



Office of the Secretary

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

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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.

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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