



Office of the Secretary

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

March 7, 2007

Mr. Jerry Cerasale
Senior Vice President, Government Affairs
Direct Marketing Association
1615 L Street, N.W., Suite 1100
Washington, D.C. 20036

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

Dear Mr. Cerasale:

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 assert the Direct Marketing Association's position that the proposed order's "express consent" requirement should be limited to fencing in the specific conduct at issue, and not have a broader future impact on all software downloads. You contend that, although perhaps appropriate in the above-referenced matter, consent separate from an End User License Agreement (EULA) is not a standard that would be appropriate for many software downloads and that acceptance of EULAs through "click-wrap" licenses is commonly used and supported by legal precedent. You further suggest that different standards and guidelines should apply to various types of software downloads (*e.g.*, the need to distinguish cookies and other similar technologies), rather than adopting a blanket rule requiring specified consent for all software or applications.

The proposed consent order does not create an overarching standard for *all* software downloads. It is fencing in 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/online/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

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case-by-case basis, weighing what information is material to consumers and the overall, net impression upon the consumer regarding the transaction.

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