

**TESTIMONY OF
CHRISTINE A. VARNEY, ESQUIRE
HOGAN & HARTSON LLP
On Behalf of
ZANGO, INC.
Before the
SUBCOMMITTEE ON COMMERCE, TRADE
AND CONSUMER PROTECTION
THURSDAY, MARCH 15, 2007**

Summary

- Zango is an online media company that provides consumers with free access to premium online content, and provides content creators and Web publishers with the opportunity to monetize their online creations and traffic, by delivering to advertisers a receptive consumer audience when those consumers are most likely to be making an online purchasing decision.
- Zango's desktop advertising software requires user notice and consent, is easy to uninstall, and labels the ads it serves to consumers by identifying the source of the ads and of the Zango software itself. The software thus meets the requirements of H.R. 964, and since January 1, 2006 has also featured a proprietary technology designed to detect and thwart the efforts of rogue individuals or entities attempting to use illicit means to install software on computers without notice and consent.
- Federal legislation is needed to (1) protect Internet users from spyware; (2) require clear and conspicuous notice, consent, simple uninstallation procedures, and ad-labeling; and (3) provide a single coherent and pro-competitive federal regime for consumer protection in this area rather than a patchwork quilt of state laws, some of which are aimed more at protecting home-state businesses than consumers.
- Sections 2 and 3 of H.R. 964 appropriately and carefully distinguish between software functions that are unacceptable *per se* versus those for which consumer choice and consumer benefits are preserved together with appropriate consumer protections. Zango also supports the preemption provisions of section 6 and the tracking cookie study in section 8.
- The liability exception for so-called "good Samaritans" in subsection 5(c) should be stricken. It will unnecessarily restrict the FTC's ability to pursue enforcement against those parties the FTC believes warrant it. And the provision opens the door to judicial expansion of the immunity concept in private litigation between commercial parties based on a purported "congressional policy of protecting good Samaritans," even though some of the companies who would argue for such immunity themselves misidentify and mislabel other software in their own marketing efforts.
- Zango supports all provisions of H.R. 964 with the exception of subsection 5(c).

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Chairman Rush, Ranking Member Stearns, and Members of the Subcommittee:

I am Christine Varney, a partner in the law firm of Hogan & Hartson LLP, and I am appearing here today on behalf of my client Zango, Inc., an online media company based in Bellevue, Washington, outside Seattle. Zango appreciates being given the opportunity to share with the Subcommittee its views on H.R. 964, the "Securely Protect Yourself Against Cyber Trespass Act," and I am pleased to be here to represent them.

Zango provides consumers with access to a large and ever-expanding catalog of more than 100,000 pieces of premium Web content, including online videos, games, music, tools, and utilities. Much like television, this content is funded by advertising and can therefore be provided free to consumers. Using a clear and conspicuous notice and consent process, 20 million consumers have chosen to enjoy those benefits, and tens of thousands of consumers elect to download Zango software every day. At the same time, this business model offers content providers and Web publishers the opportunity to monetize their creations and their online traffic. It does so by delivering to advertisers a receptive consumer audience when consumers are most likely to be making an online purchasing decision.

The company has more than 3,000 advertising partners. Advertisers purchase keywords from Zango in a manner similar to purchasing keywords from paid search engine providers like Google or Yahoo. Consumers in turn gain access to the free content by installing Zango's proprietary software, which today is served directly from the company's own servers in order to give the company appropriate control over the notice and consent process described in further detail below. Zango's Web publisher network includes direct relationships with several hundred Internet businesses operating thousands of Web sites. These Web publishers monetize premium portions of their Web sites by requiring users to install Zango in order to access that content without charge. Zango also works with online content providers, delivering them a much-needed revenue stream in order to continue to develop content that can be kept free for consumers.

In short, Zango links the consumer, content provider, Web publisher, and advertiser into one cohesive online ecosystem – in effect, a “Content Economy” that offers each participant a level of access, opportunity, and return never before possible. The company has also won recognition for its achievements from several objective observers of the online industry. This year Zango was named one of AlwaysOn Media's “Top 100 Private Companies,” and in 2005 it ranked number 7 on the Inc. 500 “Fastest Growing Private Companies” list. That same year, CEO Keith Smith was named one of Fortune Small Business' “Best Bosses,” and in several recent years the company was recognized by Washington CEO Magazine as one Washington State's “Best Companies to Work For”.*

* In connection with its acquisition of another firm during the summer of 2006, the company changed its corporate name from 180solutions, Inc. to Zango, Inc., reflecting the brand name of its primary consumer software product. The honors mentioned above prior to mid-2006 were awarded to 180solutions, Inc., but the company's senior management team have remained the same following the acquisition, including its CEO, President and COO, and Executive Vice President and Chief Compliance Officer.

How Zango Works

Zango's desktop advertising model differs from other marketing applications in several respects. First and foremost, Zango's notice and consent process would readily meet the requirements of H.R. 964 (as would its uninstallation and ad-labeling functions further described below). Specifically, prior to download and installation, the software displays to every potential user a conspicuous and plain-language description of the software and requires not one but two opt-in consents. It does this through a complex set of technologies that Zango invented for this very purpose, in response to concerns its executives heard beginning in 2004 from Members of this Committee, the Senate Commerce Committee, their respective staffs, and consumer advocates such as the Center for Democracy and Technology. Named Safe and Secure Search (S3), Zango's proprietary technology is designed to thwart the efforts of rogue individuals or entities that use botnets, Windows security holes, and other illicit means to attempt to fraudulently install software onto computers without user notice and consent. This technology has been a part of Zango's software installation requirements since September 2005. As of October 2005, Zango also ceased paying publishers for distribution of pre-S3 versions of its software. A new and enhanced version of S3, included as part of every download since January 1, 2006, features a closed-loop system that enables quicker detection of unauthorized attempts to install the software.

Second, Zango does not track or store *any* personally identifiable information (PII). Since H.R. 964 and its predecessors have been commonly referred to as "spyware" bills, it is important to emphasize that Zango does not collect a user's name, address, e-mail address, phone number, social security number, credit card number, or any other personally identifying information. In short, Zango is not spying on anyone. Zango's software uses only the non-PII data necessary to provide consumers with access to comparative shopping opportunities during their online search process.

This consists mainly of the momentary linkage of two data points – the URL address of the site the user visits, and the IP address of the computer being used. Even those two minor data points are not retained or stored.

Third, instead of merely providing hyperlinks in response to a search query, or simply serving the user with “click-throughs” or banner ads, Zango delivers an advertiser’s Web site (or specific Web site page) in response and related to the consumer’s search for a product or service, so that the user may directly access the advertiser’s product. This business model avoids interrupting the user’s enjoyment of non-transactional computer activity (during which time advertisements are not designed to be delivered) – for example, playing games, typing a document, or listening to music – and instead displays the advertiser’s Web site or page only during Web browsing activity that would appear to have the highest relevance to the advertiser and consumer alike. This unique ad-delivery method, called “time-shifted advertising,” separates the advertising experience from the content it supports and moves it to a time and context more valuable to the consumer receiving the message – providing the consumer with the benefits of comparative offers on the Web at a time the consumer is more likely to be shopping online.

Fourth, advertisement presentation on Zango is standardized so that consumers see competing Web offers in a separate browser window that are prominently branded with Zango’s company name, the Web location from which its software was downloaded, and a link to its customer support page (which includes instructions for uninstallation of the software). To ensure that consumers are provided a safe, meaningful, pleasant and positive download and advertising experience, Zango requires its partners to follow both a Web Publisher Code of Conduct and an Advertiser Code of Conduct. Failure to abide by these Codes is cause for immediate termination,

forfeiture of any financial gains from illicit installations, de-activation of ad campaigns, and penalties.

Finally, Zango does not hide, as some advertising programs do, in a registry or file that makes it difficult for consumers to locate on their computers; instead, it provides a branded icon in the computer's "system tray" visible at the foot of the screen. It is also identified clearly on the list of programs the user can see when he or she clicks on the "Add or Remove Programs" menu. Consequently, the software can be easily uninstalled by clicking the "Remove" button next to the entry for Zango. In addition, the Frequently Asked Questions (FAQ) page on Zango's Web site also provides clear instructions and a link to "uninstall Zango." If issues or questions remain, the company also provides online customer support for its users 24 hours a day, seven days a week.

Zango Supports Most Provisions of H.R. 964

We commend the Subcommittee, and the full Energy and Commerce Committee, for its efforts to enact federal legislation that (1) protects Internet users from the ill effects of spyware programs; (2) requires clear and conspicuous notice, consumer consent, simple uninstallation procedures, and an ad-labeling function for programs that display advertising to consumers on their computers; and (3) provides a single coherent and pro-competitive federal regime for consumer protection in this area, rather than a patchwork quilt of differing state laws, some of which are motivated less by an intention to protect consumers than by a desire to protect favored home-state businesses from Internet competition.

The policy debate in this area has addressed not only privacy concerns about how computers may be secretly accessed and used by nefarious third parties, but also the belief in

some quarters that consumers simply dislike online advertising. Zango's experience challenges that belief, and it would point to the 20 million consumers who have knowingly and willingly installed Zango on their computers as strong evidence to the contrary. Moreover, online advertising is no less a legitimate form of expression protected by the First Amendment than advertising in the more traditional media, not to mention an essential means of providing useful information to the growing number of consumers who prefer to do their shopping online and sponsorship for the massive quantities of content that can be accessed online.

Nonetheless, Zango recognizes that concern over how some advertising has ended up on consumers' computers without their knowledge or consent is why H.R. 964, like most of its predecessor and companion bills, addresses downloadable programs that deliver advertising to consumers, and not just "spyware" – a pejorative term that should be limited to software that, *without notice and consent*, collects PII about the user, transmits PII to any third party, or engages in any deceptive, fraudulent, or dangerous action. And although as I emphasized above, Zango is *not* spyware, the company long ago recognized that its success, and ultimately the success of its business model, was dependent upon Internet users and consumers being able to understand and trust its value proposition, and upon a level regulatory playing field for all online advertising businesses. Thus, Zango has supported congressional action in this area and, as far back as the 108th Congress, specifically endorsed H.R. 2929 as reported by this Committee, a well-crafted measure to achieve the three goals described above.

Zango is pleased that the essential elements of that bill were incorporated into H.R. 29 during the 109th Congress and into the current Congress's H.R. 964, which we are discussing

here today. Zango strongly supports federal legislation to prohibit devious and fraudulent behavior with respect to the collection of PII or the secretive installation of software on users' computers.

H.R. 964's greatest strength is its recognition that the conduct and intentions underlying different forms of downloadable software require different legislative approaches. For example, not all software that serves advertising collects PII; Zango is an example of that. By contrast, there are many programs that collect PII and even sell it to third parties without ever serving a single advertisement. Many Web sites do both without ever giving the user notice or obtaining the user's consent.

Section 2 of the bill would absolutely prohibit the dangerous and pernicious practices that are most frequently associated with spyware – practices that, in fact, have contributed to unfounded and unfair suspicions about many other downloadable software applications including Zango's. Section 3 of the bill preserves consumer choice and consumer benefits for other downloadable software, including desktop advertising, by appropriately and carefully requiring clear notice, opt-in consent, easy uninstallation, and plain identification to the consumer of the source of an advertisement the consumer may be viewing. Zango supports these provisions, as well as the provisions of section 3 giving the Federal Trade Commission (FTC) authority to craft regulations to implement those requirements.

We also commend the authors of the bill for continuing to include the preemption provisions of section 6. While some states have moved to enact so-called anti-spyware laws, it is

widely believed that several of these were motivated more by a desire to protect powerful home-state business interests from online competition – to the obvious detriment of consumers – than to protect computer users from dangerous software. Even where no such intention exists, this Committee has wisely and repeatedly recognized that state-by-state legislation affecting online commerce is unwieldy, impractical, and ultimately confusing to businesses and consumers alike. The preemption provision of the bill appropriately continues in section 6(a)(3) to protect state trespass, contract, tort, and fraud laws. Still, Zango suggests that report language clarify the Committee’s intention that states not be permitted to override H.R. 964’s federal approach with contrary or additional requirements disguised to fit within one of section 6(a)(3)’s exceptions.

The authors of this legislation originally intended to address only the issues raised by downloadable software. Nonetheless, because Zango competes directly with other online business models that use Web sites rather than downloaded software to serve ads, it is useful to reiterate a point Zango has made in comments to the Committee on earlier versions of this legislation. The primary distinction between the manner in which these other business models generate their advertising revenues and Zango’s business model is that Zango’s conspicuously displays a notice to the consumer of what the consumer is getting and requires the consumer’s explicit consent before that advertising is displayed. In stark contrast to that approach, which collects absolutely no PII, many popular Web sites require a user to provide a variety of personal information in order to visit those sites. These Web sites then use that personal information to serve advertising to the users, and even transfer that information to third parties for use in other advertisers’ programs, whether the user has consented to it or not. Zango acknowledges that this bill will not directly address the privacy concerns inherent in those marketing practices but, in

the name of competitive parity, Zango commends the Committee for seeking from the FTC, in section 8, a report on the use of tracking cookies in the delivery and display of online advertising.

The Liability Exception in Subsection 5(c) Should Be Stricken

Zango is concerned by subsection 5(c) of the bill, which has been described as a liability exception for so-called “good Samaritans.” Although it was undoubtedly well-intended when it first appeared in the 109th Congress’s H.R. 29, it is potentially both anticompetitive and, based on Zango’s own experience, subject to commercial abuse. Some companies selling scanning applications to consumers compete with each other by issuing inflammatory warnings designed to frighten consumers about software “lurking” on their computers. Rather than assisting Internet users and consumers, the liability exception provided by subsection 5(c) – and by most other versions of a so-called “good Samaritan” provision that were discussed in the last Congress – could primarily end up serving the interests of the most aggressively marketed scanning applications. If not deleted, H.R. 964’s liability exception may also distort the market for online advertising dollars in an anticompetitive manner, mainly to the benefit of large companies that compete with the much-smaller Zango. Zango urges the Committee to strike it from the bill.

At a minimum, even if read most narrowly to be limited strictly to actions taken by the FTC, the provision unnecessarily restricts the FTC’s ability to pursue enforcement against those parties the FTC believes warrant it. Equally important, the presence of such an immunity provision in the bill opens the door wide to judicial application and expansion of the concept in private litigation between commercial parties. It will not be long before a purported

“congressional policy of protecting good Samaritans” is cited by a scanning application in a court of law as the basis for dismissing or defending against a civil claim that the scanning application has misidentified, mislabeled, or even commercially defamed a useful item of software, including perhaps even another scanning application.

This is more than just a hypothetical concern for Zango. Regrettably, the company has had direct experience, including litigation, with the kind of software provider that would argue for legal immunity under a logical extension of a provision like this. As difficult as the experience was for all concerned, the relevant point here is that Zango’s filing of a lawsuit ultimately had the desired effect – forcing the scanning application to alter its mischaracterizations and enabling Zango to remove the sole impediment to an important business deal. If subsection 5(c) had been federal law when Zango’s interaction with this scanning application provider began, the provider might have felt far more comfortable adhering to its position. At a minimum, it could have constructed a plausible legal and policy argument for an affirmative defense of immunity that could have prolonged the litigation until a fact-finder had the opportunity to decide whether it had acted “in good faith” – a highly subjective standard that, as any litigator knows, can be difficult to disprove.

Multiply this single incident by dozens of software providers battling dozens of scanning applications in court, and subsection 5(c) could have the unintended consequence of promoting many more protracted legal battles over how the scanning applications label or characterize software. If this provision became law, it is reasonable to foresee state courts having to consider and decide whether the particular sensitivity that Congress evinced in H.R. 964 for these so-

called “good Samaritans” suggests a policy that would support extending such immunity to those scanning applications as a common law defense under state law. Legitimate software providers could well see their businesses harmed in the process, as Zango did, while the legislation unintentionally facilitates the typical scanning application’s business strategy of attempting to gain market share by claiming to find more, and more allegedly damaging, software on the customer’s computer.

In summary, when it comes to scanning applications, experience tells us the following:

1. Scanning applications get it wrong . . . a lot.
2. Scanning criteria are far more subjective than most scanning application companies would have you believe.
3. Fear mongering is a standard “tool of the trade” in the scanning application market.
4. Recourse against scanning application vendors is difficult and expensive – and could become more so if subsection 5(c) were enacted into law.

Scanning applications are not the only businesses that have a financial interest in interfering with advertisers’ ability to work with companies like Zango to reach consumers. Many large and small online service providers, Web sites, and contractors serving those parties profit from their own competing online advertising models. Companies actively pushing the use of their own free ad-supported software and Web sites have every incentive to engage in and to continue the same sort of fear-mongering that benefits the scanning applications. And the same legal arguments could be made by those companies in litigation as the grounds for an affirmative defense of “good Samaritan” immunity. Based on Zango’s own experience – including experience dealing with some companies that possess enormous economic power in the online marketplace – it can readily foresee some of those companies using this provision in an effort to

cripple desktop advertising software and thus eliminate a form of competition for advertising dollars that is arguably much more transparent to the consumer than the models they use.

Immunity grants in federal legislation are generally confusing at best, and ill-advised in most instances. There is no compelling reason in this case to alter the usual understanding that commercial disputes between commercial parties should be settled commercially, and that the conduct of commercial parties subject to the jurisdiction of the FTC is not entitled to a blanket exception from FTC enforcement merely because of the particular product or service being sold.

The passage of time since the House's consideration of H.R. 29 in 2005 has provided an excellent opportunity for further analysis of the "good Samaritan" concept and of the legislative language repeated in H.R. 964. Zango respectfully hopes that the preceding discussion will persuade the Energy and Commerce Committee to delete subsection 5(c) in any Managers' Amendment that may be offered during Subcommittee or Full Committee markup. With that single revision, Zango would strongly support passage of the legislation as introduced

Zango's FTC Settlement

Last week, following a public comment period and by a unanimous vote of 5-0, the FTC issued a final approval of the settlement it initially reached with Zango last fall. The settlement followed an investigation in which Zango cooperated fully. The investigation focused primarily on the company's alleged business practices during a period very early in its history during which it relied on outside affiliates to enforce its consumer notice and consent policies. Unfortunately, the company's management began to learn even before the FTC commenced its

inquiry that its early business model allowed deceptive third parties to exploit the company's system to the detriment of consumers, advertisers, and publishers. For Zango, which was founded by two childhood friends and, like so many Internet start-ups, grew more quickly than they had ever imagined possible, it was a painful lesson in who to trust. When the preliminary FTC settlement was announced last October, CEO Keith Smith publicly apologized for the resulting negative impact on those consumers, advertisers, and publishers who were adversely affected by any unwanted downloads.

Although the settlement requires Zango to adhere to a set of standards outlined in the order that are fully consistent with the requirements of H.R. 964 and to pay a \$3 million penalty, two additional points are essential to note.

First, the agreement was made for settlement purposes only and does not constitute an admission that the law, as it stood at the time of the allegations, was violated. In essence, the FTC staff's complaint charged Zango with responsibility for its failure to anticipate the unscrupulous actions of some deceptive third parties. The company felt it best under those circumstances to apologize to anyone who had been harmed, pay the fine, and welcome the FTC's consent order – which included provisions that were in accord with Zango's current business model – as a template for the industry standards and best practices.

Second, more than a year before the FTC even began its investigation of past practices, Zango's management recognized that the online business of downloading software and applications needed a set of rules or guidelines with which all should comply. As a result of

their discussions with policymakers and public interest advocates here in Washington as far back as 2004, they began working with a number of inter-industry groups to develop best practices that required informed notice and consent for consumers. As noted earlier, they advocated for federal legislation to govern downloadable software practices. And on January 1, 2006, more than 10 months before the proposed FTC settlement was announced, they retired the distribution of their past products.

As of that date, they required that all Zango applications include an enhanced version of their proprietary Safe and Secure Search, or S3, technology. That new version included a built-in software enhancement, known as their Closed Loop System, that enables quicker detection of unauthorized attempts to install their desktop advertising software. They overhauled their distribution channel to completely eliminate third-party software distribution. They assembled an aggressive team of security professionals dedicated to the monitoring of the Zango software system 24 hours a day, 7 days a week, 365 days a year.

As a result of these efforts, Zango met or exceeded the key notice and consent standards detailed in the FTC settlement order literally months before that order was proposed, and the company now meets every other FTC requirement as well. While it may seem counterintuitive for Zango to welcome an FTC settlement under which it agreed to pay a \$3 million fine, that is indeed the case because Zango views the FTC's standards as a set of best practices and a significant step forward in terms of providing legal clarity for the online advertising industry and, indeed, for all who offer downloads over the Internet.

Conclusion

The time has come for all online marketers to embrace and implement these standards as Zango has, but unfortunately not all will. Too many, in fact, will not until they are compelled to do so by new laws, regulations, or FTC orders that apply not only to Zango but to them as well. As the desktop advertising industry continues to evolve, Zango will continue to strengthen its business practices and enhance its technology to make the online economy increasingly valuable for everyone by enabling consumers, advertisers, and publishers to reach each other. With the single modification Zango has suggested above, H.R. 964 offers the promise of extending needed consumer protections across the online economy so that online commerce and content may continue to thrive and prosper in an atmosphere of trust.

Thank you again for inviting Zango to participate in today's hearing and for your consideration of its views.