

Alan L. Sullivan (3152)
James D. Gardner (8798)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Celia Goldwag Barenholtz (pending *pro hac vice* admission)
Michael D. Paley (pending *pro hac vice* admission)
Jason M. Koral (pending *pro hac vice* admission)
Ian Ross Shapiro (pending *pro hac vice* admission)
Marisa L. Megur (pending *pro hac vice* admission)
KRONISH LIEB WEINER & HELLMAN LLP
1114 Avenue of the Americas
New York, New York 10036
Telephone: (212) 479-6000
Facsimile: (212) 479-6275

Attorneys for Plaintiff WhenU.Com, Inc.

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

WHENU.COM, INC., a Delaware
corporation,

Plaintiff,

vs.

THE STATE OF UTAH, a body politic,
OLENE S. WALKER, in her official
capacity as Governor of Utah, and
MARK SHURTLEFF in his official
capacity as Utah Attorney General,

Defendants.

AFFIDAVIT OF MARISA L. MEGUR

Case No. _____

Honorable _____

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss: _____

MARISA L. MEGUR, having been first duly sworn upon oath, deposes and says:

1. I am an attorney at Kronish Lieb Weiner & Hellman LLP, attorneys for Plaintiff WhenU.Com, Inc. ("WhenU"), and a member in good standing of the bar of New York.

2. I have listened to audiotapes made available to the public of the February 13, 2004 Public Utilities and Technology Standing Committee meeting and the Utah House and Senate debates on the Spyware Control Act (HB323). The following paragraphs contain accurate transcriptions of relevant excerpts of these audiotapes. (Copies of the audiotapes will be made available to the Court upon request.).

3. The following is an excerpt from the February 13, 2004 comments of Benjamin Edelman, a consultant for 1-800 Contacts, Inc., to the Public Utilities and Standing Committee:

"The problem we're here to talk about today is Spyware, the title of the bill tells us that much. Defining the class of software that's at issue is really the the core question and is of course the reason why this software is of such great concern. We're basically talking about a broad class of programs that can get installed on your computer often without your knowledge or your consent, certainly without your informed consent because if you knew what was going on you almost certainly wouldn't have allowed it. The programs monitor what you're doing, typically keeping track of what specific websites you visit, what specific web pages on those sites you visit, and I can't understate the importance of all of that, if you knew which web pages and which websites I visit, I think you'd know most everything about me, you'd know that I'm here today and not going to class, you'd know that I had gotten the notes for the

classes that I was missing, you'd know who I support for president, you'd know what bank I use, you'd probably know my bank balance, I suppose, just by watching what sites I visit and what pages I go to on those sites. With that information well the sky's the limit as to what devious third parties could do with it. Many of them like to show advertisements according to precisely what they've learned about you. If they learn that you're going to London for vacation, because you asked Expedia for plane tickets to London, they might start sending you advertisements for hotels in London or currency conversion services. I suppose they could also send a message to your neighborhood thief to tell him that your home is going to be vacant and he could break in and steal your possessions. Is that sort of thing actually happening right now? I don't know, it's harder to tell. If it were happening we probably would be none the wiser. We do know that there are plenty of programs out there that use your computer to send junk mail to others, all based on having tricked you into installing their programs in the first instance. They show you advertisements, some of them record your passwords and send them to central servers for well it's hard to know what purpose. Others change your home page if you've ever loaded your web browser and found that the default page is something other than what you had thought it would be it's a pretty good hint that you have some spyware installed on your computer."

4. The following is an excerpt of Representative Urquhart's comments about spyware at the February 13, 2004 Public Utilities and Standing Committee meeting:

“But this is a profound problem where someone can, they’re on our computer and we’re sending out data to them of every website we visit and every keystroke we do so that if they know that I went to Zion’s bank, and then I typed in a password of 43UZH7, they’ve got me.”

5. The following is an excerpt of Representative Urquhart’s comments during a March 2, 2004 House debate on the Spyware Control Act:

“Thank you. I wish I could state this as well as the information technology officer for Overstock.Com but he said that Spyware it imposes a toll on all legitimate businesses. That what it does is it extracts a little here and there from legitimate businesses. The people who are being really harmed by this stuff along with all of us the consumer are legitimate businesses. For example, we have one business in this state, 1-800 Contacts which they spend about thirty million dollars a year on advertising. Overstock.com spends fifty million dollars in advertising. So someone comes along with Adware and all they do is they wait right at the point of purchase, right at the cash register and then bang. They pop up an ad preying off of the legitimate efforts of these businesses. And this is something that is insidious. It is a problem.”

6. The following is a colloquy between Representative Becker and Representative Urquhart during a March 3, 2004 House debate on the Spyware Control Act:

Rep. Becker: “Are you aware of whether or not there’s been a federal court proceeding involving this kind of advertising?”

Rep. Urquhart: "Well, that's as I stated when we adopted this, there have been a few. For example, Wells Fargo has sued WhenU, one of the spyware makers and 1-800 Contacts has sued WhenU also. WhenU prevailed in the Wells Fargo case, not in the 1-800's case, 1-800 Contacts case. The problem is what they're doing is there they're dealing with the Lanham Act, dealing with trademarks. They're really just trying to use conventional statutes to get at a computer problem. So this directly addresses the issue. We're, we're setting policy on spyware rather than getting at it in these roundabout ways."

7. The following are excerpts of Representative Urquhart's comments during a March 3, 2004 House debate on the Spyware Control Act:


"And so what these things can do is they monitor the sites you go to on the Internet, and they send that information elsewhere so they can know o.k., this person likes to travel. Let's hit him with travel pop-ups. Let's hit him with hotel rental car information. What else it can do which is more insidious, it can log all of your key strokes. So they know that this person went to Bank of, Bank of Utah, and then typed in 1279J3. O.K., they know that's your account. Then they know that you typed in JQ43X. They just got your account and your password. And so these are folks that we don't know what they're gonna do with this information. Also, they can hijack your computer, and so you're sending out all sorts of emails and offensive things, your

computer is, that they're just using it to mask who's really sending it and so your friends and relatives are asking you why you're sending them all of this vulgar email and things like this. So, with that, I'm open for questions."

* * *

"The intent of this is to sit on your computer and watch what you do. And then based on what you do, it will either steal your information and deplete your bank account, or it knows that you're interested in certain activities, and it will hit you, bombard you, with pop-up boxes in those, on those subjects."

DATED this 12th day of April, 2004.



Marisa L. Megur

SUBSCRIBED and SWORN to this 12 day of April, 2004.



Notary Public

JUDITH SARA SALZMAN
Notary Public, State of New York
No. 02548000135
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 17, 2007