UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

March 7, 2007

Mark Bohannon, Esq.
General Counsel & SVP Public Policy
Software & Information Industry Association
1090 Vermont Ave., NW, Sixth Floor
Washington, D.C. 20005-4095

Re: Zango, Inc., f/k/a 180solutions, Inc., Keith Smith, and Daniel Todd
FTC Matter No. 0523130

Dear Mr. Bohannon:

Thank you for your December 5, 2006 comment regarding the above-referenced matter. Your comment was placed on the public record pursuant to Section 2.34 of the Commission's Rules of Practice, 16 C.F.R. § 2.34, and was given serious consideration by the Commission.

In your comment, you address the concern of the Software & Information Industry Association (SIIA) that several elements of the proposed order and complaint "may unintentionally create confusion for legitimate vendors of software and information products." SIIA raises its concerns "[w]ithout prejudice to the final outcome of this proceeding," but merely to urge the FTC to carefully consider how broadly to use this case as a platform for further cases involving spyware and malware.

SIIA raises three points. First, SIIA seems to be concerned that the deception count of the proposed complaint (paragraph 16) neglects to allege specific "harm" when alleging a failure to disclose or a failure to disclose adequately that monitoring software was being downloaded. The Commission, however, does not need to allege injury to consumers when pleading deception. *See Novartis Corp.*, 127 F.T.C. 580, 685 (1999). Instead, an act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and it is material, *i.e.* "likely to affect a consumer's choice of or conduct regarding a product." *Thompson Medical Co.*, 104 F.T.C. 648, 816 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Nevertheless, "[a] finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique." *FTC Policy Statement on Deception*, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984). In addition, the complaint as a whole references a variety of harms, including unwanted adware, unwanted pop-up advertisements, the inability to remove the adware, and the expense of purchasing third-party applications to remove the unwanted adware.

Second, SIIA is concerned that the proposed complaint and order's requirement for disclosures in addition to those in a EULA creates a more general standard for *all* software downloads. This is not the case because these requirements are fencing-in relief related to the particular conduct and software at issue. Nevertheless, it is important for industry to recognize that a EULA disclosure alone may not be sufficient to correct a misleading impression created elsewhere. *See, e.g.*, FTC, *Dot Com Disclosures* (adequacy of disclosure required to prevent deception is based on the overall net impression) (available at www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html); *cf. FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (fine print notices are insufficient to undo deceptive net impression); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff'd* 265 F.3d 944, 956 (9th Cir. 2001) (disclaimers and truthful statements that are made outside the context of a deceptive representation do not automatically undo the deception and exonerate deceptive activities). Accordingly, the Commission will analyze EULA-only disclosure on a case-by-case basis, weighing what information is material to consumers and the overall, net impression the consumer has regarding the transaction.

Third, SIIA contends that the proposed complaint pleads insufficient facts regarding the technology and business methods used by Zango, making it difficult for industry to assess with confidence a predictable basis for the FTC's actions. The complaint, however, provides numerous facts regarding Zango's business methods to provide a predictable basis for FTC actions, *e.g.*, exploiting computer vulnerabilities, failing to provide adequate notice and obtain consumer consent, and failing to provide a means to uninstall. *See, e.g.*, Proposed Complaint ¶¶ 10-15. Moreover, the Zango complaint and order support the following propositions: (1) a consumer's computer belongs to him or her, not the software distributor, *i.e.*, it must be the consumer's choice whether or not to install software; (2) buried disclosures of material information are insufficient to correct actions or statements that create an otherwise misleading impression; and (3) if a distributor puts a program on a consumer's computer that the consumer does not want, the consumer must be able to uninstall or disable it.

After considering your comments, the Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without modification.

Thank you again for your comments. The Commission is aided in its analysis by hearing from a variety of sources in its work, and we appreciate your interest in this matter.

By direction of the Commission.

Donald S. Clark
Secretary