

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright

_____)
In the Matter of)
) **DOCKET NO. C-4391**
)
TIMOTHY KELLY and)
RONALD P. KOLLER.)
_____)

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Timothy Kelly is an officer and owner of DesignerWare, LLC, a Nevada limited liability company. His principal office or place of business is 108 Hutchinson Drive, North East, Pennsylvania 16428.

2. Respondent Ronald P. Koller was an officer and owner of DesignerWare, LLC, until on or about March 28, 2012. He resides in Ocoee, Florida.

3. The Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. Unless otherwise specified, "respondents" shall mean Timothy Kelly and Ronald P. Koller.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

a. In textual communications (e.g., printed publications or words displayed on the screen of a computer or mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subpart (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a

form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and include nothing contrary to, inconsistent with, or in mitigation of any statement contained within the disclosure or within any document linked to or referenced therein.

5. “Geophysical location tracking technology” shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. “Monitoring technology” shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

- a. Recording keystrokes, clicks, or other user-generated actions;
- b. Capturing screenshots of the information displayed on a computer monitor or screen; or
- c. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer’s webcam or microphone.

7. “Covered rent-to-own transaction” shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer’s contract or rental agreement provides for payments over time and an option to purchase the computer.

I. MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device for use in connection with a covered rent-to-own transaction, directly or indirectly, are hereby permanently restrained and enjoined from:

A. Using any monitoring technology to gather information or data from any computer rented to a consumer; and

B. Licensing, selling, or otherwise providing third parties with monitoring technology for installation or activation on computers rented to consumers.

II. USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device for use in connection with a covered rent-to-own transaction, directly or indirectly, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without ensuring that the computer user is provided clear and prominent notice at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also ensuring that the computer renter's affirmative express consent is obtained at the time the computer is rented. For purposes of this section, providing clear and prominent notice to computer users and obtaining affirmative express consent from computer renters means:

1. Clear and Prominent Notice: a clear and prominent notice is provided to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information;

2. Affirmative Express Consent: affirmative express consent is obtained by giving the computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require that a computer be rented to a user who declines to consent to installation or activation of any geophysical tracking technology;

3. Icons: the activation of any geophysical location tracking technology shall be accompanied by the installation of a clear and prominent icon on the computer on

which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information;

Provided that the notice requirements of this Part may be suspended and geophysical location tracking technology activated if (a) the renter reports that the computer has been stolen or there is otherwise a reasonable basis to believe that the computer has been stolen, and (b) either the renter or another person has filed a police report stating that the computer has been stolen. *Provided further that* respondents shall ensure that documents establishing (a) and (b) are retained. For purposes of this Order, “filing of a police report” means the reporting of a complaint with the police department in any form recognized in the jurisdiction;

Provided further that the notice and record-keeping requirements of this Section II shall be satisfied when respondents act as licensors if respondents include in the licensing agreement contractual requirements that: (i) licensees may only activate geophysical location tracking technology if (a) the renter reports that the computer has been stolen or there is otherwise a reasonable basis to believe that the computer has been stolen and (b) either the renter or another person has filed a police report stating that the computer has been stolen, and (ii) documents establishing (a) and (b) are retained by the licensees; and

B. Licensing, selling, or otherwise providing any third party with geophysical location tracking technology for installation or activation on a computer to be rented in a covered rent-to-own transaction, without requiring as a condition of the license, sale, or other provision of the technology that the third party obtain consent and provide notice as provided in Section II.A, above.

III. NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device, are hereby permanently restrained and enjoined from making, or assisting others to make, any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

**IV.
PROTECTION OF DATA**

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data, if any, previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order, unless such action is otherwise prohibited by court order or other legal obligation; and

B. Transfer data or information, if any, gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to server(s) operated by respondents, and from server(s) operated by respondents to any other computers or servers only if such information is rendered unreadable, unusable, or indecipherable during transmission.

**V.
NO MISREPRESENTATIONS ABOUT PRIVACY**

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device, directly or indirectly, shall not misrepresent, in any manner, expressly or by implication, the extent to which respondents maintain and protect the security, privacy, or confidentiality of any personal information gathered from or about consumers.

**VI.
DISTRIBUTION OF ORDER**

IT IS FURTHER ORDERED that respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers for all companies that either respondent controls that engage in any covered rent-to-own transactions, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondents shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. From each person to whom respondents deliver a copy of this order, respondents must obtain a signed and dated acknowledgment of receipt of this order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 et seq.

VII. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondents shall each, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

B. Respondents shall each, for a period of three (3) years after the date of issuance of this order, notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include the new business address and telephone number and a description of the nature of the business or employment and respondent's duties and responsibilities.

C. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Timothy Kelly and Ronald P. Koller, File No. 1123151. *Provided, however;* that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VIII. RECORDKEEPING

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last date of any act or practice covered by Parts I – V of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondents, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party for use in connection with any covered rent-to-own transaction, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order;

- C. Contradict, qualify, or call into question respondents' compliance with this order;
- or
- D. Acknowledge receipt of this order obtained pursuant to Part VI.

IX.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this Order that terminates in less than twenty (20) years;
- B. This Order's application to any respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Wright not participating.

Donald S. Clark
Secretary

SEAL:
ISSUED: April 11, 2013