

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ZANGO, INC.,

Plaintiff,

v.

KASPERSKY LAB, INC.,

Defendant.

NO. 07 CV 0807 JCC

SECOND DECLARATION OF  
GREGG BERRETTA

I, GREGG BERRETTA, declare as follows:

1. I am Director of Industry Affairs for Zango. I make this declaration based on personal knowledge.

**KIS Defeats Access to Zango Without Consumer Choice**

2. On March 8, I discovered that Kaspersky’s software “Kaspersky Internet Security” (KIS), a consumer targeted anti-virus technology, was defacing one of the Zango websites: [www.seekmo.com](http://www.seekmo.com). KIS damaged the Zango web site for any customer running Kasperky’s KIS by removing the Seekmo software download link from the webpage, thus making it impossible for potential Zango customers to download our Seekmo software. Kaspersky customers were not warned that the link would be removed. There was no obvious

SECOND DECLARATION OF GREGG BERRETTA - 1  
No. 07-CV-0807

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Phone (206) 467-6477  
Fax (206) 467-6292

1 way to determine that anything was missing from the site or that the KIS had taken this action.  
2  
3 The results of our tests are attached as Exhibit 1.  
4

5 3. Mr. Coursen (at page 4, point 8) claims that the Kaspersky software does not  
6  
7 “touch, deface, or otherwise have any contact with the untrustworthy websites it detects.” This is  
8  
9 patently false. There is a potential semantic issue here that Kaspersky is trying to exploit. The  
10  
11 Zango web site is damaged to one who is running KIS—the damage is that the download link is  
12  
13 eliminated for all KIS users. The site will still function for one who is not running KIS, and  
14  
15 presumably that is the basis of Mr. Coursen’s statement. However, the lack of effect upon  
16  
17 people not running KIS is irrelevant.  
18

19 4. Kaspersky’s software has slightly different effects on Zango, depending on which  
20  
21 software the consumer has adopted first.  
22

23 If Zango is installed first: First, KIS removes the Zango Toolbar without the user’s  
24  
25 knowledge or consent. The toolbar is a critical component of the Zango software that makes up  
26  
27 a portion of Zango’s value to its customers. This bar, positioned at the top of the user’s Internet  
28  
29 browser page, provides tiny, relevant links to users searching for data on a specific subject. For  
30  
31 instance, someone looking for a loan may want fast access to car loans, mortgage rates, credit  
32  
33 reports, etc. The Toolbar ads provide that quick access. KIS provides no warning or choice to  
34  
35 the user that the Toolbar will be deleted. Second, every time the Zango software attempts to  
36  
37 access the Internet, which could happen as many as three or four times per minute, Kaspersky  
38  
39 will display a dialog box requiring the user to delete or “skip” repeatedly. Kaspersky does  
40  
41 purport to provide an “Apply to All” checkbox which presumably is intended to stop the  
42  
43 repeated warning (and the repeated need to “Skip”). The “Apply to All” checkbox does not  
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1 work. Zango made Kaspersky aware of this, but the “Apply to All” check box still does not  
2  
3 work as of June 4, 2007. This creates a miserable user experience and, in effect, forces the user  
4  
5 to uninstall Zango—the incessant need to hit “Skip” ultimately is intolerable.  
6

7 If KIS is installed and a consumer wishes to sign up for Zango: Kaspersky will not allow  
8  
9 Zango to be installed while Kaspersky is running. In fact, a “Web Anti-Virus Warning” appears  
10  
11 advising the user to block the Zango download requested by the user. After the user chooses to  
12  
13 “Allow,” a new “File Anti-Virus Warning” appears, stating that the Zango software cannot be  
14  
15 disinfected and that “write access is denied.” By choosing to “Skip” this “File Anti-Virus  
16  
17 Warning,” the user receives a third warning – this one stating that the Zango download file is still  
18  
19 infected and providing no choice as to what action to take. Immediately thereafter, Kaspersky  
20  
21 generates a warning that advises the user that a “Malicious HTTP object” is being downloaded.  
22  
23 However, the installation of the Zango software never completes. The user is given no choice  
24  
25 whatsoever in whether to allow or deny the installation of the Zango software. Kaspersky, when  
26  
27 first installed on a user machine, does not allow Zango to be installed thereafter. Attached as  
28  
29 Exhibit 2 are true and accurate copies of screen shots showing Kaspersky thwarting installation  
30  
31 of Zango.  
32

33 5. On May 8, Zango received complaints from a customer who was also a customer  
34  
35 of the KIS product. The customer informed us that the Kaspersky software gave the impression  
36  
37 that a user had the ability to choose whether or not to allow the Zango software to run on that  
38  
39 user’s PC. The reality was that no matter how many times this user chose “Allow,” the KIS  
40  
41 software would raise yet another warning, forcing even the most determined users to choose the  
42  
43 “Allow” option over and over until, eventually, they would give up and the Zango software  
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1 would be blocked. I informed Kaspersky of this behavior, expressed concerns that one of our  
2 primary competitors was not treated similarly, and never received a response. Clearly, the effect  
3 of this behavior unique to Zango software is to prevent potential customers from running the  
4 Zango software without extreme difficulty. As of June 4, there is no indication that this behavior  
5 has been modified.  
6  
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10  
11 6. On March 28, 2007, I sent email correspondence to Shane Coursen expressing  
12 concern about KIS damage to our download link on [www.seekmo.com](http://www.seekmo.com) from a Kaspersky OEM  
13 customer, CheckPoint, via their software product, ZoneAlarm 6. I received no word from  
14 Kaspersky on the matter and began attempting to resolve the issue through CheckPoint directly.  
15 To date (as of June 4), the issue has not been resolved and potential Zango customers using  
16 ZoneAlarm 6 (with the included Kaspersky Anti-Virus engine "KAV") still cannot download  
17 and install our software via [www.seekmo.com](http://www.seekmo.com).  
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25 7. On May 29, I asked our engineers to perform further testing on the CheckPoint  
26 ZoneAlarm 7 product, which, like ZoneAlarm 6, utilizes the KAV, and determined that Zango  
27 customers who also installed the ZoneAlarm 7 product were unable to see the Zango Toolbar.  
28  
29  
30

31 8. On May 20, I learned that America Online (AOL) was offering a free antivirus  
32 product called AOL Active Virus Shield Powered by Kaspersky. Because of the previously  
33 noted Kaspersky behavior, I asked our lab to test the treatment of the Zango software by the  
34 AOL/Kaspersky solution. I discovered that the AOL software prevented the installation of  
35 Zango software when in its default mode. This inability to install Zango's software across the  
36 millions of AOL customers is still unresolved to this day. AOL is investigating the issue, but has  
37 not yet provided its analysis to Zango.  
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1 9. To date, Zango has spent countless lab hours in an attempt to determine which  
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3 other anti-virus, anti-spyware, and firewall vendors – in addition to CheckPoint and AOL –  
4  
5 utilize Kaspersky’s technology. Kaspersky’s web page states that their anti-virus engine and/or  
6  
7 anti-virus software powers at least 50 and possibly as many as 150 OEM partners.  
8

9 **Response to Shane Coursen’s Declaration**

10 10. Zango software does not fit the typical description of adware. All Zango software  
11  
12 provides concise, clear language conveying the terms of the offer to the potential customer in  
13  
14 advance of installation. Further, Zango software makes it abundantly clear in several places how  
15  
16 to uninstall (completely) the software if it is, in fact, not wanted. The Zango software also does  
17  
18 not “track” the web surfing behavior of users, as Mr. Coursen inaccurately suggests. The Zango  
19  
20 software uploads to the downloaded client on the user’s computer a list of keywords that may  
21  
22 lead to relevant advertisements. The Zango software resident on the user’s PC detects instances  
23  
24 of those keywords from the customer’s web browser while they are surfing the internet and then  
25  
26 calls the Zango server for a relevant ad from the Zango approved ad inventory. This occurs  
27  
28 without collecting any personally identifiable information and, contrary to Mr. Coursen’s  
29  
30 suggestion at p. 3 of his declaration, without sending the consumer’s “Internet browsing habits”  
31  
32 back to the Zango servers. All ads displayed are clearly labeled as coming from Zango.  
33  
34

35 11. Zango never sends unwanted links to pornography websites. Mr. Coursen, while  
36  
37 mentioning pornography liberally, presents no evidence—and none exists—that a Zango  
38  
39 consumer would unwittingly be sent pornographic material. In paragraph 19, Mr. Coursen  
40  
41 reiterates his unfounded concerns that our software provides links to “pornography and other  
42  
43 untrustworthy sites.” Mr. Coursen, despite his tenure in the industry, appears to miss the fact  
44  
45 that Zango software provides relevant advertising to Zango customers. Zango does not provide

1 “links” and, in fact, displays the actual Internet web page from an advertiser relevant to the user  
2  
3 without requiring the user to click on a link. All advertisements are reviewed by Zango prior to  
4  
5 entering the ad inventory and Zango exercises strict controls over what is and what is not  
6  
7 allowed to be displayed. Zango has a vested interest in ensuring that customers receive relevant  
8  
9 and trustworthy advertisements. Again, Mr. Coursen provides no examples of either the  
10  
11 supposed unwanted “links” or advertisements in his declaration.  
12

13 12. Mr. Coursen repeatedly infers that Zango software will “use up computer memory  
14  
15 and processing speed,” implying both that this is unusual for a software application and that  
16  
17 Zango software consumes an inordinate share of those resources. It is not unusual, which Mr.  
18  
19 Coursen knows, because it is true of every software application, including Kaspersky Internet  
20  
21 Security (KIS). Further, Mr. Coursen’s assessment that Zango software slows the operation of  
22  
23 the computer by taking an inordinate share of computer memory or processing speed is entirely  
24  
25 unsubstantiated.  
26

27 13. Mr. Coursen (at page 6, point 12) claims that Zango has “fabricated a dispute with  
28  
29 Kaspersky.” This is false. Additionally, and perhaps more importantly, Mr. Coursen chooses to  
30  
31 ignore the more critical current damage that Kaspersky is having on Zango through its most  
32  
33 recent software release and those of its OEM customers. One of Kaspersky’s largest OEM  
34  
35 customers, CheckPoint, is to this day still removing the [www.seekmo.com](http://www.seekmo.com) download link despite  
36  
37 the fact that Mr. Coursen avers that defacing the detected website is not possible. Additionally,  
38  
39 Kaspersky’s KIS software refuses to allow a potential Zango customer unfettered access to  
40  
41 Zango functionality despite taking affirmative steps to allow the proper functioning of Zango. In  
42  
43 his paragraph 18, Mr. Coursen provides a screen shot of the Kaspersky software giving the  
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1 customer the supposed choice of allowing or denying the download of our software. What Mr.  
2  
3 Coursen fails to show the court is that once the software is installed, Kaspersky's KIS will  
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5 continue to pop warnings over and over, each time giving the user "choice" as to whether they  
6  
7 want to allow the software to function. Even the most persistent and dedicated customer will  
8  
9 find that choosing to "Allow" every 15 to 30 seconds becomes cumbersome and renders the  
10  
11 operation of our software de facto damaged.

12  
13 14. Contrary to Mr. Coursen's assertions that Kaspersky "does not specifically target  
14  
15 or single out Zango" (paragraph 16 at page 7), I personally notified Mr. Coursen and Kaspersky  
16  
17 that Zango engineers ran tests to determine whether the inability to stop warning flags from  
18  
19 Kaspersky regarding Zango software was unique to Zango or included Zango competitors such  
20  
21 as WhenU. Those tests showed conclusively that only Zango was targeted with non-stop  
22  
23 warnings despite the user having chosen to "Allow" the Zango software to proceed.

24  
25 15. Mr. Coursen attaches a copy of the FTC settlement which shows at page 3 of 11  
26  
27 in subpoint 9 that "Legacy program" will mean any software program that was installed on a  
28  
29 consumer's computer prior to January 1, 2006. Thus, the damages that Kaspersky have inflicted,  
30  
31 and continue to inflict on Zango, have all transpired since after the settlement of all claims  
32  
33 against legacy products and practices.

34  
35 16. Mr. Coursen includes in his Exhibit B several documents for the court to review.  
36  
37 Unfortunately, the Wikipedia article sited contains the contents of an on-going "edit war" and  
38  
39 cannot be cited as valid reference. Mr. Coursen then cites Mr. Edelman and Mr. Howes from  
40  
41 [www.benedelman.org](http://www.benedelman.org). Unfortunately, Mr. Edelman has made the December 8, 2006 update  
42  
43 difficult to find (see "Updated, December 8, 2006" just below the by-line on Mr. Edelman's page  
44  
45



1 at Mr. Coursen's Exhibit B.) In the December 8 update that Mr. Coursen fails to cite, Mr.  
2  
3 Edelman notes that Zango is in compliance with the FTC order. Mr. Edelman then proceeds to  
4  
5 take issue with the FTC. As to the November article, Mr. Edelman's concerns were expressed  
6  
7 during the FTC comments period and were reviewed and rejected by the FTC.  
8

9 17. The only instance where Mr. Coursen provides a post January 2007 reference is  
10 particularly telling. From February 6, 2007, a poster by the handle "Zango affiliate" states that  
11  
12 "if you guys go on Zango.com (sic) you will see that their his (sic) now new warning and  
13  
14 permission disclaimers before anything his (sic) installed on peoples (sic) systems, so lif (sic)  
15  
16 people are willing to see the pop-ups I don't see anything wrong with it. Zango will really do  
17  
18 good (sic) because of their new clean ways." It's fitting that Mr. Coursen's last citation, despite  
19  
20 the grammatical challenges exhibited, seems to echo the reality of Zango in 2007.  
21  
22

### 23 Response to Ray Everett-Church's Declaration

24  
25 18. Mr. Everett-Church seems to base his expert opinion primarily on data either prior  
26  
27 to 2005, a visit to Zango's website, and/or his own personal history of working for a company  
28  
29 that attempted to "maximize revenue through the use of its primary asset: rich data profiles  
30  
31 about the online activities of customers." Zango should not and cannot be lumped in with the  
32  
33 type of company for which Mr. Everett-Church formerly served as Chief Privacy Officer. Given  
34  
35 that Mr. Everett-Church is back in as CPO of the reformed Alladvantage.com (now called  
36  
37 AGLOCO.com), a company that purports to collect user's personal information and web  
38  
39 browsing habits (in addition to setting up a multiple level marketing scheme), it is clear why Mr.  
40  
41 Everett-Church would feel alarmed that Zango might be a competitor. Despite the irony of his  
42  
43 position and his testimony in this declaration, it is clear that Zango does not create rich data  
44  
45



1 profiles about the online activities of our customers. Such activity is deplorable and contributes  
2 significantly to the types of real harms to the Internet user's personal privacy than anything that  
3 has ever been legitimately alleged against Zango. We may show a consenting customer a  
4 relevant advertisement in exchange for providing free content, but we do not and will not ever  
5 collect a user's personally identifiable information, let alone pay people to convince others to  
6 disgorge that information to AGLOCO.  
7  
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12  
13 19. Mr. Everett-Church is incorrect in his assertion on page 5 (point 11) that "Zango  
14 also encourages developers to incorporate the Zango software into their content in exchange for a  
15 share of the advertising revenue." The fact is that all Zango software is served from the Zango  
16 server and is not incorporated directly into a developer's software. The ability to control the  
17 source of our software installation ensures that Zango is aware of where our software was  
18 installed, what notices were provided, and when to begin the timer to message the downloaded  
19 client after 72 hours to inform the user that our software is still installed – thus providing the  
20 users with a second chance to uninstall the software or choose, again, to remain a Zango  
21 customer.  
22  
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31 20. Mr. Everett-Church's frequent statements throughout his declaration that no one  
32 wants advertising delivered to their computer is not only hypocritical (see Mr. Everett-Church at  
33 page 3, point 6), but becomes of minimal significance when the Zango customers provide  
34 express consent to view the advertisements in exchange for access to free content. Further, every  
35 Zango customer has the ability to uninstall Zango at any time they believe the value offered is no  
36 longer sufficient. Despite Mr. Everett-Church's frequent claims that Kaspersky provides the  
37 public with a desperately needed solution, the reality is that no Zango user needs a "pop-up  
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1 blocker,” “anti-virus software,” or “anti-spyware software” package to rid themselves of Zango  
2 software. Zango customers simply utilize the Add/Remove Programs function common on every  
3 Windows PC and Zango’s software will be uninstalled. Had Mr. Everett-Church actually  
4 installed the Zango software as part of his research (and then uninstalled it), rather than assuming  
5 he knew how Zango worked, he would have seen that his unsubstantiated fears were incorrect.  
6  
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10  
11 21. Per Mr. Everett-Church’s assertions in points 17-22, he again fails to mention that  
12 the plain language disclosures shown to users are only one part of the overall approach Zango  
13 takes to ensure customers understand what they are getting and how to remove it.  
14  
15

16  
17 a. Zango software always provides prominent, plain language disclosure of  
18 the fact that Zango is being installed and what Zango will and will not do.  
19

20  
21 b. Zango makes the Privacy Policy and EULA, along with Best Practices,  
22 available to all users from easily accessible links.  
23

24  
25 c. Once Zango is installed, a window appears which lets the user know that  
26 Zango has been installed.  
27

28  
29 d. After Zango is installed, there is a prominent Zango icon placed in the  
30 lower right System Tray of the user’s PC. By clicking on that link, the user is able to easily  
31 access information on how to remove Zango if they should so choose.  
32

33  
34 e. Additionally, Zango includes an easy to find “Uninstall Zango  
35 Instructions” at the Start/Programs menu standard on every Windows PC.  
36  
37

38  
39 f. After 72 hours, Zango sends a notice to Zango customers informing them  
40 that they have Zango software installed on their PC. Again, this provides information on how to  
41 uninstall Zango.  
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1 g. After every 90 days, Zango again sends a notice to Zango customers  
2  
3 informing them that the Zango software is installed on their PC. Once again, the uninstallation  
4  
5 information is provided.  
6

7 22. Zango disclosures are a model in the industry as to informing customers of the  
8  
9 fact that they have installed a piece of software, what the software does, and how to uninstall it if  
10  
11 they no longer wish to take advantage of the value proposition offered by the software.  
12

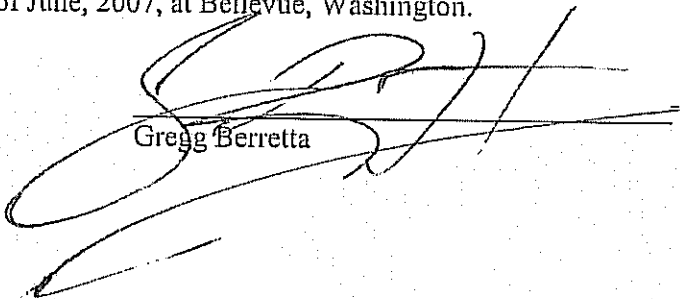
13 23. Additionally, and glaring in its omission from Mr. Everett-Church's analysis, is  
14  
15 the fact that customers have the ability to pay for the premium version of Zango's Hotbar  
16  
17 software. To claim, as Mr. Everett-Church does (at page 8, point 20) that Zango somehow offers  
18  
19 up a "free gift" while some of the customers are paying for it with their credit cards is ridiculous.  
20  
21 Mr. Everett-Church may seem in his declaration to champion the "unsuspecting and  
22  
23 unsophisticated Internet users," but it would appear that he has not installed the Zango software,  
24  
25 nor has he paid for the Premium version of Hotbar, so he is ill equipped to opine on how many  
26  
27 plain language notices an unsuspecting customer needs before they can be deemed consensual  
28  
29 installations.  
30

31 24. Mr. Everett-Church seems to believe that there is some public interest at stake in  
32  
33 the relief sought against Kaspersky. The reality is that Kaspersky should be held to the same  
34  
35 standards to which Zango is held. Kaspersky should notify their users when they, or their OEM  
36  
37 customers, intend to remove a crucial portion of a non-malicious website. Kaspersky should let  
38  
39 users know that they will prevent customers from upgrading to the premium version of Hotbar  
40  
41 rather than denying such upgrade outright. Kaspersky should ensure that their users are given  
42  
43 true choice and true information about the nature of the harm for which they purport to protect  
44  
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1 against. Zango is not a threat to the user's personal security or the security of their personal  
2  
3 computer. Zango goes beyond any other company to ensure that the users know that Zango is  
4  
5 installed and how to easily remove it completely. Zango acknowledges that Kaspersky does  
6  
7 protect against real threats in the form of viruses and malware and has not requested that such  
8  
9 protection be enjoined. Zango software should not be lumped in with malware simply by virtue  
10  
11 of showing advertising to customers that want free access to Zango content in exchange for  
12  
13 viewing ads. Because Kaspersky's business model relies on the finding of harms on the Internet  
14  
15 to disgorge unsuspecting and unsophisticated users from their hard earned money, one can safely  
16  
17 assume that Kaspersky has no business interest in accurately reporting the nature of threats when  
18  
19 such threats turn out, like Zango, to be completely benign.  
20

21 I declare under penalty of perjury pursuant to the laws of the State of Washington that the  
22  
23 foregoing is true and correct.  
24

25 DATED this 4 day of June, 2007, at Bellevue, Washington.  
26

27  
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29   
30 Gregg Berretta  
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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# **EXHIBIT 1**

## Attachment 1

When we test Seekmo, we download it from the Seekmo site (www.seekmo.com)  
But after installing Kaspersky and opening the Seekmo site - the download link disappear.

### Seekmo download page with the download link:

The screenshot shows the Seekmo website interface. At the top left, the logo "SEEKMO" is displayed with the tagline "Better Searching. More Free Stuff." and a link "How does it work? VIEW DEMO >>". Below the logo is a navigation menu with "Home", "Seekmo Privacy Center", and "Customer Support". A search bar is visible with a "GO" button. On the left side, there are "Quick Links" including "Seekmo Demo", "Contact Us", "Partner with Seekmo", and "About Us". The main content area features the "Seekmo Search Assistant" section, which describes a search-based advertising application. Below this, there is a "Seekmo Toolbar" section. A red circle highlights the "DOWNLOAD FREE" link in the "Seekmo Toolbar" section. At the bottom of the page, there are links for "Privacy Policy", "License Agreement", "Terms of Use", and "About Us", along with a copyright notice: "Copyright © 2003 - 2007 Zango, Inc. All rights reserved." The browser's status bar at the bottom shows "Done", "Internet", and "9,100%" zoom level.



**Seekmo download page after installing Kaspersky - without download link:**

Seekmo Search Assistant Information and Seekmo Toolbar - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Search Favorites

Address <http://www.seekmo.com/downloads/searchassistant.aspx> Go

Links Downloads Google

**Seekmo Search Assistant**

**Find what you want - faster**  
Seekmo Search Assistant is a search-based advertising application that gives users access to free online content across the Internet.

The Search Assistant recognizes keywords from your Internet browser and instantly matches them to relevant products and services from our advertisers.

Instead of showing you a list of search results with dozens of links, Search Assistant opens a new browser window to a website that features exactly what you're looking for, right when you are looking for it.

A better search experience

- Relevant ads that match your search
- Fast, accurate results
- Plus, get access to free online content!

**Seekmo Toolbar**  
The Seekmo Search Assistant now provides a Seekmo Toolbar so you can search the internet from any web page.

**Missing Link** ← [Find out more about the Search Assistant.](#)

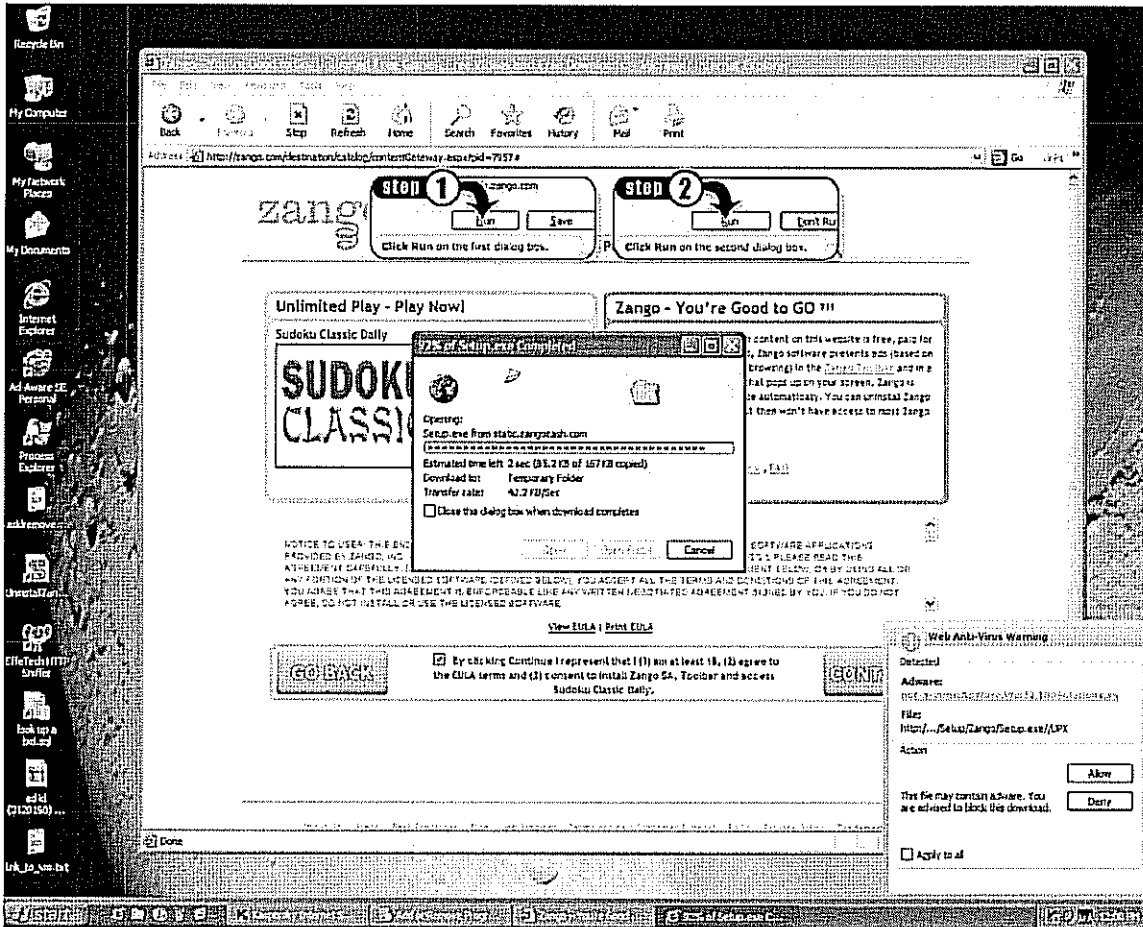
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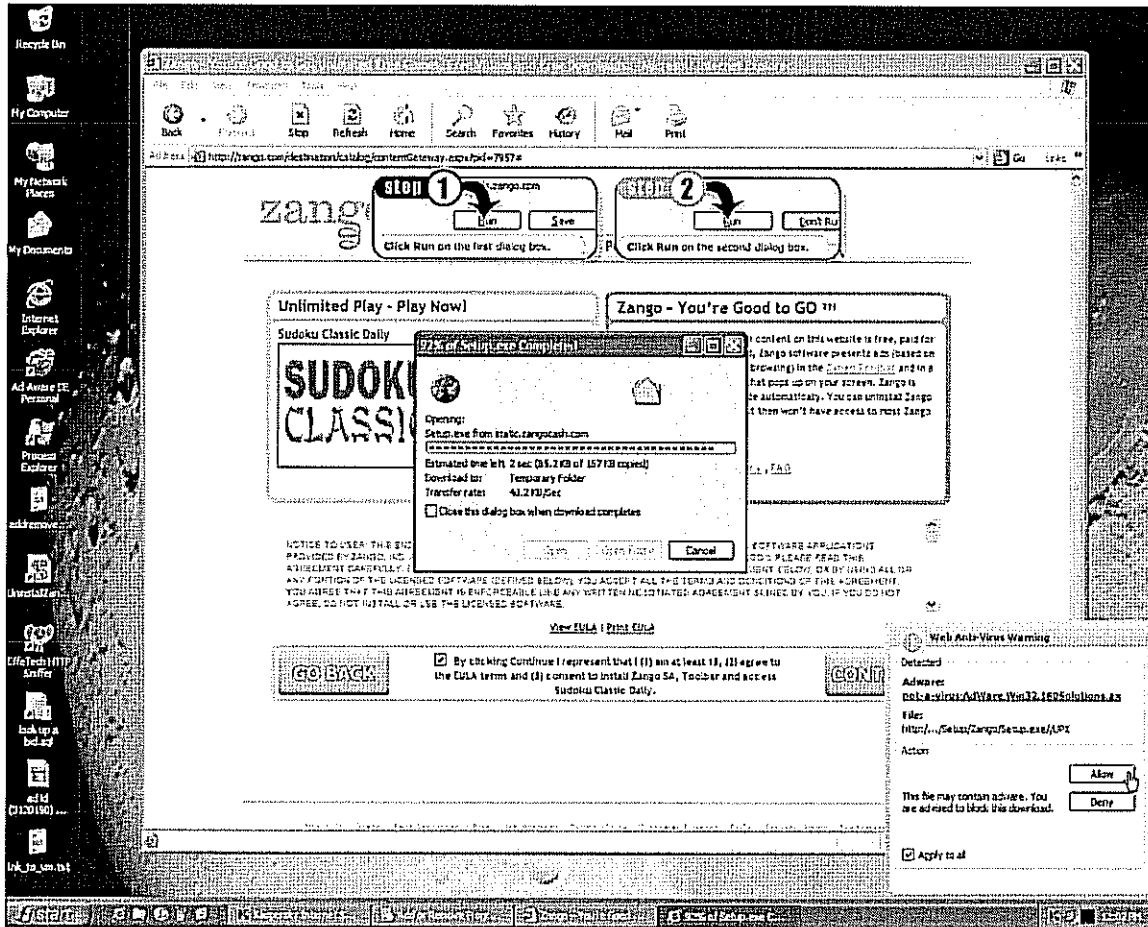
Done, but with errors on page. Internet

# **EXHIBIT 2**

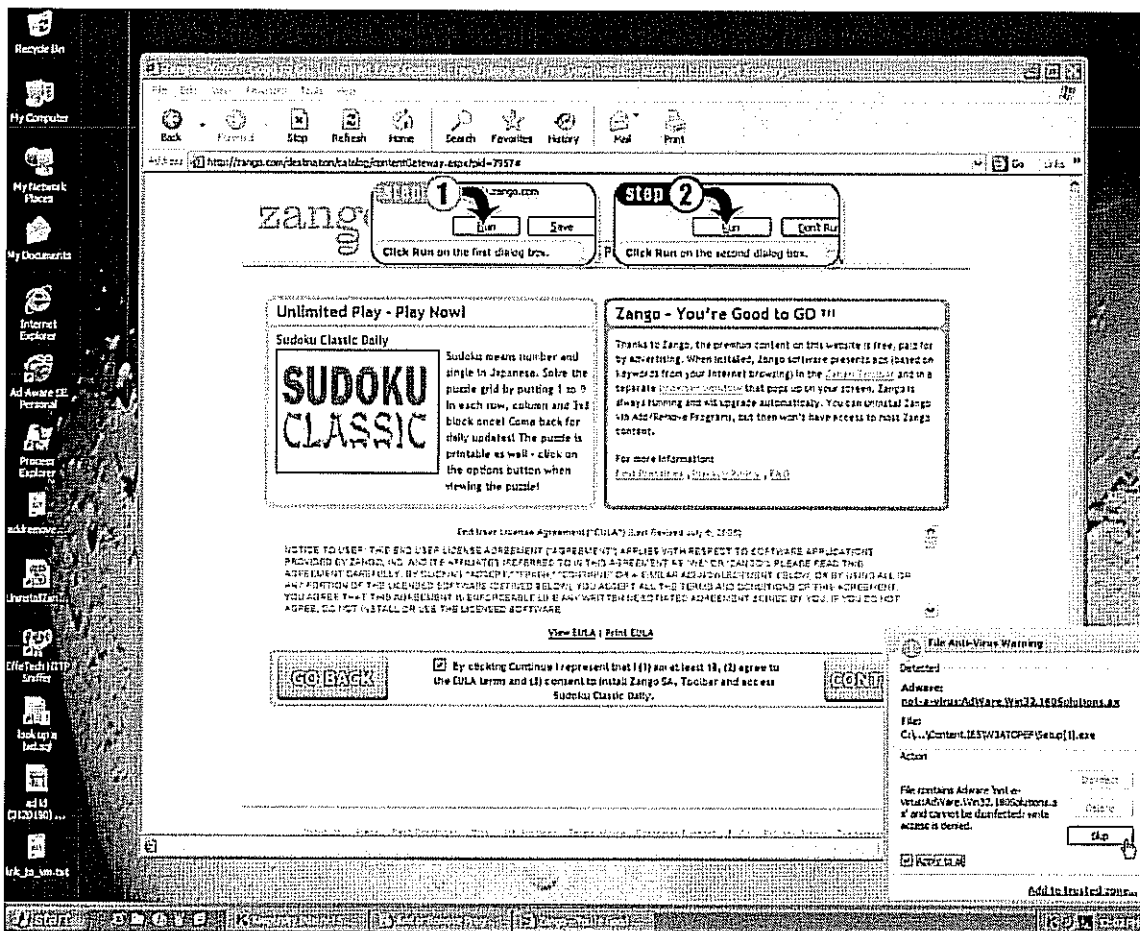
Screenshot 1 – A user attempts to install Zango while Kaspersky (KIS) is running and receives a warning.



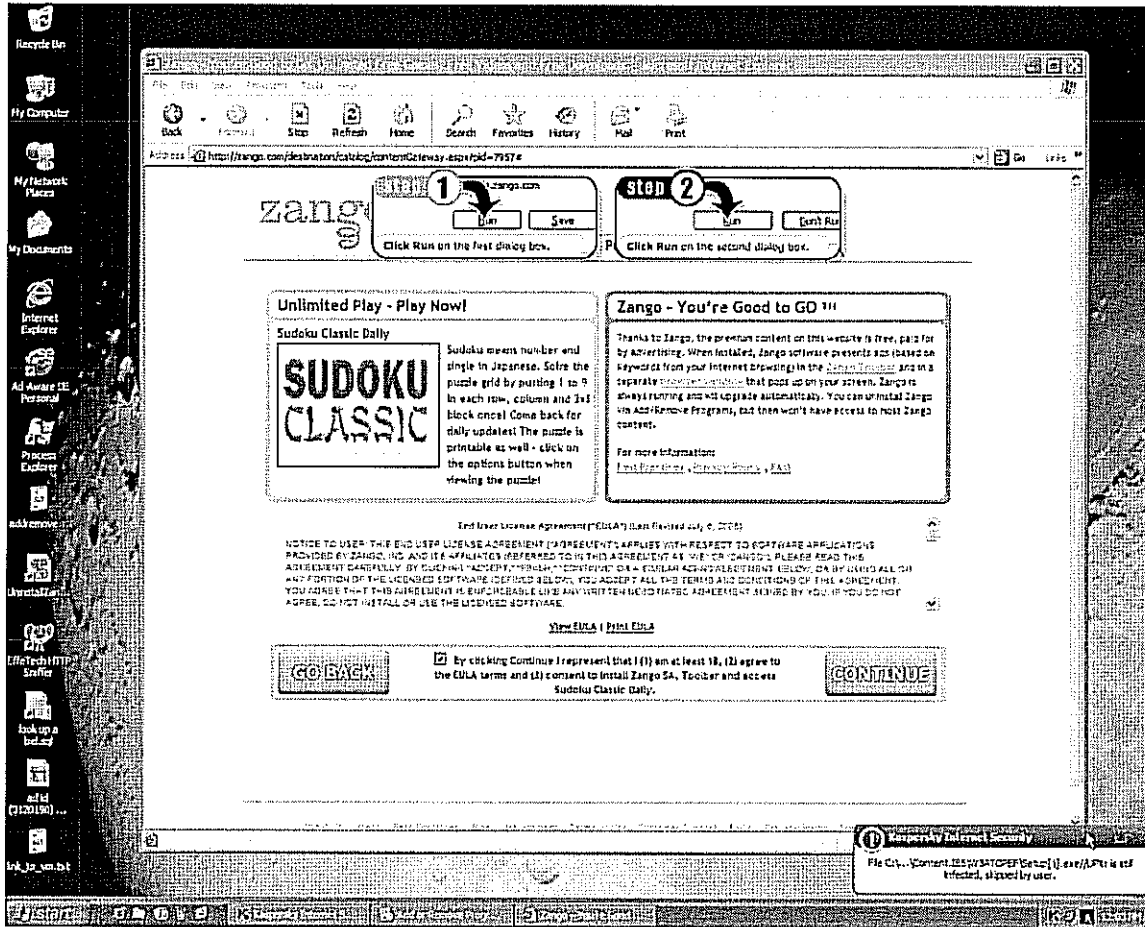
Screenshot 2 The user receives a second warning.



Screenshot 3 The user receives a third warning.



Screenshot 4 The user receives a warning without any option.





Screenshot 5 The user receives a final “Malicious HTTP” warning before the installation fails completely.

