

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from proposed respondents Zango, Inc., formerly known as 180solutions, Inc. and Keith Smith and Daniel Todd, individually and as officers of Zango, Inc. (together “Respondents”). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

General Allegations

Respondents develop, market, and distribute via Internet downloads advertising software programs (“adware”) – including programs with the names n-CASE, 180search Assistant, Seekmo, and Zango – that monitor consumers’ Internet use in order to display targeted pop-up ads. This matter concerns allegations that Respondents: (1) via a network of numerous affiliates and sub-affiliates installed their adware on consumers’ computers without adequate notice or consent; and (2) made their adware difficult for consumers to identify, locate, and remove.

The Commission’s complaint alleges that from at least 2002 through 2005, the primary way Respondents distributed their adware was through a network of affiliates. These affiliates often recruited large numbers of third-party sub-affiliates who purported to offer, generally for free, some content to the public, such as Internet browser upgrades, utilities, games, screensavers, peer-to-peer file sharing software and/or entertainment content (hereinafter “lureware”) and bundled the adware with that content.

The Commission’s complaint further alleges that consumers often have been unaware that Respondents’ adware would be installed on their computers because it was not adequately disclosed to them that downloading the lureware would result in installation of Respondents’ adware. In some instances, no reference to the adware was made on websites offering the lureware or in the install windows. In others, information regarding the adware was available only by clicking on inconspicuous hyperlinks contained in the install windows or in lengthy terms and conditions regarding the lureware. Often the existence and information about the effects of Respondents’ adware could only be ascertained, if at all, by clicking through multiple inconspicuous hyperlinks. Other affiliates and sub-affiliates used security exploits and drive-by downloads to bypass consumer notice and consent completely. The complaint alleges that Respondents knew or should have known of their affiliates’ and sub-affiliates’ widespread failure to provide adequate notice of their adware and obtain consumer consent to its installation.

The Commission's complaint further alleges that Respondents, until at least mid-2005, made identifying, locating, and removing their adware extremely difficult for consumers. Among other things, Respondents: installed code on consumers' computers that would enable their adware to be reinstalled silently after consumers attempted to uninstall or remove it; failed to identify adequately the name or source of the adware in pop-up ads so as to enable consumers to locate the adware on their computers; named adware files or processes with names resembling core systems software or applications and placing files in a variety of locations; listed the adware in the Windows Add/Remove utility under names intended and/or likely to confuse consumers; required consumers to have a live Internet connection and download additional software from Respondents to uninstall the adware; represented to consumers that the adware did not show pop-up ads and/or exaggerated the consequences of uninstalling the adware; provided uninstall tools that failed to uninstall the adware in whole or part; and/or reinstalled the adware files on consumers' computers with randomly generated names to avoid further detection and removal.

Deception Allegation

The Commission's complaint alleges that by offering content over the Internet such as browser upgrades, utilities, games, screensavers, peer-to-peer file sharing software and/or entertainment content, without disclosing adequately that this content was bundled with Respondents' adware, Respondents committed a deceptive practice. The bundling of Respondents' adware, which monitors their Internet use and causes them to receive pop-up advertisements, would be material to consumers in their decision whether to download the other software programs and/or content.

Unfairness Allegations

The Commission's complaint also alleges that it was an unfair practice for Respondents to install on consumers' computers, without their knowledge or authorization, adware that could not be reasonably identified, located, or removed by consumers. In addition, the complaint alleges that it was an unfair practice, in and of itself, for Respondents not to provide consumers with a reasonable means to identify, locate, and remove Respondents' adware from their computers. The complaint further alleges that these practices have caused or are likely to cause substantial consumer injury by requiring consumers to spend substantial time and/or money to locate and remove this adware from their computers. The injury to consumers was neither reasonably avoided by the consumers themselves, nor outweighed by countervailing benefits to consumers or competition.

The Proposed Consent Order

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future and to halt continuing harm caused by Respondents' prior unlawful practices. Part I of the proposed order prohibits Respondents from contacting any consumer's computer, to display ads or otherwise, if their adware was installed on that computer before January 1, 2006.

Parts II and III prohibit Respondents from, or assisting others in, installing software onto any computer by exploiting security vulnerabilities or failing to give adequate notice to consumers, or installing any software program or application without express consent. “Express consent” is defined in the proposed order to require clear and prominent disclosure of material terms prior to and separate from any end user license agreement, and consumer activation of the download or installation via clicking a button or a substantially similar action.

Part IV requires Respondents to establish, implement, and maintain a clearly disclosed, user-friendly mechanism through which consumers can report and Respondents can timely address complaints regarding Respondents’ practices.

Part V requires Respondents to establish, implement, and maintain a comprehensive program that is reasonably designed to require affiliates to obtain express consent before installing Respondents’ software onto consumers’ computers. Part V also contains sub-parts mandating certain measures Respondents must take to monitor their distribution network.

Part VI requires Respondents to identify advertisements served via Respondents’ adware in order for consumers to easily locate the source of the advertisement, easily access Respondents’ complaint mechanism, and access directions on how to uninstall such adware.

Part VII requires Respondents to provide reasonable and effective means for consumers to uninstall Respondents’ adware.

Part IX requires Respondents to pay \$3 million to the Commission over the course of a year. In the discretion of the Commission, these funds may be used to provide such relief as it determines to be reasonably related to Respondents’ practices alleged in the complaint, and to pay any attendant administrative costs. Such relief may include the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive practices. If the Commission determines, in its sole discretion, that such relief is wholly or partially impractical, any funds not used shall be paid to the U.S. Treasury.

Part X requires Respondents to cooperate with the Commission in this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Complaint.

The remaining order provisions govern record retention (Part VIII), order distribution (Part XI), ongoing reporting requirements (Parts XII and XIII), and filing a compliance report (Part XIV). Part XV provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.