Dunstan et al v. comScore, Inc.
Doc. 225 Att. 7

EXHIBIT 7

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September 30, 2013

VIA ELECTRONIC MAIL

Mr. Andrew H. Schapiro
Ms. Robyn M. Bowland
QUINN EMANUEL URQUHART & SULLIVAN, LLP
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robynbowland@quinnemanuel.com

Re: *Dunstan, et al. v. comScore, Inc.*, No. 1:11-cv-05807 (N.D. Ill.)

Dear Andy and Robyn:

I write to memorialize the important points discussed during our September 26th meet and confer.

Extending Discovery-Related Deadlines

After assessing comScore's most recent document production (1.5 million pages in total by our count, which we received on September 17th), we believe that an extension of the discovery deadlines is necessary to give us adequate time to review and analyze the production. Thus, we anticipate moving the Court to extend the Parties' deadlines to file motions to compel and supplement written discovery responses (currently set for October 7th and 11th, respectively) by thirty (30) days. Likewise, and in anticipation of comScore supplementing its discovery responses, as well as the possibility that Plaintiffs may propound additional requests after reviewing comScore's document production, we also intend on moving the Court for a ninety (90) day extension to the deadline for completion of fact discovery, *i.e.*, from December 20, 2013 to March 20, 2014.

We anticipate filing the motion to extend discovery deadlines no later than Wednesday, October 2, 2013. Of course, we'd like to include your view on the proposed extensions, so please let us know comScore's position on extending the discovery deadlines as quickly as possible.

Roadmap to comScore's August 30th Document Production

We asked that comScore provide Plaintiffs with a roadmap to its August 30th document production (no different than the roadmap comScore provided for its production during the class-discovery period). You stated that you believe comScore's production complies with Rule 34, but that you would consider the request and discuss it with your client. Please do so and let us know comScore's position.

comScore's Responses to Plaintiffs' Written Discovery Requests

Metadata associated with comScore's August 30th Document Production: We discussed comScore's failure to provide certain metadata associated with its document production. Plaintiff Dunstan's Requests specified that files should be produced with "associated Metadata," including information about the "characteristics" and "origins" of files. We therefore ask that comScore list the directory paths for each file produced. *See Autotech Techs. LP v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 559–60 (N.D. Ill. 2008) (noting that courts will look to a party's discovery requests to determine what metadata the opposing party should produce and that "[s]ome examples of metadata for electronic documents include: a file's name, a file's location (*e.g.*, directory structure or pathname) . . . .").

Please let us know if comScore is willing to supplement its production in accordance with the above no later than October 3, 2013.[1]

Dunstan's Document Request Nos. 19, 21, 22, and 26: We believe that all communications and advertisements sought in these Requests are relevant to identifying comScore's intent (*e.g.*, how comScore engaged with potential bundling partners and persuaded them to bundle comScore's tracking software with their own software products), but we accept that the Requests, as written, are overbroad. Thus, we agreed to narrow the Requests to only cover comScore's communications with bundling partners about packaging OSSProxy with their software and marketing materials aimed at signing-up new bundling partners. With this limitation, please let us know if comScore is willing to supplement its production in response to these Requests.

Dunstan's Document Request Nos. 34 and 36: You explained that the Parties' definitions of "purge" are not in accord. You also said that you'd consider providing a more detailed explanation of how comScore uses the word "purge," and that comScore will search for responsive documents relating to its retention practices for inadvertently or purposely collected personally identifiable information.

We request that you provide us with such an explanation (or let us know that you are unwilling to do so) no later than October 3, 2013, and with the results of the additional search no later than October 11, 2013.

Dunstan's Document Request No. 43: You explained why you believe that this Request is overly broad, but clarified that comScore produced responsive documents anyway.

Dunstan's Document Request Nos. 56, 57, 58, 59, 60, and 61: We believe that the revenue and monies generated by comScore through its use of Class members' information

[1] Note that if the Court extends any of the relevant discovery deadlines (*e.g.*, the October 7th deadline for motions to compel or the October 11th deadline to supplement written discovery), then our requested dates for supplementation will change accordingly. At this juncture, we need to know whether to include several of the issues addressed herein with any discovery motion we file with the Court.

(including any derivative forms of Class members' information such as aggregated, de-linked, or deidentified data) is relevant to the claims at issue and therefore discoverable. Not only are comScore's financials relevant to intent (*e.g.*, what information collection and/or sharing policies comScore undertook to maintain or increase revenue), they are also relevant to Plaintiffs' damages calculation under the SCA, because the Act provides that "[t]he court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and ***any profits made by the violator as a result of the violation.***" 18 U.S.C. § 2707(c) (emphasis added).

Please let us know if comScore's current position (*i.e.*, that this information is not discoverable) changes, and please do so no later than October 3, 2013.

Dunstan's Document Request Nos. 62 and 63: Based on documents produced by comScore, we believe that there are instances where comScore receives requests or orders from companies not identified as "matching companies" for individual-level data (whether identifiable, de-identified, or de-linked). You told us that comScore has produced all documents related to the "matching companies" and that for non-matching companies, comScore objects to producing documents on relevance grounds. However, Plaintiff's Requests seeking requests or orders for Class members' personally identifiable information (including any derivative forms of Class members' data such as aggregated, de-linked, or deidentified data) are relevant because they seek information necessary for Plaintiffs' damages calculation (*i.e.*, profits derived from the sale of Class members' information) and information necessary to determine comScore's intent (*i.e.*, whether comScore provides personally identifiable information to non-matching companies despite its claims to the contrary).

Please let us know if comScore's position changes on this as well, and please do so no later than October 3, 2013.

Dunstan's Document Request Nos. 64, 65, 66, 67, and 68: comScore objects to producing documents related to the Trees for the Future program on relevance grounds because the program is supposedly not referenced in any terms presented to Class members. However, comScore previously produced a number of bundling partner downloading statements that explicitly and prominently reference the Trees for the Future program. (*See* Exhibit 1 to this letter.) Likewise, the Trees for the Future program is currently referenced in the paragraphs preceding RelevantKnowledge's "PRIVACY POLICY, USER LICENSE AGREEMENT, AND PATENT NOTICE." (*See* http://www.relevantknowledge.com/RKPrivacy.aspx (last accessed September 30, 2013).)

Accordingly, comScore should supplement its responses to these Requests by producing documents and communications relevant to the Trees for the Future program. Please let us know if you are unwilling to do so by no later than October 3, 2013.

Dunstan's Document Request Nos. 74, 75, 76, and 77: comScore maintains its objection to the Requests' use of the word "complaint" because no "complaint" (if any exists) would be relevant to Plaintiffs' claims. We disagree. Complaints may show, for example, that comScore was put on notice of specific problems regarding the installation or operation of OSSProxy. Such complaints could be relevant to comScore's intent (*e.g.*, if comScore's responses to complaints are

nonexistent or unsatisfactory, such responses may indicate willful conduct on the part of comScore so as to gain access to Class members' computers). You stated that you would take our position under advisement. As such, please let us know whether comScore will withdraw its objection and supplement its production no later than October 3, 2013.

comScore also objected to Plaintiff's Requests for "complaints" on the grounds that they are too broad and burdensome, and suggested that responsive "complaints" (should they exist) may be intertwined with non-relevant complaints (such as panelists upset over misapplied rewards). We suggested that comScore attempt to identify relevant complaints by searching through any public-facing email addresses and by searching for communications from organizations that are unsatisfied with comScore's software (*e.g.*, universities unhappy with comScore's software having been installed on student, faculty, or staff computers). You agreed to have comScore conduct those searches. Accordingly, please provide us with the search results by October 11, 2013.

Dunstan's Document Request Nos. 81 and 82: We offered to limit these Requests to documents, communications, or correspondence that would identify the listed companies' (other than Nedstat, Inc.) employment figures, infrastructure, and data collection procedures and policies. You stated comScore's position is that responsive documents may have already been produced in response to Request No. 83, but if not, comScore would conduct a further search. Please provide us with any such search results no later than October 11, 2013.

Dunstan's Document Request No. 86: We're puzzled by your assertion that no search terms or queries were used to assemble the most recently produced documents (we don't see how else the documents could feasibly have been selected). It seems that we may have been speaking past each other. This Request seeks the search terms/queries used to locate documents responsive to our requests. Please provide a list of those terms, or explain whether you stand on your objections. In addition, if comScore uses keyword searches or queries while gathering documents to supplement its production, please produce those search terms as well, and do so by October 11, 2013.

Dunstan's Document Request No. 88: Plaintiffs only seek insurance policies that would be relevant to this lawsuit (*i.e.* policies that would completely or partially cover any possible judgment entered against comScore). You indicated that comScore understood our position, but you didn't clarify whether comScore would produce relevant insurance policies. Please let us know one way or the other no later than October 3, 2013.

Dunstan's Interrogatory Nos. 10 and 11: comScore answered "None" because Plaintiffs' definition of personally identifiable information did not include "aggregated" and/or "anonymized" data. You informed us that if Plaintiffs were to amend their definition of personally identifiable information, comScore would object on relevance grounds as it had to Request Nos. 56, 57, 58, 59, 60, and 61. However, and as stated above, our position is that the money or benefits comScore received for Class members' information (or information derived therefrom, including "aggregated" or "anonymized" data) is directly relevant to the issue of damages. *See* 18 U.S.C. § 2707(c). Therefore, please let us know whether comScore will supplement its responses no later than October 3, 2013.

Dunstan's Interrogatory No. 12: As stated in their complaint, Plaintiffs are seeking punitive damages in this case. comScore's net worth is relevant to a punitive damages calculation and, thus, responsive documents are discoverable. *See Lanigan v. Babusch*, No. 11-cv-3266, 2011 WL 5118301, at *4 (N.D. Ill. Oct. 27, 2011) ("A party's net worth is discoverable where punitive damages are at issue."). Please let us know if comScore will supplement its response no later than October 3, 2013.

Harris's Interrogatory No. 2: comScore maintains that the identities of bundling partners are not relevant to Plaintiffs' claims. However, you indicated during the call that because comScore already produced a chart listing some bundling partners (*see* Exhibit 2 to this letter), comScore may rethink its position. In the event that comScore stands on its objections, however, we are firm in our position that the identities of and details surrounding the identities of bundling partners are relevant and discoverable. Such information will, for example, reveal the repute of those companies that comScore partners with in order to distribute its tracking software. And if comScore intentionally engaged with disreputable software distributors, such information could be relevant to comScore's intent (*e.g.*, if comScore knowingly partnered with certain unscrupulous bundling partners, it could point to comScore as having willfully installed its tracking software on Class members' computers without first attempting to obtain consent).

Please let us know whether comScore will withdraw its objections and answer the Interrogatory no later than October 3, 2013.

Harris's Interrogatory Nos. 3 and 4: comScore agreed to supplement its answer to Interrogatory No. 4 by identifying which documents are responsive to it (and by reference, Interrogatory No. 3). Please do so by October 11, 2013.

Plaintiffs' Responses to comScore's Written Discovery Requests

comScore's Request No. 3: comScore maintains that Plaintiff Dunstan must produce his entire hard drive for inspection. Our position remains that we'll consider requests to produce specific relevant, non-privileged information from the hard drive. The Parties agreed that given repeated meet and confers, this issue may need to be presented to the Court for resolution.

comScore's Interrogatory Nos. 13, 14, 15, 16, 17, 20, 21, and 22: Plaintiffs will consider supplementing Plaintiffs' answers to 13 and 14. However, for the remaining Interrogatories, Plaintiffs anticipate that review of comScore's recent document production will reveal the facts necessary to answer comScore's contention interrogatories. Thus, we will supplement our answers (if necessary) accordingly.

comScore's Interrogatory No. 18: Having heard our position on comScore's definition of "filter," you suggested that comScore will rethink its position on Plaintiffs' answer to this Interrogatory.

comScore's Requests for Admission Nos. 1 and 2: Plaintiffs' answers to these Requests for Admission are entirely consistent with Plaintiffs' long-standing position that comScore is not a party to the Downloading Statement or the Privacy Policies and User License Agreement. We

explained that these Requests for Admission as written lend themselves to denials, but that Plaintiffs will respond in good faith to additional requests, should comScore choose to issue any.

Thank you for the productive meet and confer, and we look forward to hearing from you.

Best regards,

EDELSON LLC

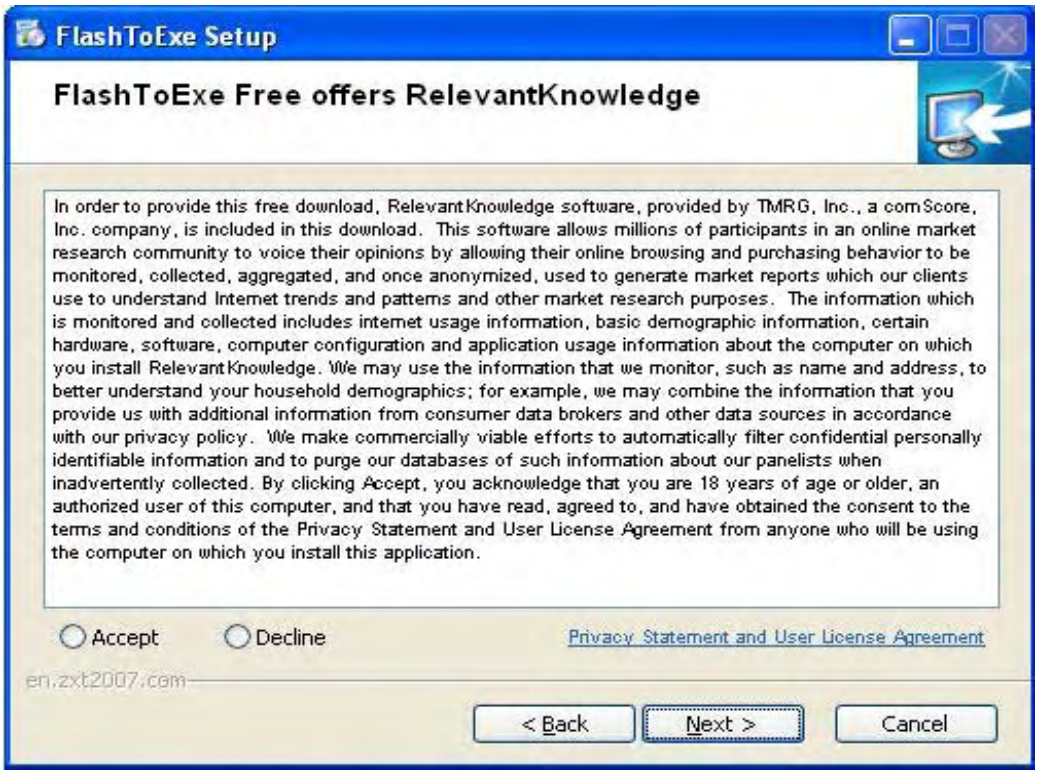
Rafey S. Balabanian

cc: Mr. Jay Edelson
Mr. Ari J. Scharg
Mr. Chandler R. Givens
Mr. Benjamin S. Thomassen
Mr. Stephen S. Swedlow

EXHIBIT 1

Exhibit A

678Soft



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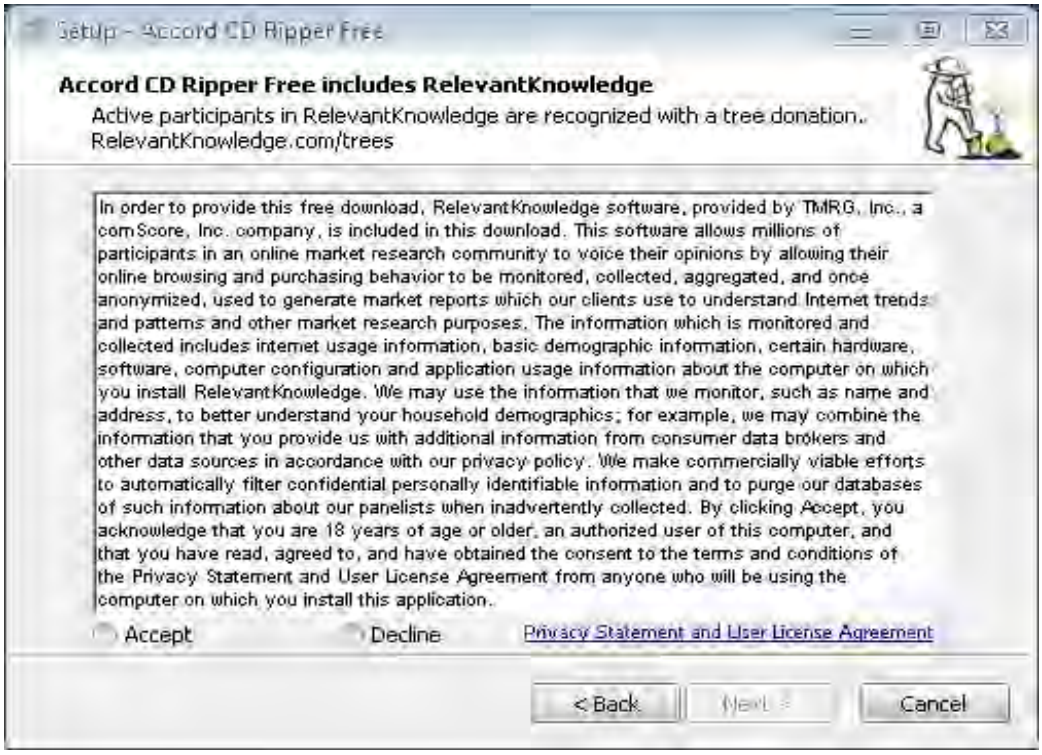

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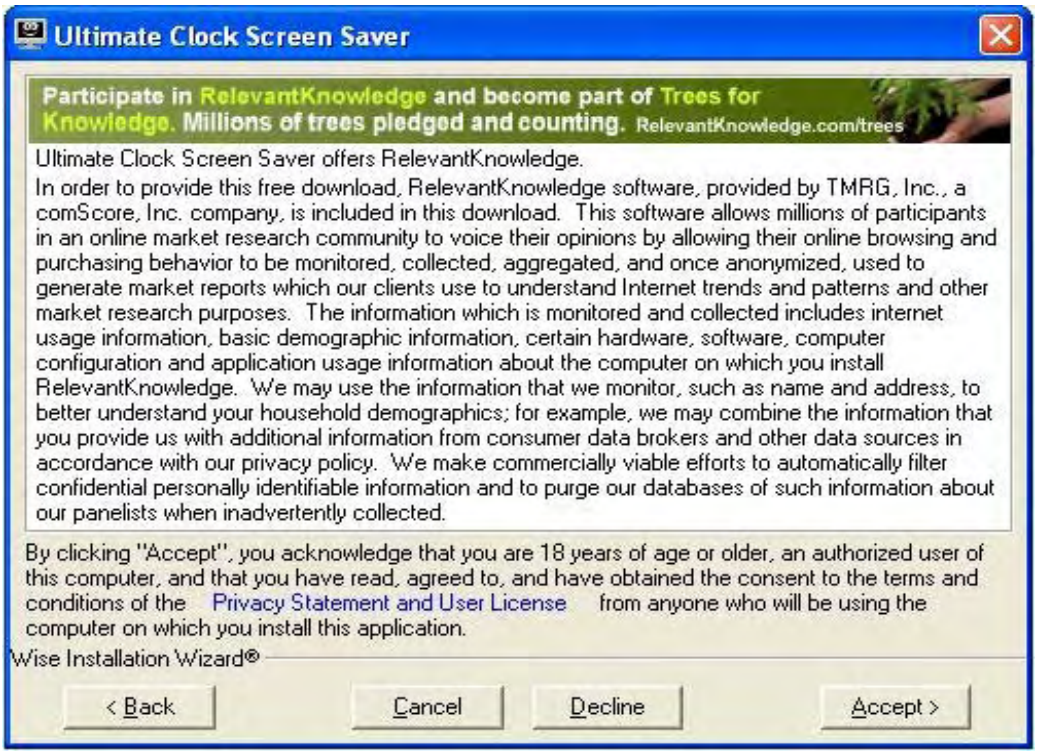
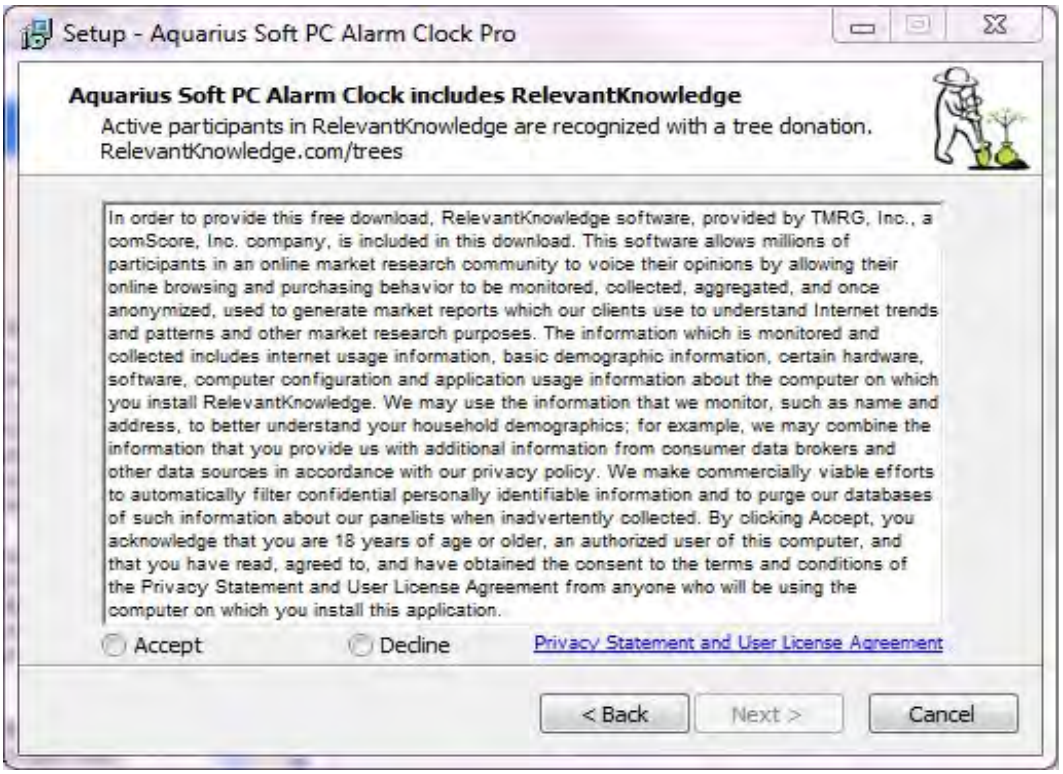


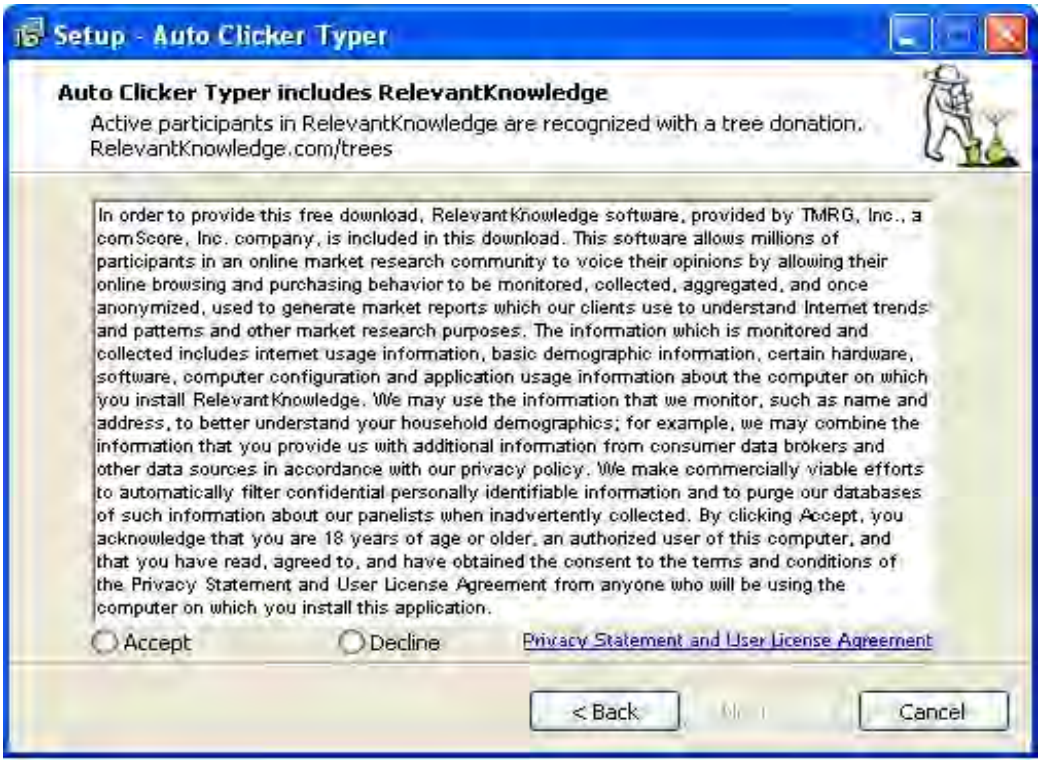
A1 Software

AquariusSoft
-Test Bundle in QA

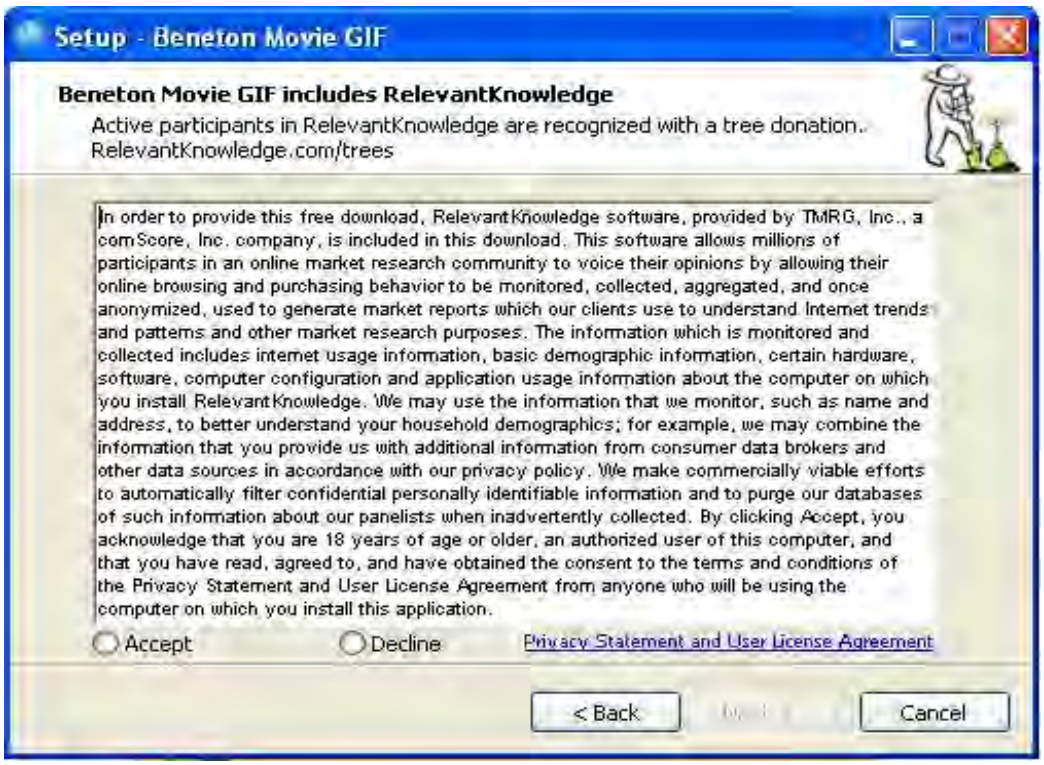


* As of 10/3/2011: In QA and will roll out once it is approved

ASoftwarePlus

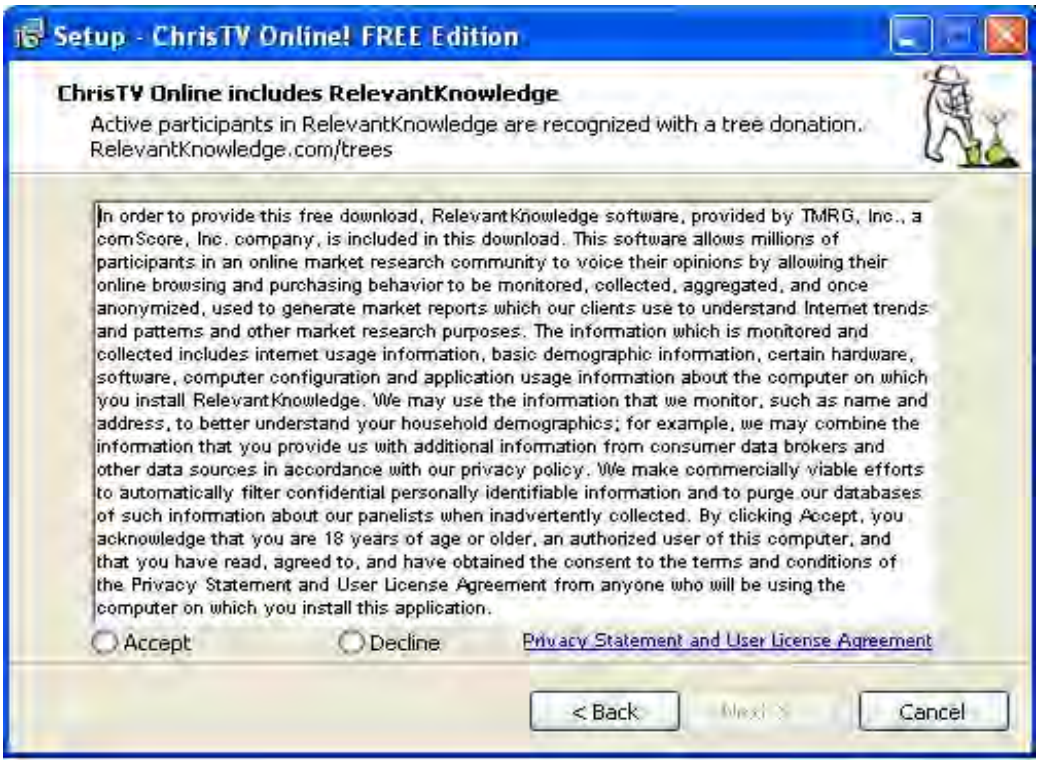


Beneton Software



Chit Chat

ChrisPC



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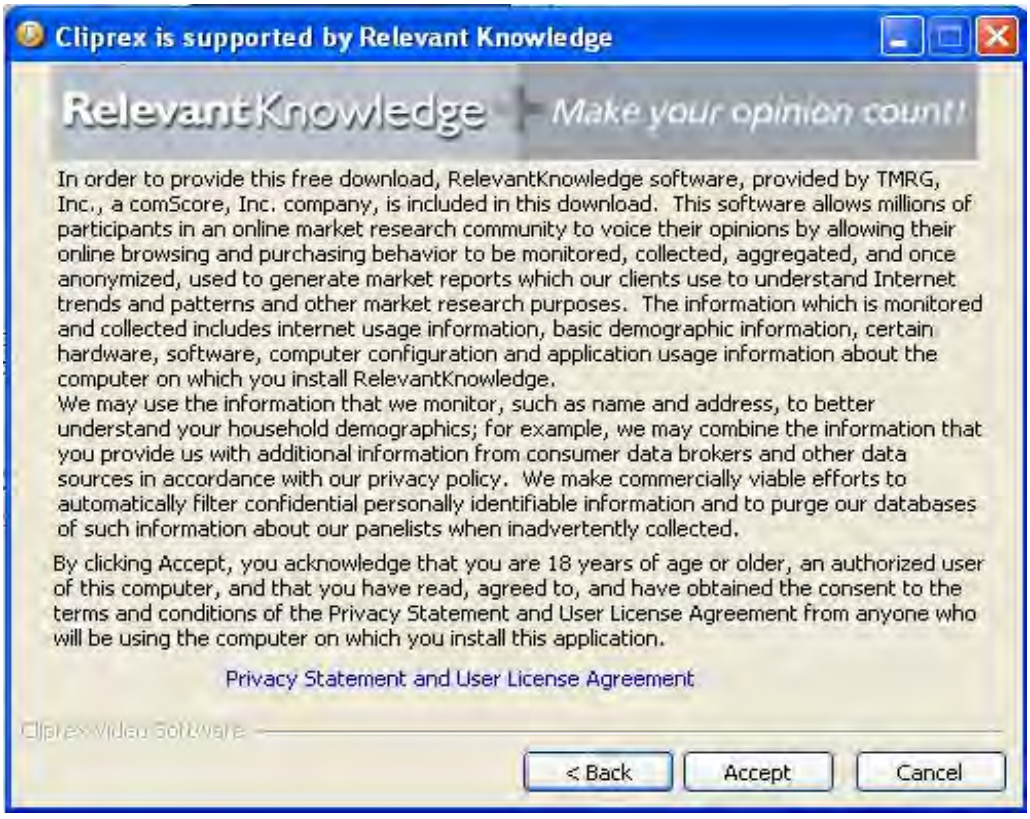

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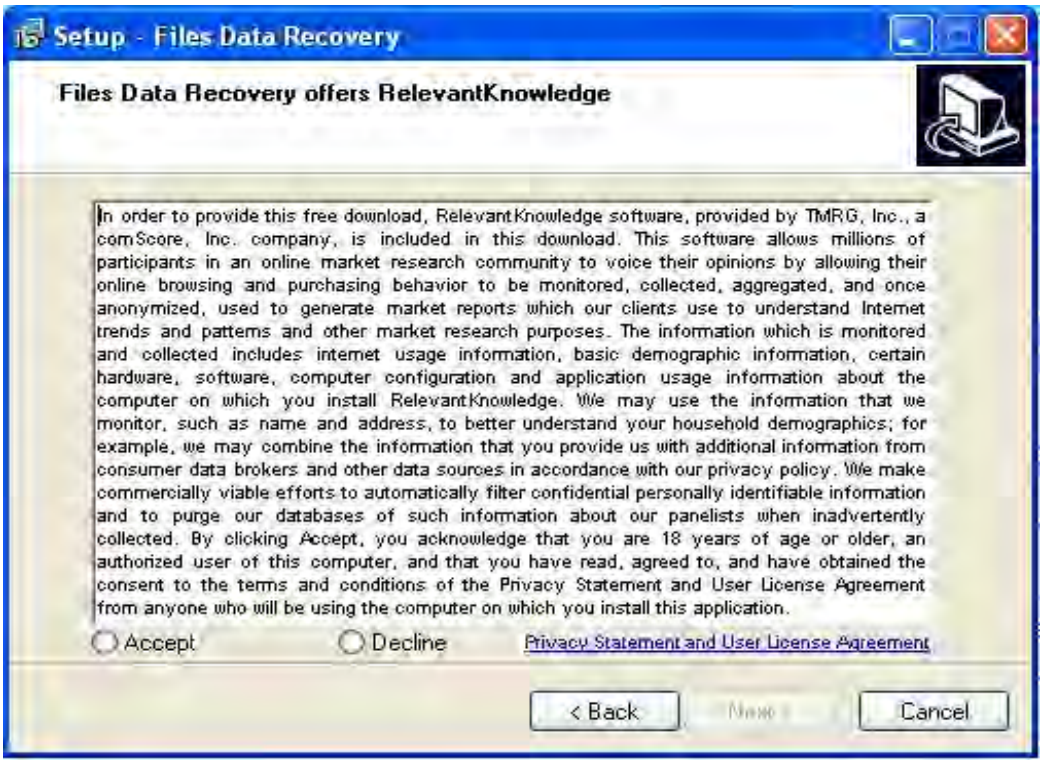
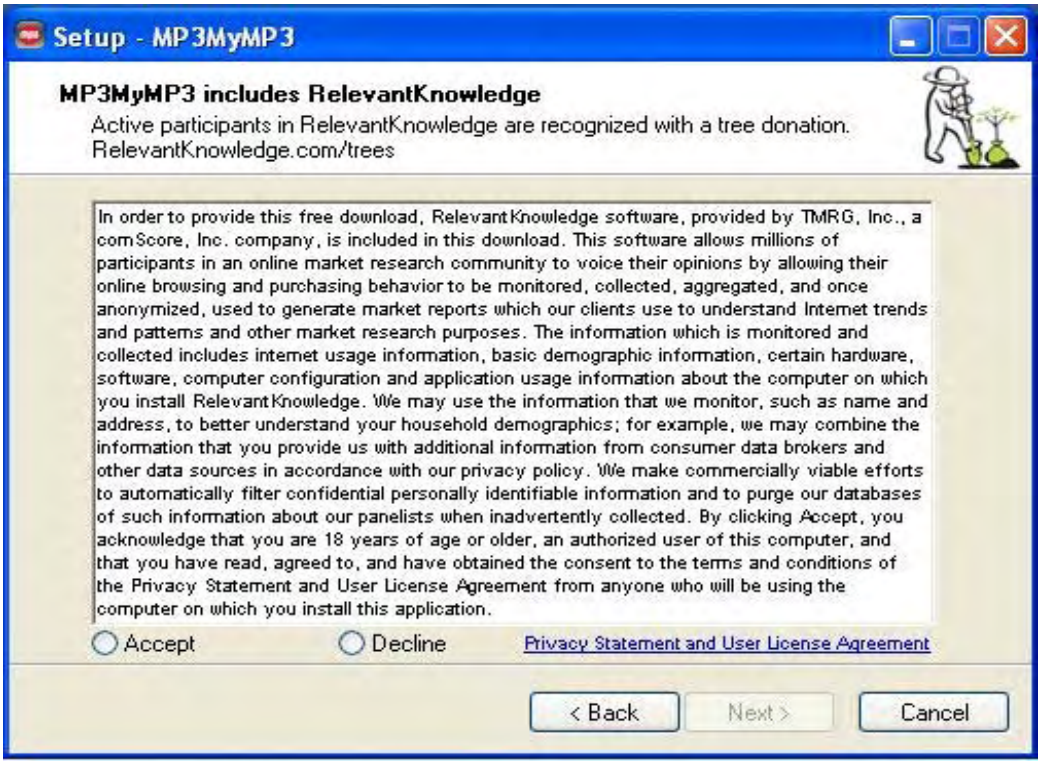


Digital Liquid



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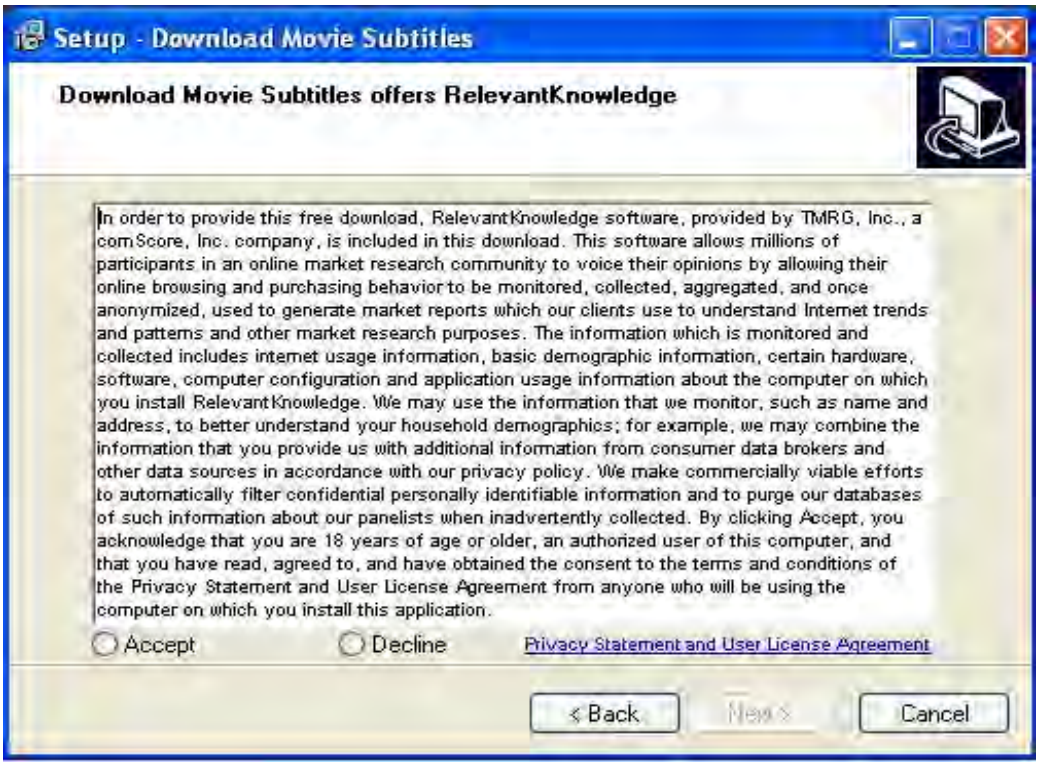
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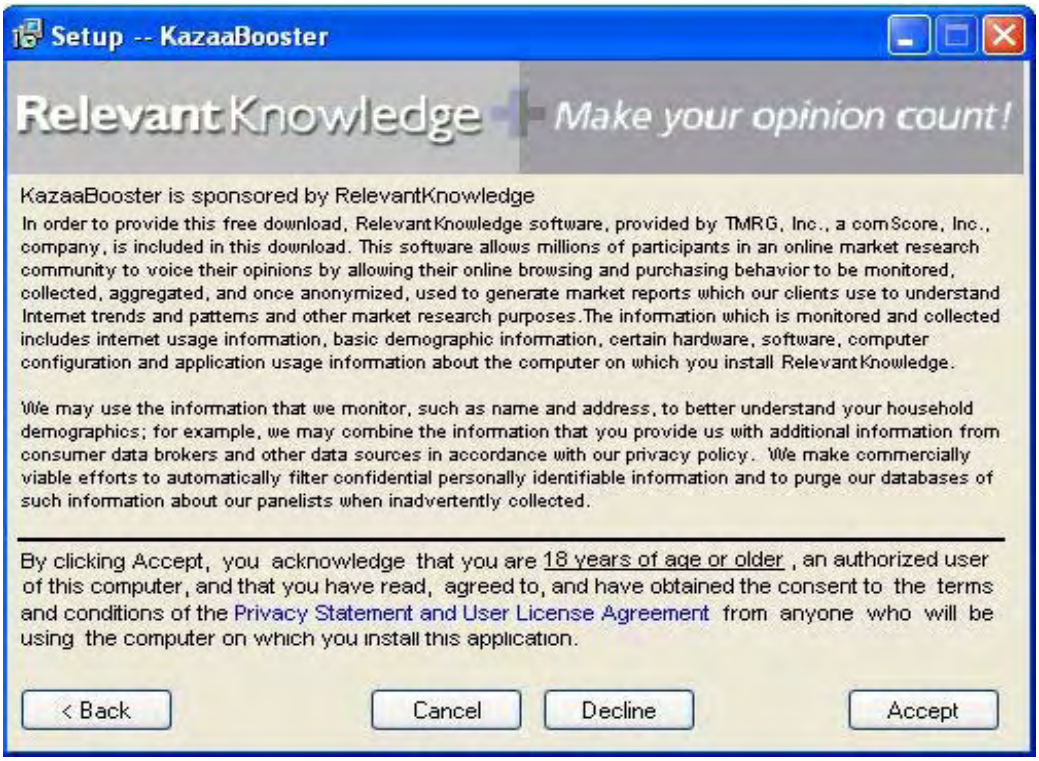
EtExchange



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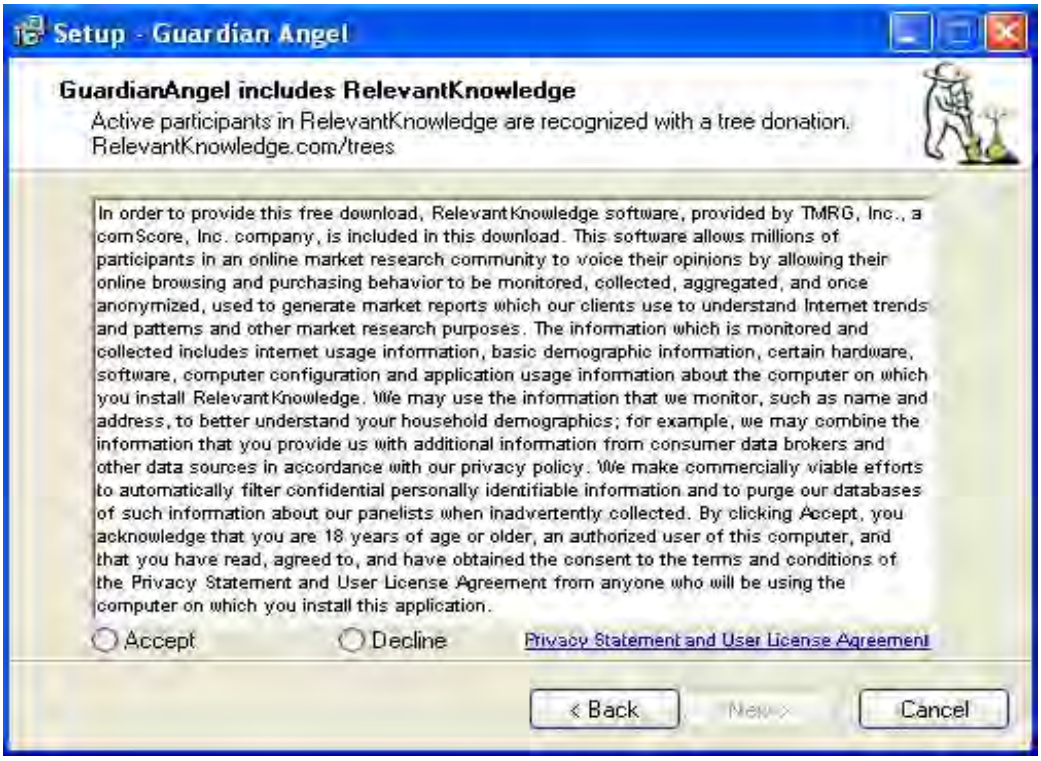

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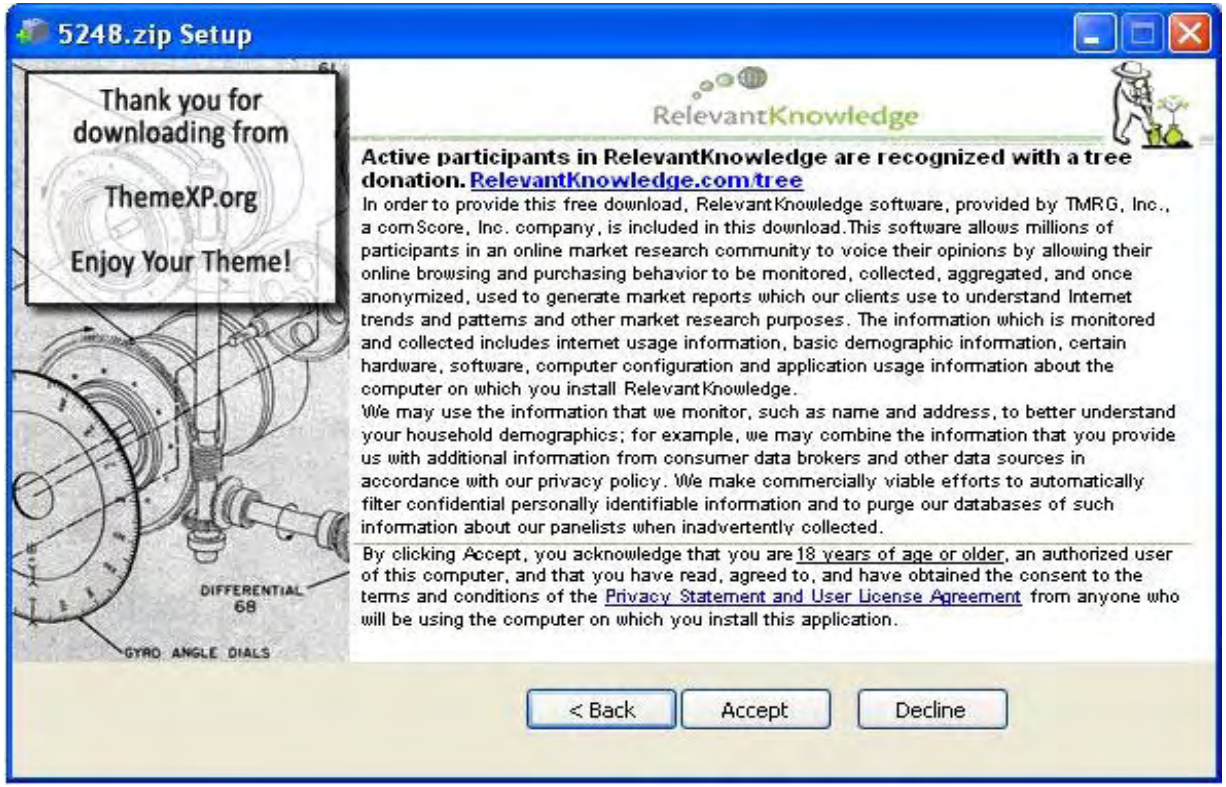
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We may use the information that we monitor, such as name and address, to better understand your household demographics; for example, we may combine the information that you provide us with additional information from consumer data brokers and other data sources in accordance with our privacy policy. We make commercially viable efforts to automatically filter confidential personally identifiable information and to purge our databases of such information about our panelists when inadvertently collected.
By clicking Accept, you acknowledge that you are 18 years of age or older, an authorized user of this computer, and that you have read, agreed to, and have obtained the consent to the terms and conditions of the Privacy Statement and User License Agreement from anyone who will be using the computer on which you install this application.
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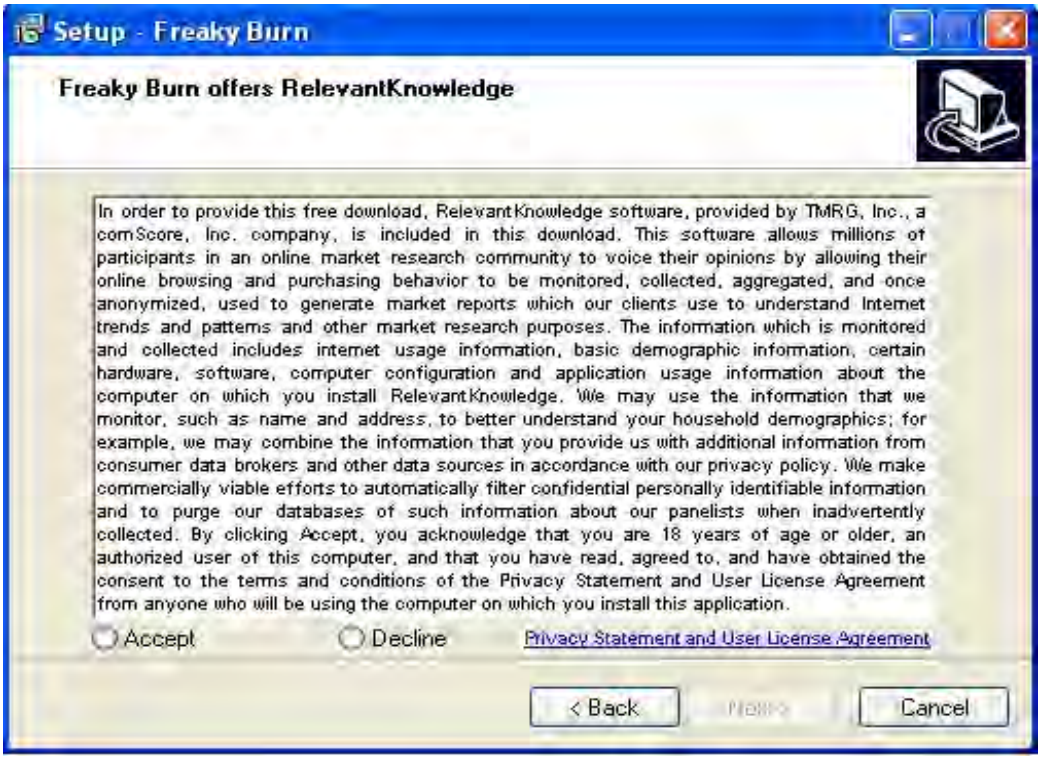
Accept
Decline

FreakyBurn



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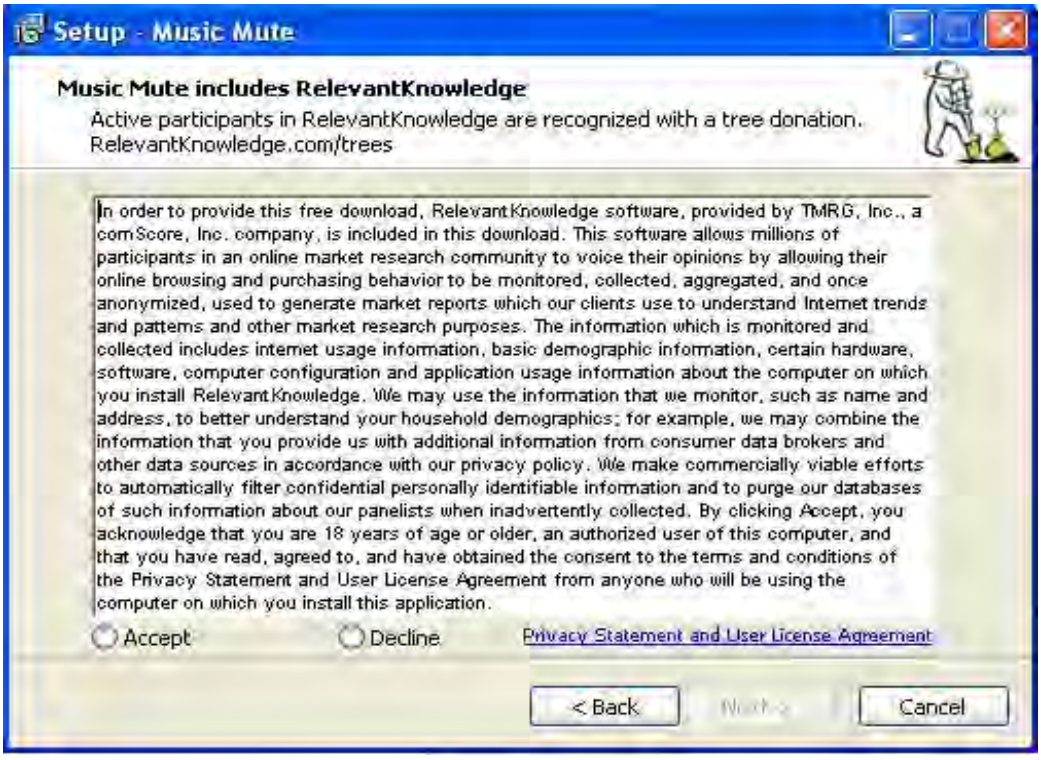

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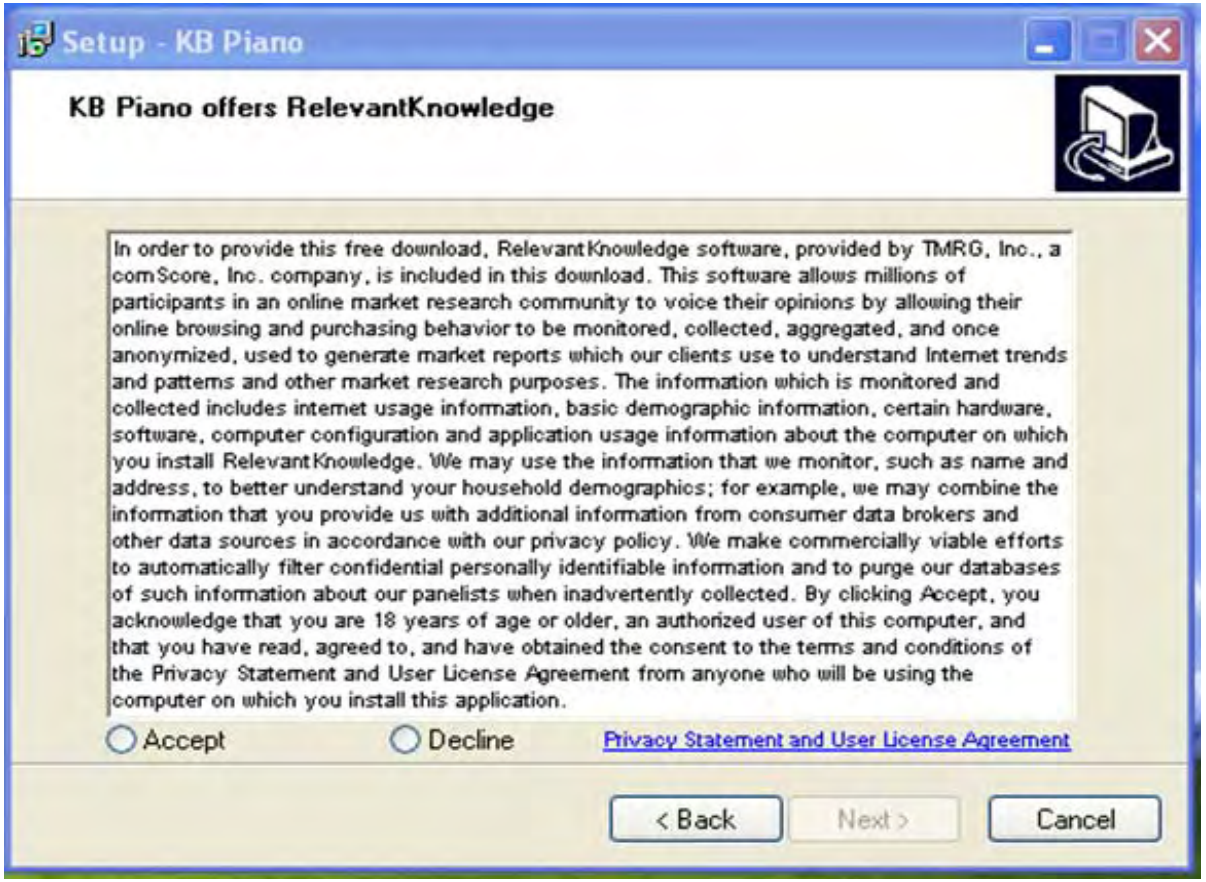
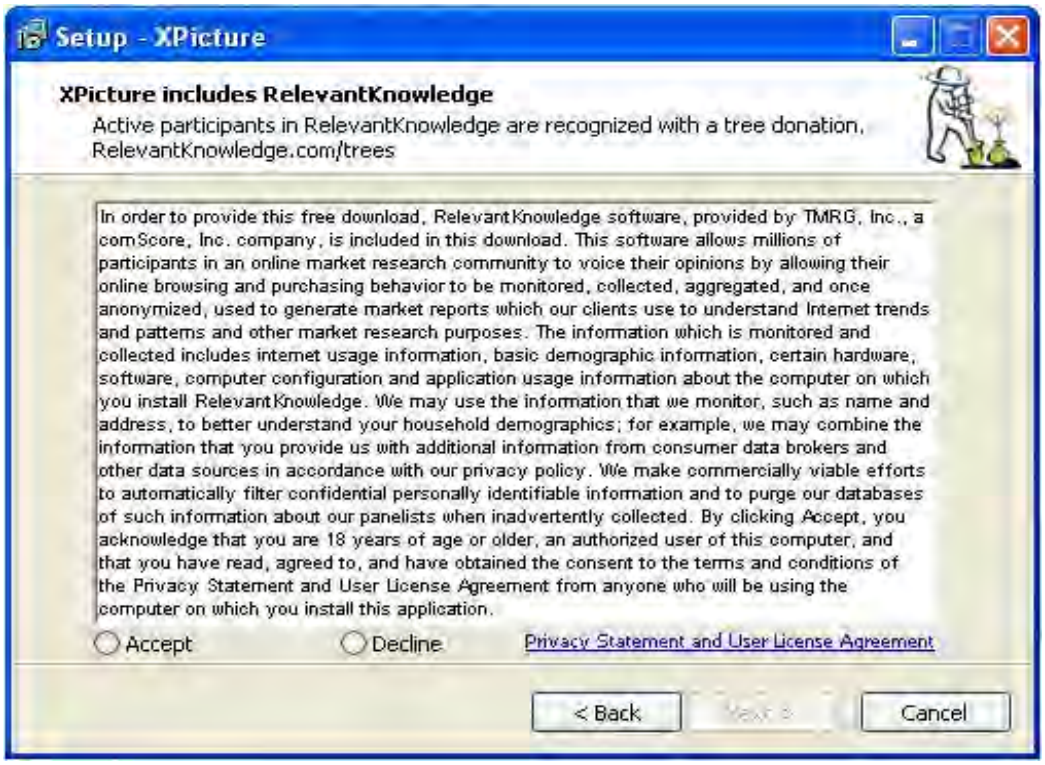


* Screenshot taken from last QA submission

Goztun



GuitarFX
- Waiting for test bundle

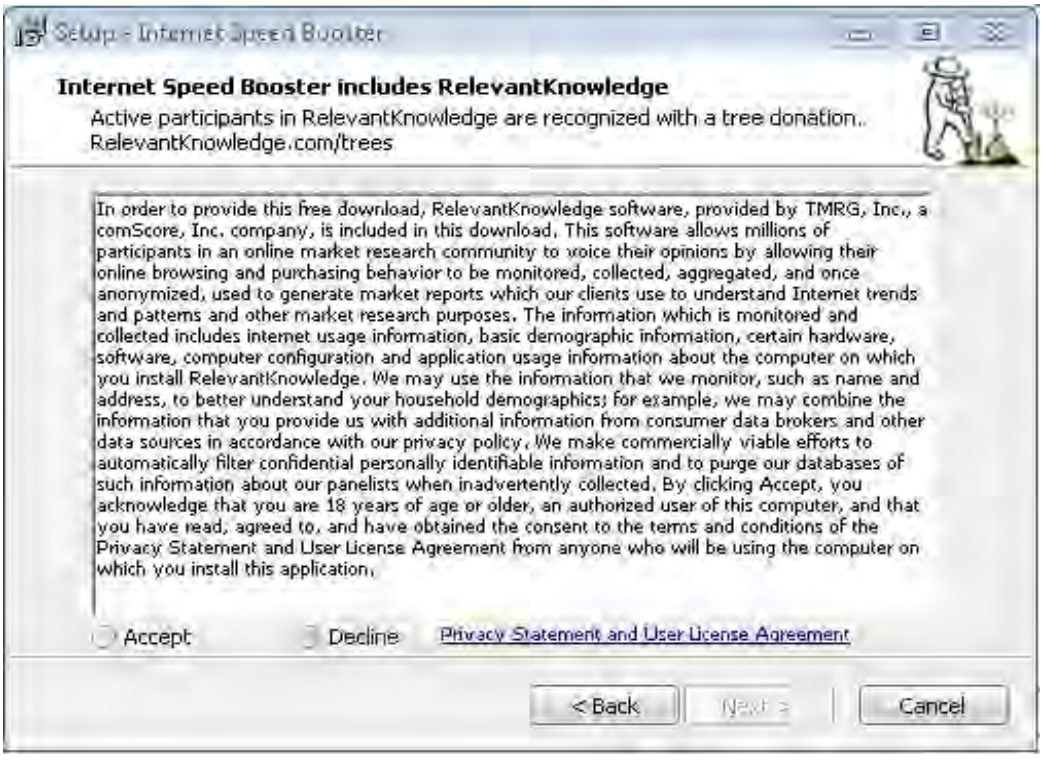
* As of 10/3/2011: In QA and will roll out once it is approved

Guppy Games

GustoSoft

KC Software

King Sedco



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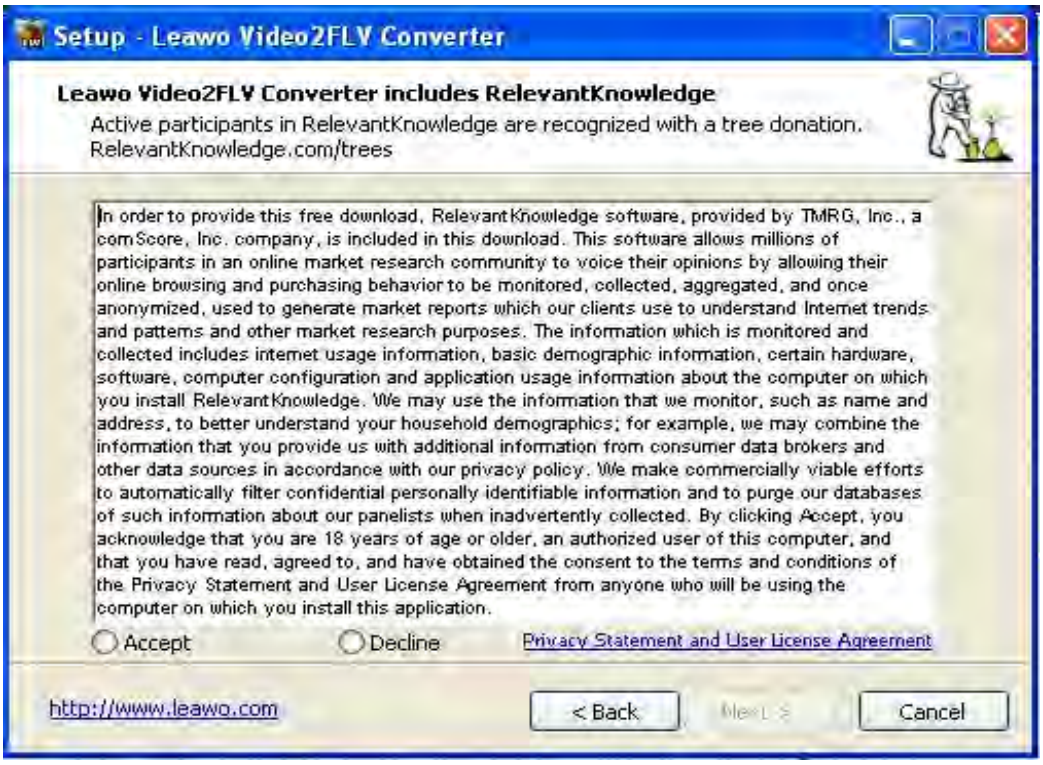
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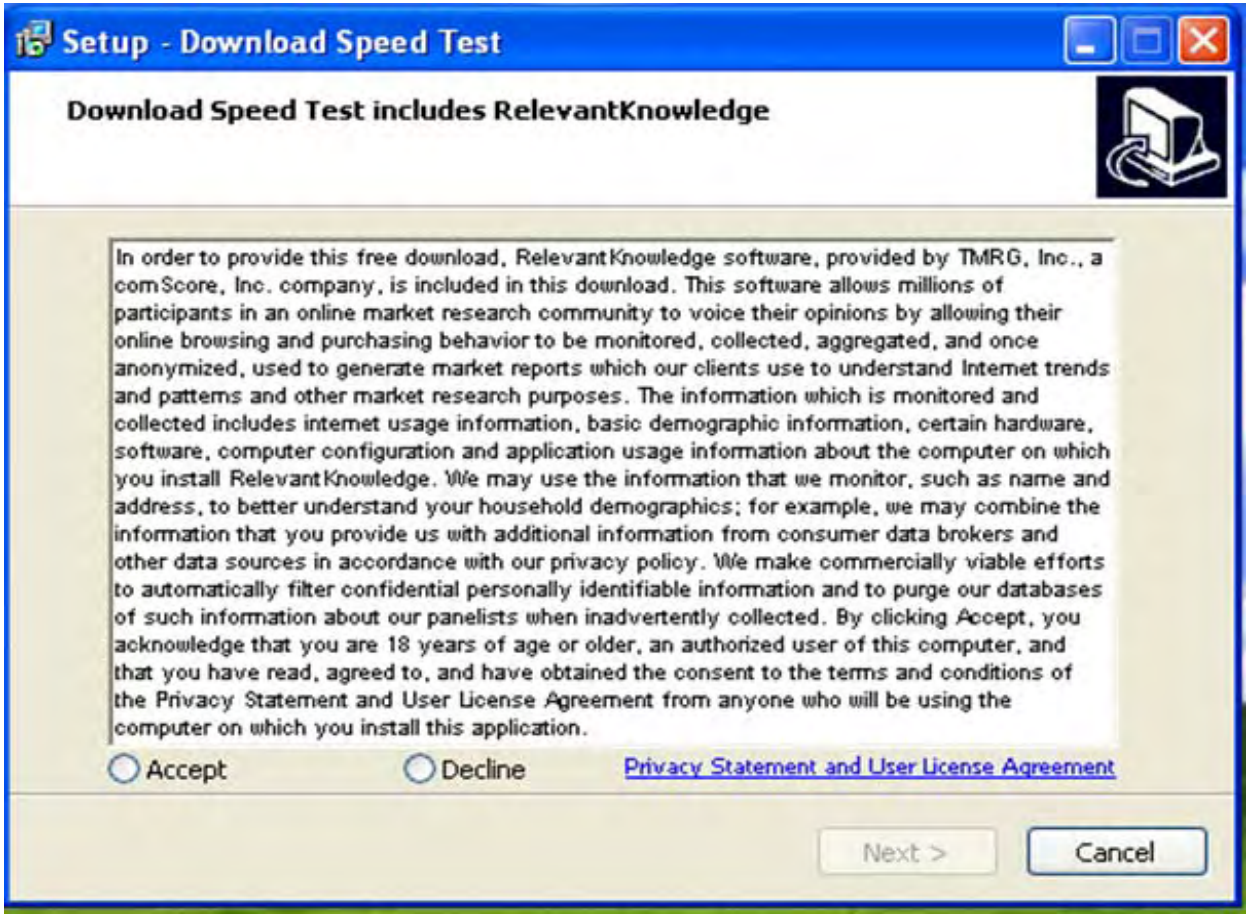
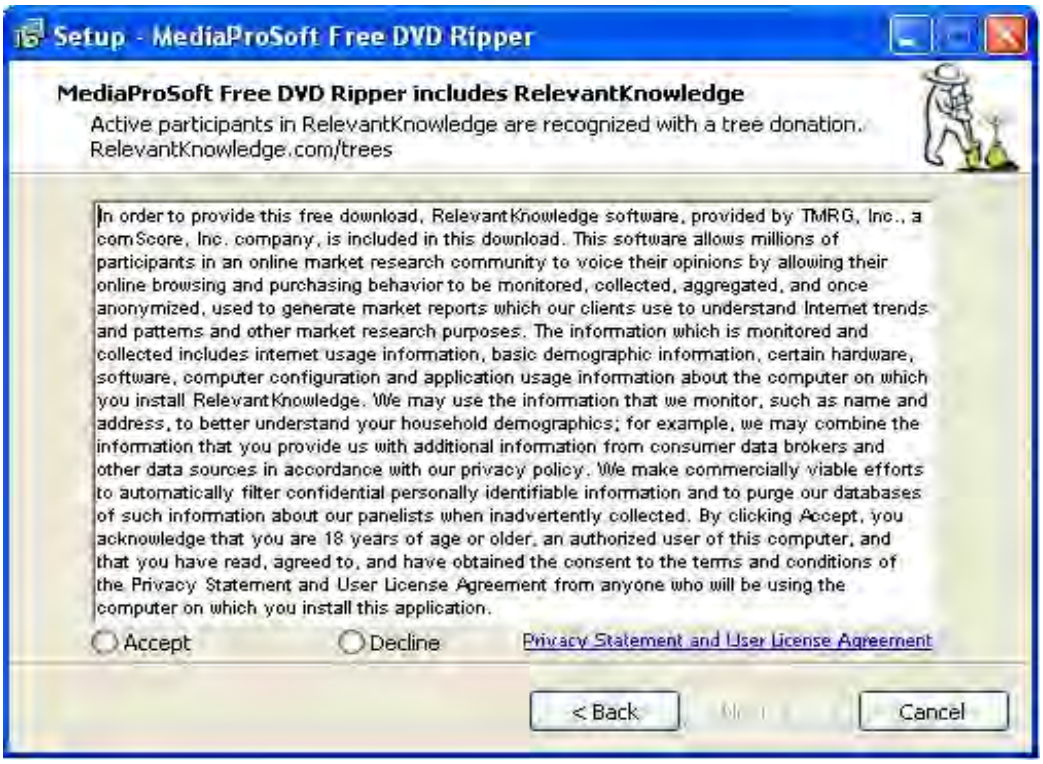
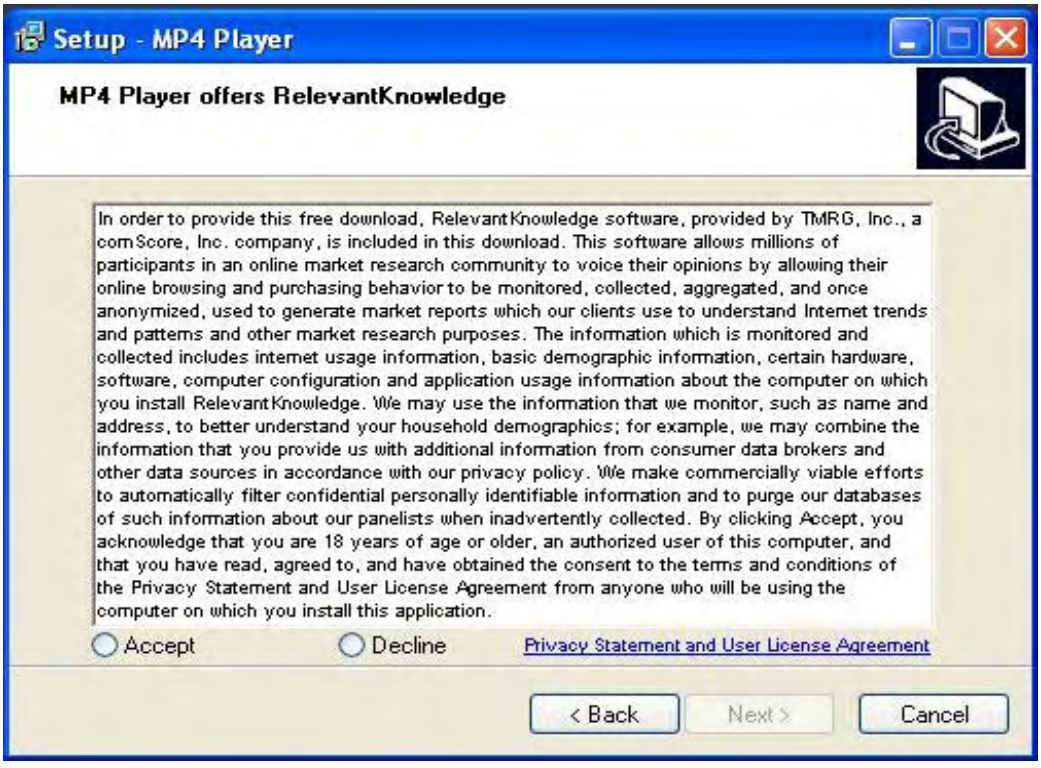


* Screenshot taken from last QA submission

MediaProSoft

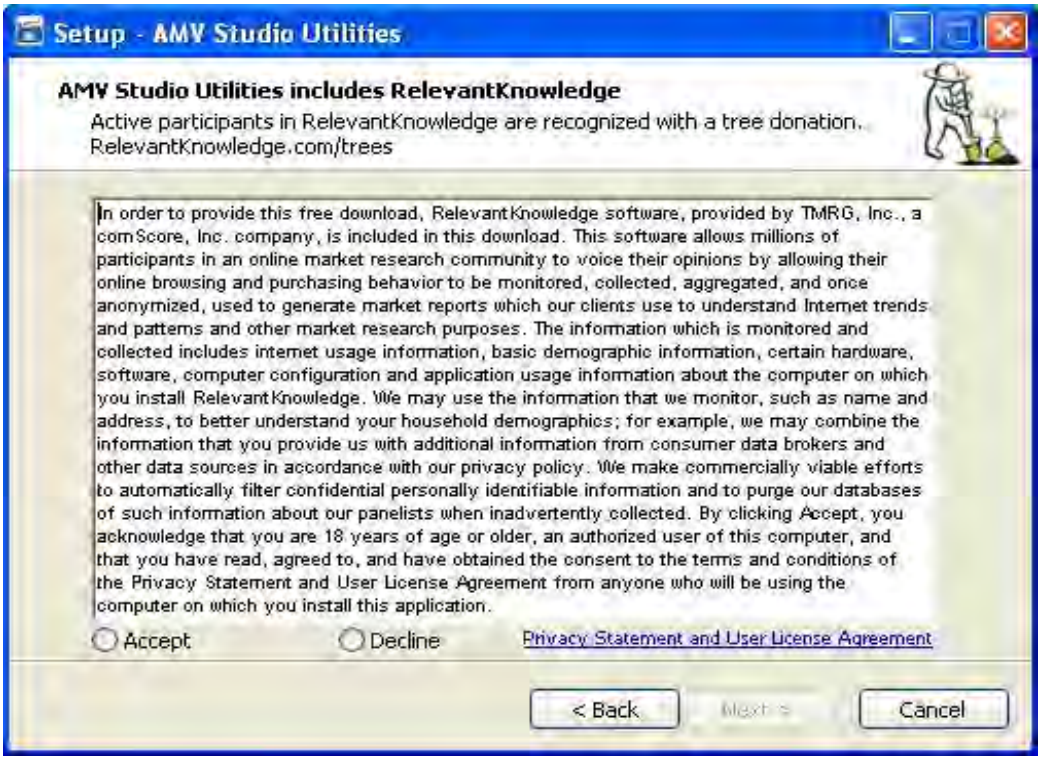


MP4 Player

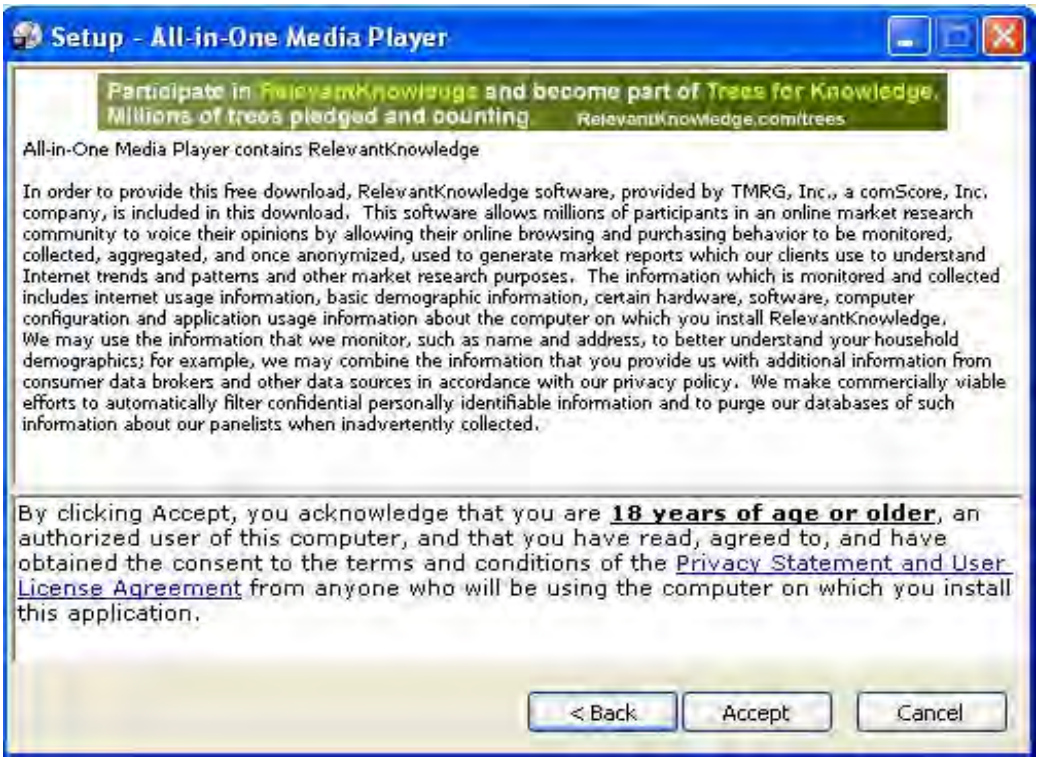


NeoSoft

Network467

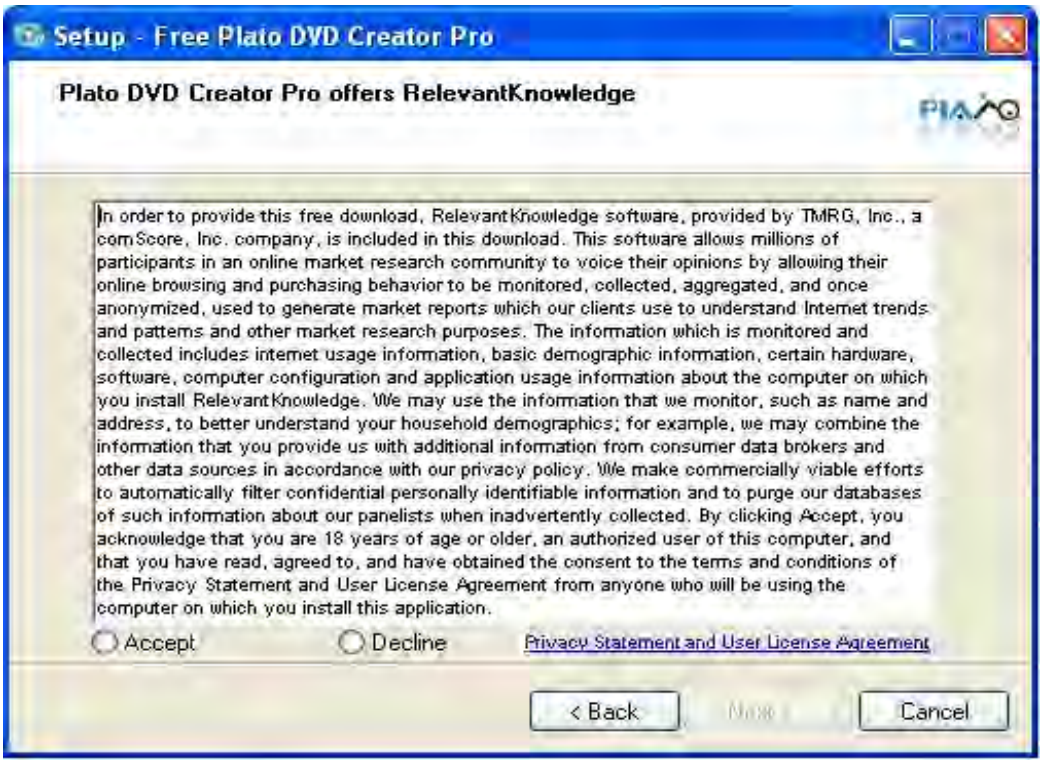


NPS Software



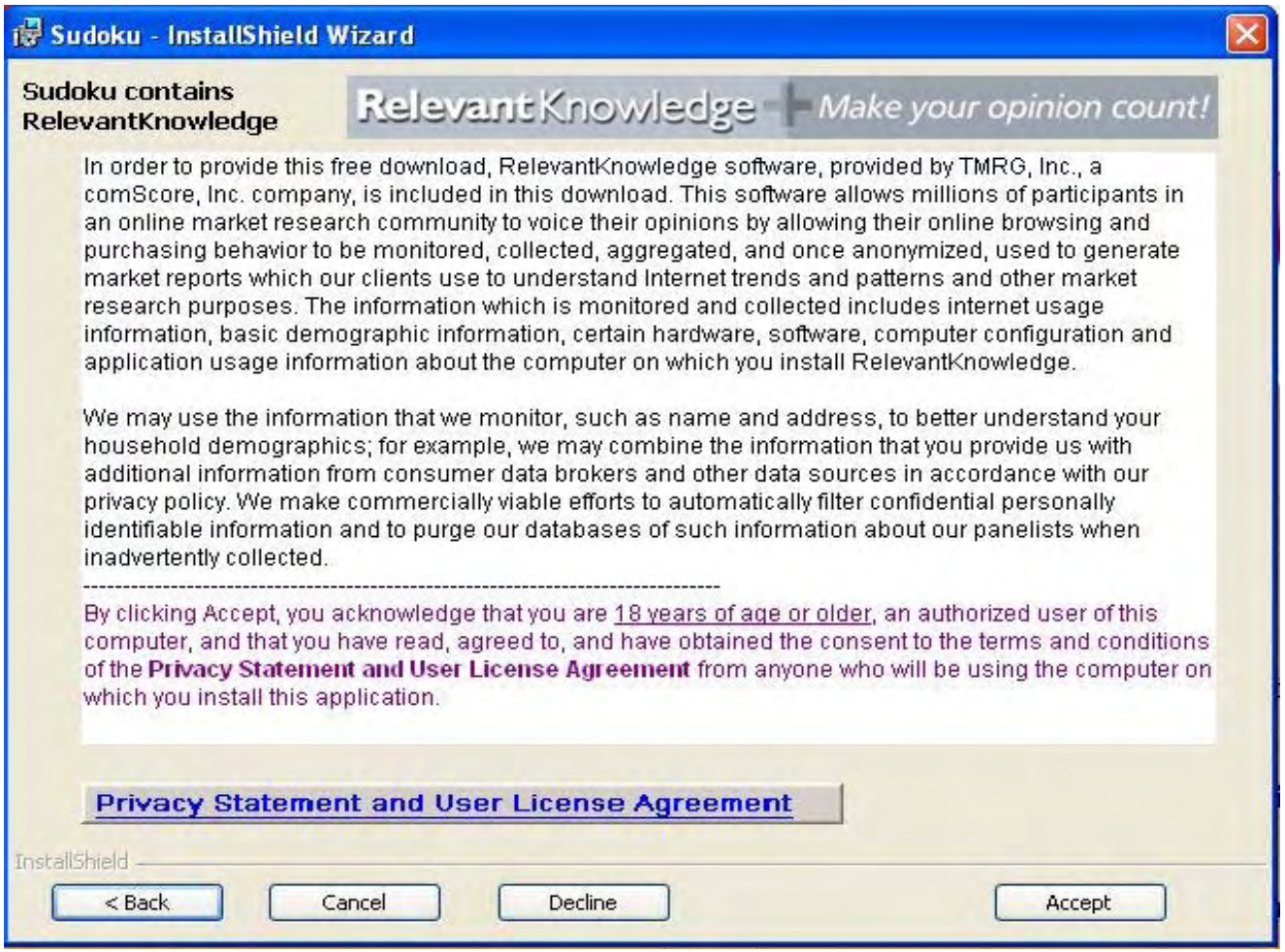
OurScreenSavers

Plato

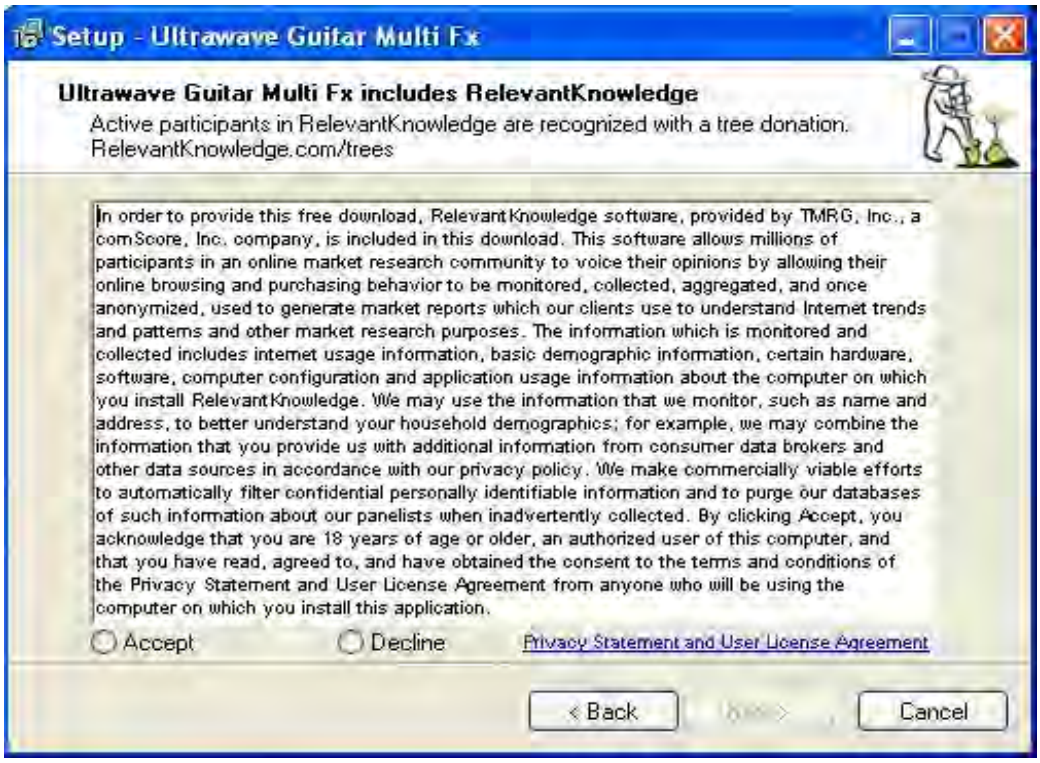


RisingResearch

Uberdownloads

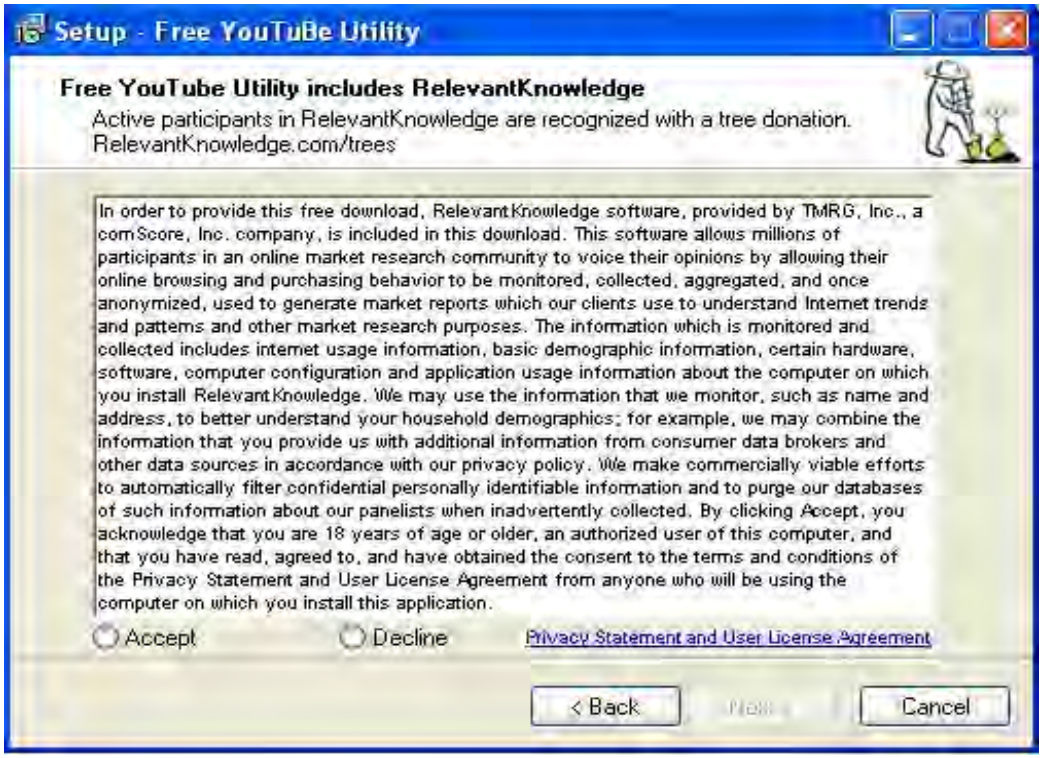


UltraWave Guitar

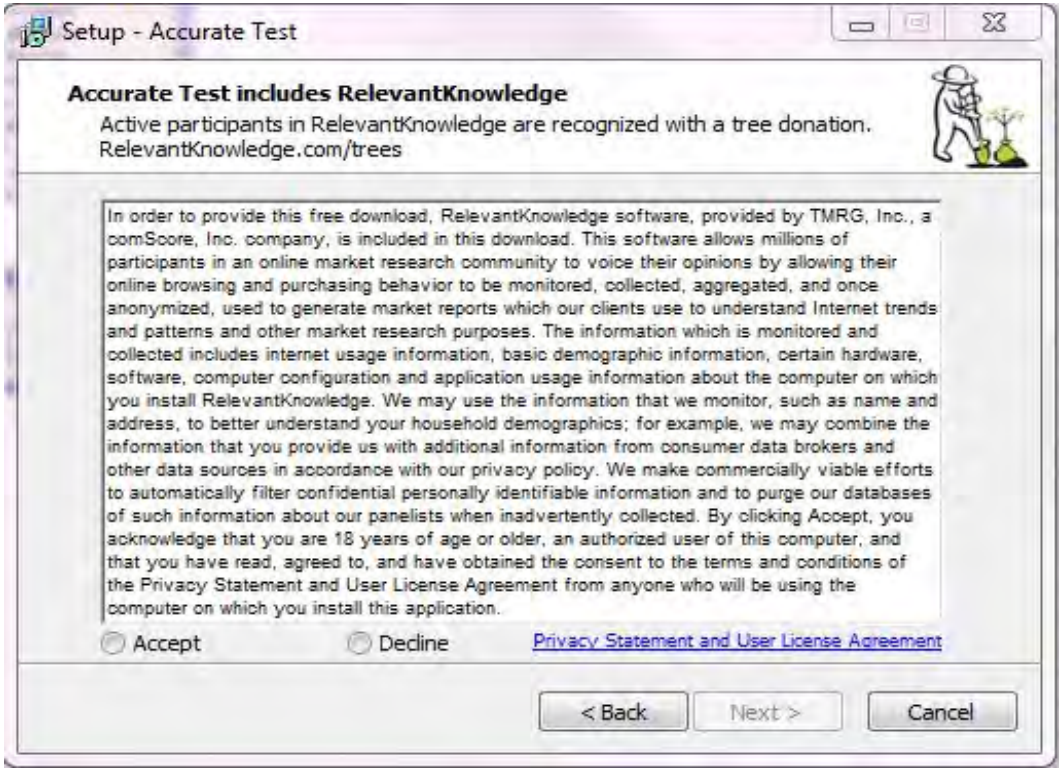


Whitepaw

WiseCleaner

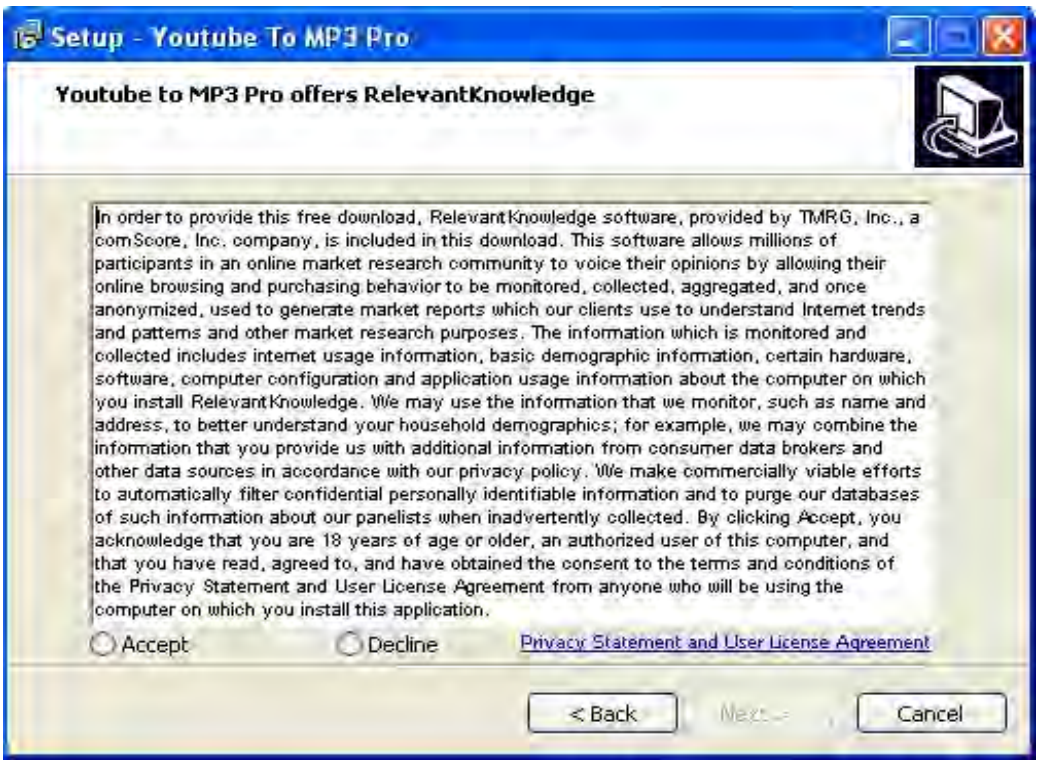


WordOfMouth
- Test Bundle in QA



* As of 10/3/2011: In QA and will roll out once it is approved

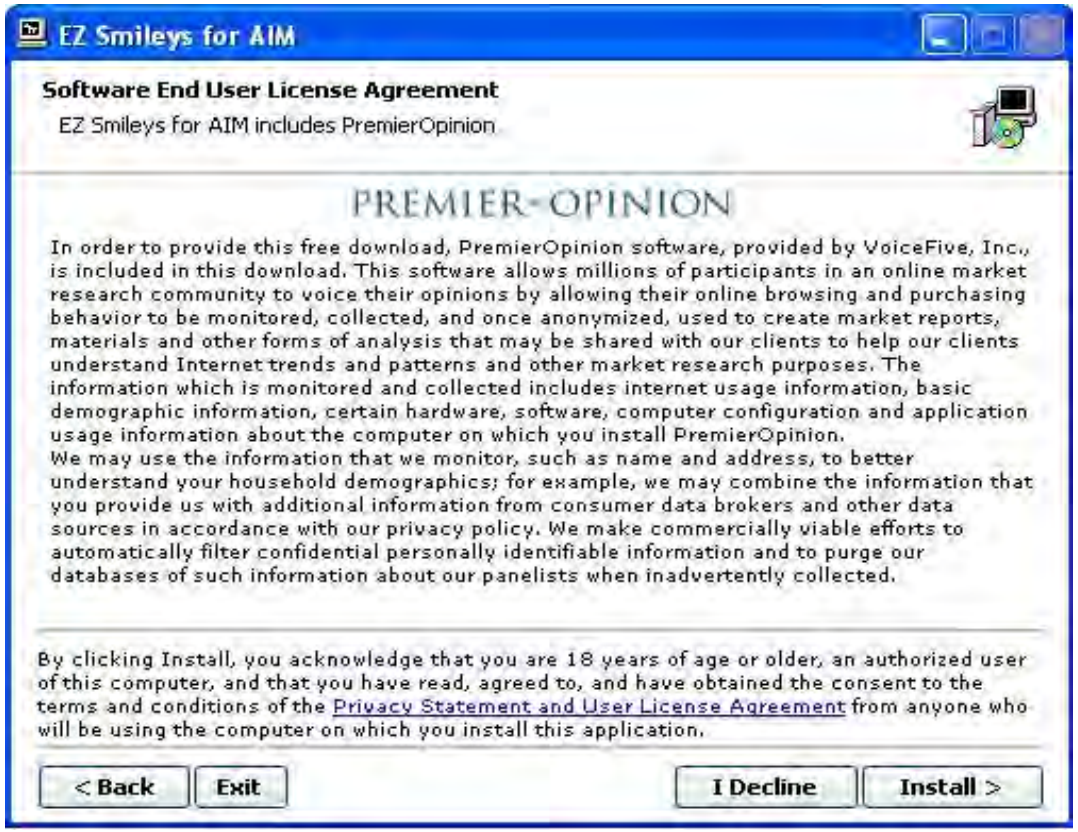
Ytmp3Pro



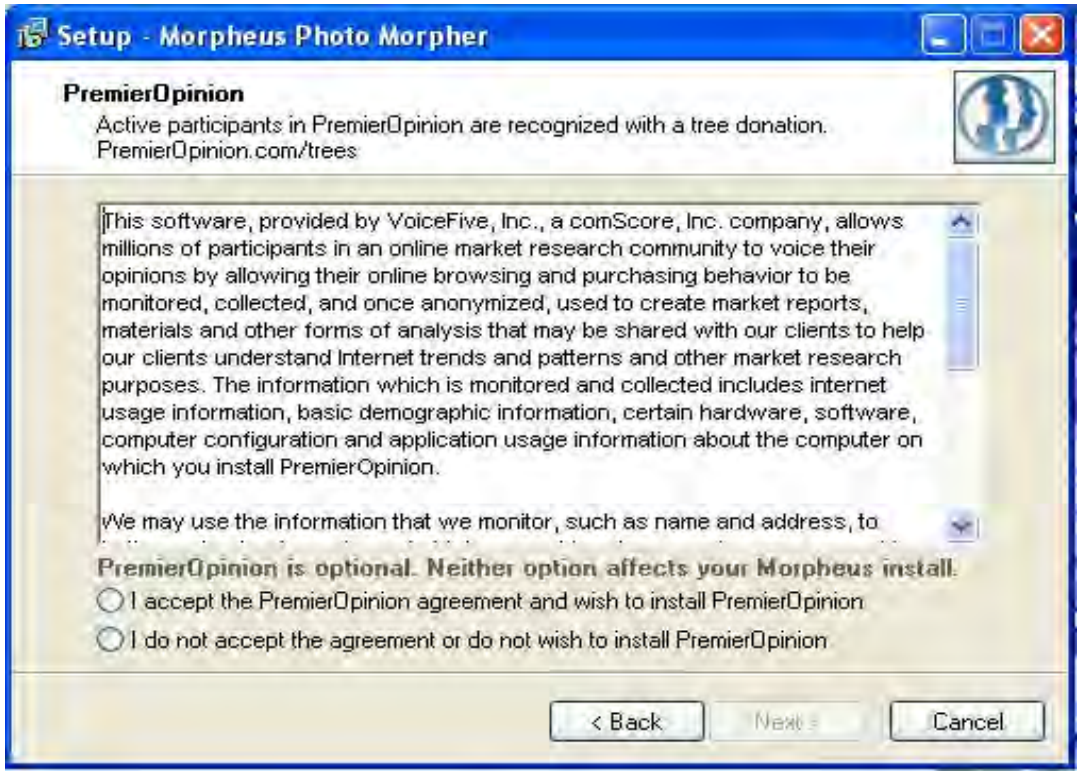
ZXT

PremierOpinion

Cyzeal



Morpheus


Setup - Morpheus Photo Morpher
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Active participants in PremierOpinion are recognized with a tree donation.
PremierOpinion.com/trees
This software, provided by VoiceFive, Inc., a comScore, Inc. company, allows millions of participants in an online market research community to voice their opinions by allowing their online browsing and purchasing behavior to be monitored, collected, and once anonymized, used to create market reports, materials and other forms of analysis that may be shared with our clients to help our clients understand Internet trends and patterns and other market research purposes. The information which is monitored and collected includes internet usage information, basic demographic information, certain hardware, software, computer configuration and application usage information about the computer on which you install PremierOpinion.
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Traffix

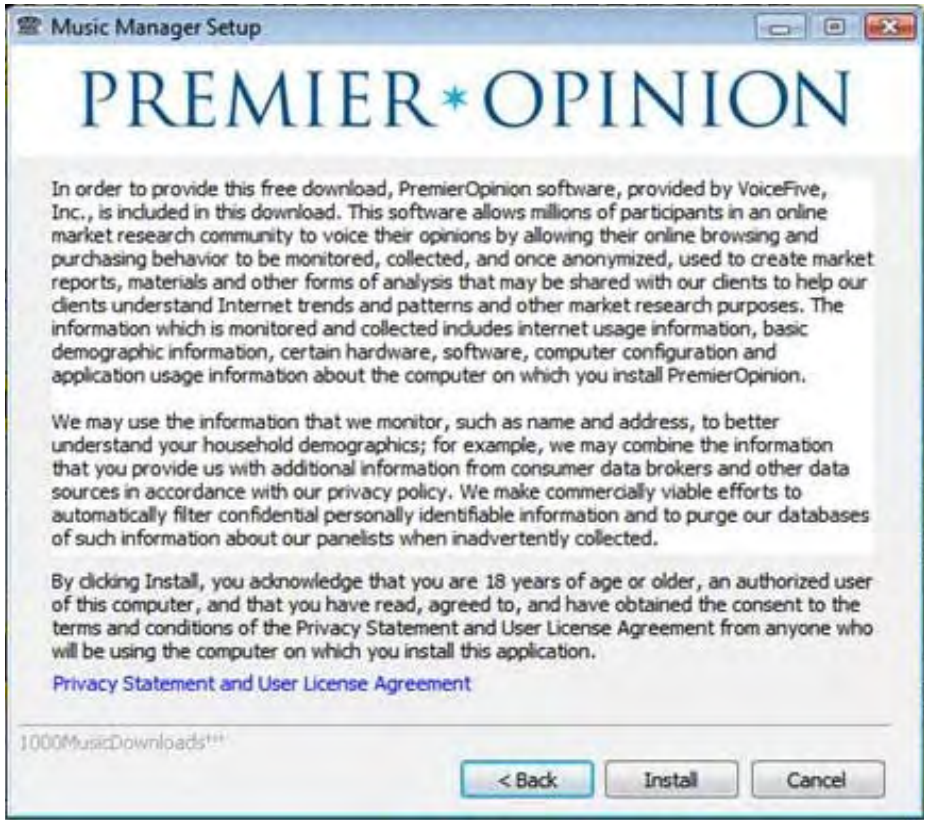
Music Manager Setup
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EXHIBIT 2

Partners	Partner Installs	CS Attempts	CS Installs	Accept Rate (CS Installs / Partner Installs)
Filesubmit	**295,691**	**254,085**	**168,939**	**57.13%**
IronTraffic	**188,684**	**124,490**	**69,177**	**36.66%**
MC A Software Plus	736,000	502,885	383,201	52.07%
MC Accmeware	253,000	199,515	155,026	61.28%
MC Beneton Software	**24,497**	**9,615**	**7,662**	**31.28%**
MC Digital Liquid	243,911	43,936	34,136	14.00%
MC Falco Software	300,000	168,929	118,389	39.46%
MC GustoSoft	30,000	11,698	9,030	30.10%
MC KC Software	109,356	78,938	54,177	49.54%
MC OurScreenSavers	76,816	10,638	8,463	11.02%
MC Rising Research	**28,670**	**7,726**	**6,096**	**21.26%**
MC Wise Cleaner	**39,398**	**11,270**	**8,797**	**22.33%**
Grand Total	**2,326,023**	**1,423,725**	**1,023,093**	**43.98%**
BOLD TOTALS	**576,940**	**407,186**	**260,671**	**45.18%**

- Partner Provided Numbers
- comScore Database

NOTES:
- Data is from August-October 2012 (global)
- **BOLD** partners have actual collected data, have a higher degree of confidence in accuracy
- Accept Rate assumes same rate of attempted installs to actual installs for cS SW and Partner SW

CS0016873

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