 2006. This is in direct conflict with Zango's statement referenced above.

III. Conclusion

The landmark nature of this settlement makes Zango's adherence to the terms of the agreement critical to future FTC enforcement in similar cases and to the FTC Act in general. Furthermore, the strength of the message that this agreement sends to the software industry depends on whether Zango indeed reforms its practices in order to achieve compliance.

There are two steps we encourage the FTC to take in order to ensure that the terms of the agreement are not violated. First, we urge the FTC to require Zango to rescind its November 3 press release and issue a retraction statement. This is the best way to bring Zango's rhetoric in line with its actions and to alert Zango to the fact that deception will not be tolerated.

Secondly, the FTC should closely monitor Zango's compliance. Information from others suggests that Zango may already be violating other terms of the agreement as well. A careful and consistent review of the behavior of both Zango and its affiliates will be crucial in determining whether Zango is respecting the settlement terms going forward.

We appreciate the opportunity to comment on a case of such significance. We look forward to the final version of the agreement and the positive impact that it will have on consumers.

Sincerely,

Ari Schwartz   Alissa Cooper
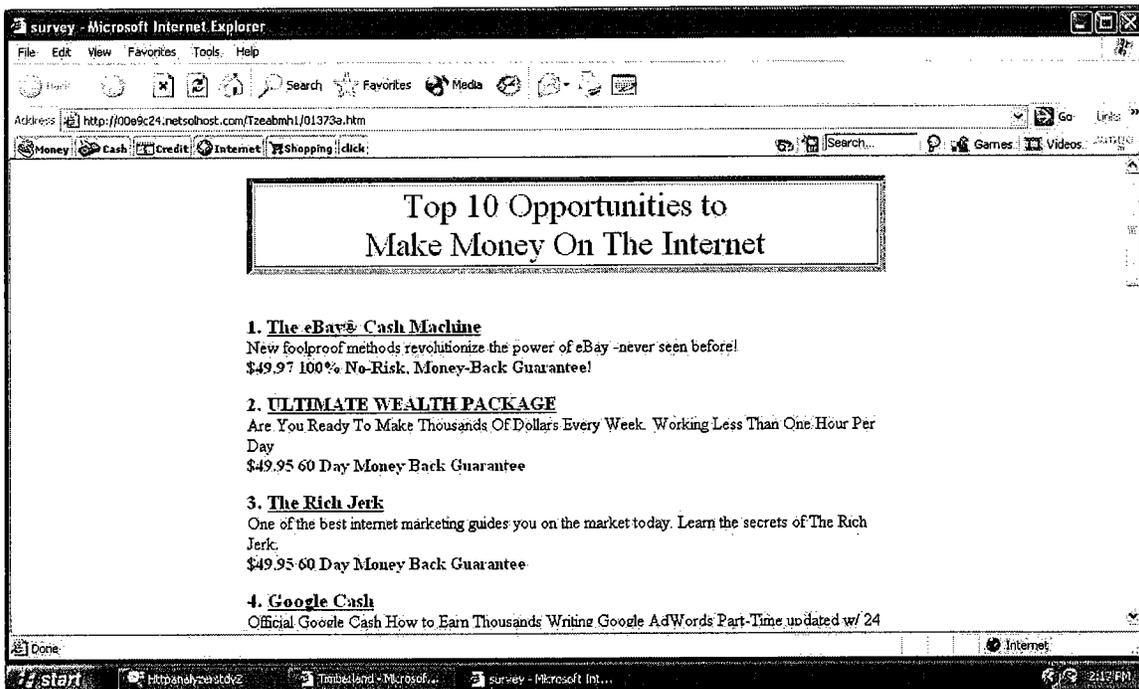Deputy Director   Policy Analyst

Appendix A: Ads in Violation of Section VI of the Settlement Order

CDT used a Windows PC running the Zango Search Assistant software to collect the ads shown below. While the ads were being displayed, we used a packet logger to record the chain of URL re-directions that led up to the display of each ad.

When the Zango Search Assistant displays an ad, it first queries a Zango server to find the appropriate ad to show. Thus, the first URL in each chain comes from the zango.com domain. The ad that is chosen may be delivered through one or more intermediaries. These intermediaries' URLs are the next steps in the chain. The last intermediary retrieves the domain containing the actual ad. The URL displayed in the address bar of each ad thus matches the last URL listed in the chain. Thus the chain of re-directions captured by our packet logger shows in each case that the ad originated with Zango. We are happy to provide the FTC with complete packet logs and further details about how these ads were displayed upon request.

1. Top 10 Opportunities to Make Money on the Internet advertisement

This advertisement was served by Zango Search Assistant on November 10, 2006.

4

CDT's packet logger showed the following chain of URL re-directions that led up to the display of this ad:

```
http://tvf.zango.com/showme.aspx?&SID=TCPWBSRK&OS=5.1.2600.2&SLID=1033&ULID=103
3&TLOC=1033&ACP=1252&OCP=437&DB=iexplore.exe&IEV=6.0.2600.1&TPM=200785920&APM=5
0823168&TVM=2147352576&AVM=2064084992&FDS=2347667456&LAD=1601:1:1:0:0:0&WE=5&SR
W=1075&SRH=644&CD=www.timberland.com&ma=2&did=4216&ver=8.50&duid=78D8086A80EBF2
14CDA6E79E1A5037062F0C1CA8851F58C6B30FF8F4FA31568C&partner_id=472245208&product
_id=4216&browser_ok=y&rnd=6&basename=zango&KWV=0&tzbias=5&MT=0178D8086A80EBF214
CDA6E79E1A5037062F0C1CA8851F58C6B30FF8F4FA31568C&DMT=0177375F00684BC1B12E01F95E
151D681F5E18B020417ACB4E245D89FB130E533D&WID=01C66A2B92764400&GVI=1&GPI=1&AXV=8
.50&FFGWV=8.50&HMP=CCC52B0AA1446DA664306E1F79146AC8B2C5D379A3931CA989561E4ED902
8258&keyword=%2etimberland%2ecom&bid=0&QSC=01EDBB5AA7E7F866B744801105DF65D808AA
5D6994030FE8B89C6A7A0810216744

http://00e9c24.netsolhost.com/Tzeabmh1/01373a.htm
```

2. Fossil advertisement

This Fossil advertisement was served by Zango Search Assistant on September 13, 2006.

The original site that was navigated to was the same site displayed by the advertisement, Fossil.com (thus the two identical windows displayed in the Windows Task Bar). CDT's packet logger showed the following chain of URL re-directions that led up to the display of this ad:

```
http://tvf.zango.com/showme.aspx?&SID=WLQJEJWZ&OS=5.1.2600.2&SLID=1033&ULID=103
3&TLOC=1033&ACP=1252&OCP=437&DB=iexplore.exe&IEV=6.0.2600.0000&TPM=200785920&AP
M=47435776&TVM=2147352576&AVM=2064805888&FDS=2480467968&LAD=1601:1:1:0:0:0&WE=5
&SRW=1075&SRH=644&CD=www.fossil.com&ma=2&did=4216&ver=8.0&duid=78D8086A80EBF214
CDA6E79E1A5037062F0C1CA8851F58C6B30FF8F4FA31568C&partner_id=472245208&product_i
d=4216&browser_ok=y&rnd=17&basename=zango&KWV=989&tzbias=5&MT=0178D8086A80EBF21
4CDA6E79E1A5037062F0C1CA8851F58C6B30FF8F4FA31568C&DMT=0177375F00684BC1B12E01F95
E151D681F5E18B020417ACB4E245D89FB130E533D&WID=01C66A2B92764400&GVI=1&GPI=1&AXV=
8.30&FFGWV=8.0&HMP=CCC52B0AA1446DA664306E1F79146AC8B2C5D379A3931CA989561E4ED902
8258&keyword=%2efossil%2ecom+%2efossil%2ecom%2f+%2efossil%2ecom%2fjump+%2efossi
l%2ecom%2fjump%2ejsp%3f+fossil%2ecom&bid=0&QSC=01C42017957F2CC192415AF1249682D5
4DFDDE354D9B623E57609F16B477DE7776

http://www.shoptvoffers.com/fossil2.html

http://clickserve.cc-
dt.com/link/tplclick?lid=41000000000642697&pubid=21000000000100870

http://www.fossil.com/coupon.jsp?affiliate=Performics&url=http%3A%2F%2Fwww.foss
il.com%2Fjump.jsp%3FitemID%3D0%26itemType%3DHOME_PAGE%26PSID%3DPFXMAINFSLB07210
6HPMAINPFX%20

http://www.fossil.com/jump.jsp?itemID=0&itemType=HOME_PAGE&PSID=PFXMAINFSLB0721
06HPMAINPFX
```
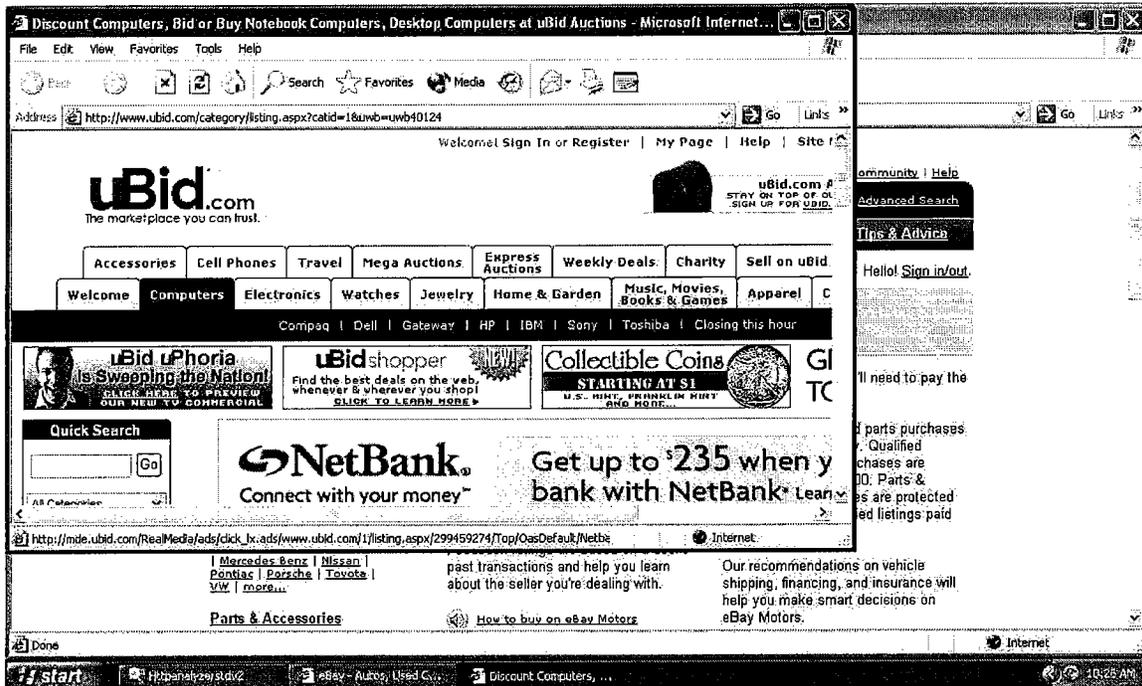
6

3. uBid advertisement

This uBid advertisement was served by Zango Search Assistant on September 14, 2006.

CDT's packet logger showed the following chain of URL re-directions that led up to the display of this ad:

```
http://tvf.zango.com/showme.aspx?&SID=WLQJEJWZ&OS=5.1.2600.2&SLID=1033&ULID=103
3&TLOC=1033&ACP=1252&OCP=437&DB=iexplore.exe&IEV=6.0.2600.0000&TPM=200785920&AP
M=75448320&TVM=2147352576&AVM=2062626816&FDS=2477408256&LAD=1601:1:1:0:0&WE=5
&SRW=1075&SRH=644&CD=www.motors.ebay.com&ma=2&did=4216&ver=8.0&duid=78D8086A80E
BF214CDA6E79E1A5037062F0C1CA8851F58C6B30FF8F4FA31568C&partner_id=472245208&prod
uct_id=4216&browser_ok=y&rnd=3&basename=zango&KWV=990&tzbias=5&MT=0178D8086A80E
BF214CDA6E79E1A5037062F0C1CA8851F58C6B30FF8F4FA31568C&DMT=0177375F00684BC1B12E0
1F95E151D681F5E18B020417ACB4E245D89FB130E533D&WID=01C66A2B92764400&GVI=1&GPI=1&
AXV=8.30&FFGWV=8.0&HMP=CCC52B0AA1446DA664306E1F79146AC8B2C5D379A3931CA989561E4E
D9028258&keyword=ebay%2acom&keywordm=used%2acar+used%2acars+used%2bcars+autos+m
otorcycles+ebay%2amotors+trucks+online%2aauction+online%2bauction&bid=0&QSC=019
59BF9D22EFCB0E77D2A081F0B42EDC88861610031F714446BAF7FB5E1702F60

http://leadgenetwork.com/sw/20044/CD176/&dp=48289

http://www.ubid.com/category/listing.aspx?catid=1&uwb=uwb40124
```