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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 AVI NAIDER

Case No. _____

Honorable _____

AVI NAIDER, under penalty of perjury, hereby declares:

1. My name is Avi Naider, and I am the President and Chief Executive Officer (“CEO”) of the plaintiff WhenU.com, Inc. (“WhenU”). I submit this affidavit in support of WhenU’s application for a temporary restraining order and preliminary injunction enjoining the operation and enforcement of the newly enacted “Spyware Control Act,” Utah Code § 13-39-101 et seq. (the “Act”), on the grounds that the Act violates the Utah Constitution, the United States Constitution, and the federal Copyright Act.

2. As President and CEO of WhenU, my duties involve the management of WhenU as a whole, strategic planning, reporting to the Board of Directors on the welfare of and outlook for the company, negotiating with potential strategic partners and overseeing the relationships with those partners. Accordingly, I am familiar with the overall business of WhenU. The statements set forth below are based on my personal knowledge, except for those indicated to be based on information and belief; as to matters stated on information and belief, I believe the statements are accurate based on information from sources I believe to be reliable.

Contextual Advertising and the Business of WhenU

3. WhenU is an online contextual marketing company that has developed a unique way to reach consumers with information about products and services at the moment that information is most relevant to them. WhenU addresses an age-old problem: consumers’ lack of access to potentially valuable market information when they need it most. Although consumers are inundated on a daily basis with information of all sorts, including offers from advertisers, the value of such information is reduced because it is not shown to the consumer at the right moment in time. WhenU’s software delivers highly pertinent and timely advertisements and money-saving coupons based on consumers’ immediate interests, as expressed by the consumers’ immediate Internet browsing activity.

4. Contextual marketing is an outgrowth of the decades-old, multi-billion dollar database marketing industry. Database marketing, at its core, relies on behavioral targeting of consumers. For example, American Express tracks and analyzes the purchasing behavior of its credit card holders and uses the information gleaned from such analysis to send consumers potentially pertinent offers. Many other companies have used database marketing to analyze individual consumers' past purchasing behavior in an attempt to predict what discounts and offers would be most attractive to those consumers in the future.

5. More recently, companies have advanced the field of database marketing by deploying new technology-driven methods. For example, Catalina Marketing has developed technology that links to the point-of-sale (POS) systems of many grocery stores and analyzes the purchases of individual consumers as they are scanned by the cashier. Based on the particular products purchased by the consumer, targeted offers and incentives for competing products are then immediately printed for the consumer (typically on the back of his or her grocery store receipt).

6. Software-based contextual marketing technology as developed by WhenU is a revolutionary advance in the field of behavioral marketing. Whereas traditional database marketing companies analyze a consumer's past purchases to predict what the consumer is likely to purchase in the future, WhenU's technology assesses the activity of the consumer in real time, *i.e.*, at the very moment the consumer is researching a certain product or category of products on the Internet. A consumer considering the purchase of a particular brand of replacement contact lenses from an Internet retailer, for example, might receive a WhenU advertisement informing the consumer that the same brand of replacement contact lenses is available from another online retailer at a lower price. And, as discussed below, since

WhenU focuses on immediate consumer activity, it does not need to collect personally identifiable information.

7. Various forms of "real-time" contextual marketing have existed in the physical world for a long time. For example, stores place their generic label brands near well-known branded products on their shelves, hoping to attract the interest of consumers interested in the branded product, and to convince them to purchase the generic label product instead. Clothing retailers stand outside department stores advertising the merchandise of nearby, competing discount outlets. Credit card companies supply eye-catching offers prominently displayed at the cash registers of stores or on the billfolds that restaurants use to enclose the check, thus encouraging consumers to use their credit card for the purchase they are about to make.

8. Essentially, WhenU's technology utilizes the unique capabilities of the Internet environment in the same manner as these companies do in the real world, to offer consumers information that might assist them in comparison shopping and in making purchasing decisions before the decision are made, at a time when the information is most useful.

9. WhenU's contextual marketing concept has proven effective. Thus, since commencing operations in 2000, WhenU has fostered advertising relationships with over four hundred online advertisers in the United States and abroad including Delta Airlines, Hewlett Packard, Dell, Kraft, HBO, Orbitz, Bank of America, H&R Block, Lloyds of London, T-Mobile, AOL, Cingular, and Monster.com. These advertisers enjoy the opportunity of being able to deliver targeted, contextual offers to WhenU's installed user

base, which includes users in all 50 states, as well as millions active computers (or “desktops”) in more than 200 countries outside the United States.

Internet Advertising

10. There are many different sources of advertising on the Internet.

Advertisements can be displayed by websites. For example, ESPN.com, a sports-related website, displays advertising; a consumer viewing the ESPN website might be shown an online advertisement for Labatt beer. Advertisements can also be launched by Internet service providers, such as Microsoft Network or AOL. Some search engines, such as Yahoo!, display advertisements. On information and belief, other advertisements, such as those delivered to the trial users of the “gmail” electronic mail service recently announced by Google, are based on the content of computer users’ e-mails.

11. Online advertisements come in many different formats. Traditional banner ads are integrated into the design of the webpage that the user is currently viewing. Ads which appear in a separate window are often called “pop-ups” or “pop-unders”; these ads can usually be closed by clicking the “X” in the corner of the window.

12. Search engines typically use a form of advertising called “sponsored results” or “sponsored links.” The search engine monitors the information that the user inputs into the search engine and then prioritizes the listing of links to its paid advertisers when it generates the results to the user’s search query. For example if the user enters a search term such as “contact lens,” the results displayed most prominently would be links to the sites of Web Merchants such as www.1800contacts.com. Web Merchants pay the search engine for the placement of these listings; hence the disclaimer that these results are “sponsored.” This kind of advertising is a form of contextual marketing. Attached hereto as Exhibit A is a

screen shot of sponsored advertisements for lensmart.com and 1800contacts.com that appear when a person enters a search for the phrase "Vision Direct contact lenses" (Vision Direct is a direct competitor of 1-800 Contacts and Lensmart) into the Google search engine.

WhenU's Internet Advertising

13. Unlike online advertising from search engines or other websites, WhenU advertisements are generated by its proprietary contextual marketing software "SaveNow."¹

14. The use of SaveNow is entirely consensual. Typically, consumers choose to download the SaveNow software and accept the ads it delivers as part of a "bundle" of other software applications from one of WhenU's download distribution partners.

15. WhenU's download distribution partners are among the many software companies which bundle revenue-generating, advertising software (sometimes called "adware") with free software programs (sometimes known as "freeware") to enable them to offer the freeware to consumers at no cost. In this way, consumers get popular software for free and developers of these software applications generate revenue that enables them to offer the software for free. Alternatively, in some cases, consumers are given the option to decline the adware and choose instead to pay for the base program.

16. For example, the Bearshare software application is marketed to consumers in two forms: a premium, subscription version that costs \$2.99 per month, and a free version that comes bundled with Save. By partnering with Save, Bearshare can therefore offer

¹ In some instances, WhenU's Contextual Marketing technology is branded "SAVE!" However, there is no difference between the way "Save" or "SaveNow" software works. Thus, my description of the SaveNow software technology in this Affidavit applies equally to the "Save" software technology, and I generally use "SaveNow" to refer to both "Save" and "SaveNow" in this Affidavit.

interested users the opportunity to acquire the software free of charge, increasing Bearshare's distribution and saving consumers money.

17. The bundling of revenue-generating, advertising software ("adware") with free software programs ("freeware") is a common practice. Many software companies rely on the revenue generated by advertising software in order to offer freeware for free and to provide service and support for their freeware programs.

18. During the installation process, the consumer always receives a notice that SaveNow is part of the download, and explaining what SaveNow is. To proceed with the installation of SaveNow, the consumer must affirmatively accept a short and simple license agreement we have tried to make as intelligible as possible to the average computer user (the "License Agreement"). The License Agreement, a copy of which is attached hereto as Exhibit B, clearly explains that the software generates contextually relevant advertisements and coupons, utilizing "pop-up" and various other formats. The SaveNow software cannot be installed unless the consumer affirmatively accepts the terms of the SaveNow License Agreement.

19. Once SaveNow is installed, it generates advertisements through the use of a proprietary directory that is delivered to and saved on the consumer's hard drive when the consumer installs the software. This directory is compiled by cataloging the Internet in much the same way as a local Yellow Pages indexes merchants. Specifically, a team of WhenU researchers uses available market research to sort commonly used search phrases and commonly visited web addresses (or "URLs") into different categories. The WhenU directory contains more than 40,000 search phrases and web addresses, organized into more than 500 product or service categories (such as "finance") and sub-categories (such as

“mortgages”). WhenU updates the directory on a daily basis and the software delivers those updates to consumers who have installed SaveNow.

20. As a participating consumer browses the Internet, the SaveNow software on that consumer’s hard drive studies the search terms typed by the consumer and the addresses of websites that the consumer accesses to determine whether any of those terms or addresses match any information in the directory. At the same time, SaveNow studies the content of web pages the customer views for matches with various “keyword algorithms.”² If the software finds a match, it identifies the associated product or service category and determines whether an appropriate advertisement for that category is available to be displayed, subject to built-in limits on the frequency with which a consumer can receive advertisements generally and the number of times a consumer can see a particular advertisement.³

21. For example, a participating SaveNow consumer surfing the Internet for information related to a mortgage refinancing might see an ad for a low-cost mortgage provider while viewing the website of Quicken Loans. A SaveNow consumer looking online for moving vans might see an ad for a discount moving service while viewing the U-Haul website. Because WhenU’s advertisements are contextually relevant and do not require expensive and intrusive compilations of personally identifiable data, they are especially useful and attractive to consumers and effective for advertisers.

22. In addition to providing advertisements, WhenU provides consumers valuable offers, such as “dollars off,” “percentage off,” and other savings coupons for

² Keyword algorithms are combinations of words (e.g., five occurrences of the word “contact” and two occurrences of the word “lens”).

³ WhenU sells advertising to advertisers on a category basis. WhenU makes no guarantee to advertisers that their advertisements will appear when participating consumers access a particular website. WhenU guarantees only that advertisements will be shown to consumers who have demonstrated interest in a particular product or service category.

products and services for use at specific online retail merchants. A WhenU coupon might remind a consumer, for example, of a free shipping offer that is available by using a particular product code when purchasing the product. Attached hereto as Exhibit C is a screenshot of a WhenU coupon that appeared when an individual was viewing an Old Navy webpage.

How WhenU Advertisements Are Displayed

23. WhenU makes the ads, offers and coupons that it serves easy to identify. Ads are displayed in a separate, WhenU-branded window, including the marks "Save" or "SaveNow" a WhenU logo and other distinctive branding elements.⁴

24. In addition to WhenU's unique branding, SaveNow advertisements contain a prominent notice on their face stating: *"This is a WhenU offer and is not sponsored or displayed by the website you are visiting. More..."* When the consumer clicks on the word *"More..."*, a window opens that contains information about SaveNow and a direct link to the

⁴ WhenU's software is designed to operate within the Windows computer operating system, popularized by Microsoft. When a user interacts with a software application in the Windows environment, it is launched in what is known as a "window," a box on the user's desktop within which all of the functions of that application are displayed and operate. A window can be enlarged in order to fill the entire computer screen or reduced to take up a smaller area. Once a user launches a window associated with a particular software application, the open window is simultaneously represented by a button on the "task bar," the strip that typically runs along the bottom of the user's computer screen. (Attached hereto as Exhibit D is a true and correct copy of a screenshot of a typical Windows desktop environment.)

A user can open many windows at the same time and these windows will typically appear to be stacked one in front of another like papers on a desk, in such a way that the windows may or may not "cover" all or parts of other open windows. But, like papers on a desk, computer users can move these windows around by clicking and dragging or minimizing the windows and can go from one open window to another in a variety of ways. These steps are all familiar, widely understood means of operating a desktop computer in a Windows environment. (Attached hereto as Exhibits E and F are screenshots of a computer desktop with multiple programs and webpages open, arranged in different ways on the screen.)

"Frequently Asked Questions" page of WhenU's website, which contains more information about SaveNow.

25. The SaveNow advertisements are displayed in various formats, including: (1) a small "pop-up" window that typically appears flush to the bottom right-hand corner of the consumer's desktop; (2) a larger "pop-under" window that is designed to appear behind the browser window that the consumer is viewing when the ad is generated; (3) a "panoramic" window that runs along the bottom of the desktop; and (4) a small "scroll up" window that initially appears like a pop-up window, but then automatically minimizes to a short horizontal bar, and "scrolls-up" into the small pop-up format only when the user passes his or her cursor over the bar. (Attached hereto as Exhibits G, H, I, and J are true and correct copies of screenshots of each of these types of advertisements, respectively). Regardless of the format used, the SaveNow window is conspicuously branded and has no connection with any other window that may be open on the participating consumer's screen in which a software application is running or a website is displayed.

26. A consumer who is not interested in a WhenU advertisement can easily close the advertisement with one step: clicking the "X" in the corner of the WhenU window. Clicking on an "X" to close a window is a simple action, familiar to all consumers who use Windows-based computers. On the other hand, if the consumer is interested in the advertisement, he or she can access the advertiser's website by affirmatively "clicking" elsewhere on the advertisement. Whether the consumer chooses to access the advertiser's website or to close the advertisement is entirely up to the consumer.

Uninstalling WhenU's Software

27. Consumers can easily uninstall WhenU's software from their computers if they no longer wish to have it. Once uninstalled, the software will cease to operate or show advertisements or coupons on the consumer's computer.

28. When a user removes or "uninstalls" a program bundled with Save according to the instructions provided by the freeware program, the Save software is automatically uninstalled along with it. The Save software supports the associated program and cannot be uninstalled without also uninstalling that associated program. SaveNow can be uninstalled separately from any freeware program with which it was downloaded.

29. Directions for uninstalling Save and SaveNow are contained in a link included with every advertisement. SaveNow is uninstalled through the computer's Control Panel Add/Remove menu, the same straightforward process used for uninstalling most Windows-based software. The Save program is also uninstalled by using the Control Panel Add/Remove feature, by uninstalling the underlying software program supported by Save. The information box that links to the directions for how to uninstall Save contains an explanation notifying users that to uninstall Save, they must uninstall all the Save-supported applications on their computer, and lists all those applications.

30. A user who follows the WhenU instructions will have no difficulty removing Save or SaveNow. Indeed, tens of millions of computer users have successfully uninstalled these programs.

WhenU's Commitment to Consumer Privacy

31. WhenU delivers its highly relevant advertisements while at the same time protecting consumer privacy. WhenU has always placed a great emphasis on consumer privacy.

32. The idea behind the SaveNow software was to revolutionize targeted marketing from the old model in which interests are deduced based on who a consumer is and what their personal information is, to a new software-based system that focuses on actual interests as reflected in their Internet browsing activity – when you shop, when you travel, when you invest. In fact, that's why we named the company WhenU: "When you" are about to book a trip to London, WhenU software will deliver a relevant offer to you. Thus, WhenU has no more need to compile the consumer's personal information that does a man handing out coupons in front of his competitor's store.

33. Since WhenU advertisements are not determined based on the consumers' personal information, WhenU does not need to collect, store, compile or use personally identifiable information about its users, and it abides by a strict privacy policy that exceeds current standards in the Internet advertising industry. The SaveNow software is "rules-based." That is, the SaveNow software's decisions regarding which ads to retrieve and display are all processed on the user's computer desktop and isolated from WhenU's servers. Thus, although the SaveNow software monitors the activity in a user's browser, this monitoring occurs on the user's own computer.

34. WhenU collects only the information necessary to run its system and to be able to compensate its partners and invoice its advertisers. This information consists of the specific element within the directory that triggered the delivery of a WhenU advertisement, which advertisement was delivered, and whether the user clicked on the advertisement. This

information is collected by WhenU on an aggregate basis and is not associated with an individual user -- even on an anonymous basis -- or with an individual profile. WhenU does not collect its users' names, mailing addresses, gender, email addresses, account information or purchase history. It does not log its users' key strokes. It does not collect its users' "clickstream data," *i.e.* information concerning the history of the webpages they visit. Nor does it use "cookies," devices used by many website merchants to track the activities of computer users.

35. Upon installation, the software generates an anonymous unique machine identifier for each computer on which SaveNow is installed. This anonymous ID is used for one and only one purpose: to allow WhenU to calculate the number of active users within the WhenU network. To further protect user privacy, this anonymous machine ID is stripped from the communications sent by SaveNow to WhenU when an ad is displayed. In addition, like most entities that operate on the Internet, WhenU uses the IP address of its users in order to direct content to their computers. WhenU does not use IP addresses to identify individual users and, in fact, IP addresses cannot reliably be used to identify individual users.

36. WhenU is proud of its privacy policy and explains the policy in detail on its website. In April 2002, an independent third party analyzed the SaveNow privacy policies and certified that they are highly protective of consumer interests. The independent auditor concluded that: (a) SaveNow does not collect personal information of users; (b) SaveNow does not collect information about the user's browsing activity such as lists of URLs visited; (c) SaveNow does not collect information about which advertisements have been shown to which specific users; and (d) neither WhenU nor its affiliates maintain any personal information of users in files or registry settings transmitted to their servers. (Attached hereto

as Exhibit K is a true and correct copy of an executive summary of the report by M. Simon Cavalletto of Evolution Softworks.)

SaveNow Is Not "Spyware"

37. The term "spyware" is generally used to describe software that appears harmless, but, once it is downloaded, operates differently than its stated functionality, for example, by stealing or transmitting personal data about the consumer and his or her browsing habits, keystroke data or clickstream behavior. Spyware can also refer to software that sneaks onto a user's computer, masking its operations once it has been installed on the computer, and is nearly impossible to uninstall. Sometimes programs that are surreptitiously downloaded onto user's computers and show ads whose source is not easily identifiable are referred to as spyware.

38. SaveNow is not spyware. It does not steal or transmit any personally identifiable data. SaveNow clearly discloses its presence and purpose to consumers and obtains consumers' consent to download SaveNow and to allow SaveNow to serve advertisements to them. SaveNow continues to disclose its presence and purpose whenever it displays an offer. Unfortunately, despite WhenU's many consumer-protective features, WhenU has sometimes been falsely accused of being "spyware."⁵

39. WhenU regards spyware as a serious problem, and has spoken publicly against it. Legitimate advertising models like WhenU's are not spyware, however, and if software from legitimate marketing companies that truly give choice to consumers is lumped together with nefarious software that intends to deceive, then unscrupulous, "rogue"

⁵ In *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734 (E.D. Mich. 2003), notwithstanding the plaintiffs' efforts to label WhenU "spyware," the court found the opposite to be true. *Id.* at 739 (finding that WhenU protects the privacy and security of its users).

companies who play by no rules and adhere to no standards of consumer protection will be given the upper hand in the marketplace.

40. I personally take the spyware problem very seriously and I had the privilege to testify at Congressional hearings on proposed federal legislation that aims to address that problem. Following my testimony, which included a description of how WhenU operates, Senator Conrad Burns (R. Montana), a sponsor of the bill in the United States Senate,⁶ stated that WhenU “is a legitimate business.” Attached hereto as Exhibit L is a true and accurate copy of an article reporting Senator Burns’ comments. I have since been invited to be a panelist at a public workshop sponsored by the Federal Trade Commission on April 19, 2004, entitled “Monitoring Software on Your PC: Spyware, Adware, and Other Software.”

41. In sum, WhenU provides advertisers with the ability to reach consumers at the point when their advertisements are most relevant to them. WhenU provides participating consumers with information about competing products in the form of advertisements, coupons and money-saving tips. And it does so with a free, voluntary, highly privacy-protective software that consumers can download from the Internet, thereby supporting the development of other free software that consumers find valuable. In short, WhenU provides a useful service to participating consumers, provides a revenue model for popular free software, and contributes to the development of the Internet-enabled desktop as a comparative shopping medium.

⁶ Senator Burns is sponsor of the “SPYBLOCK” bill “to regulate the unauthorized installation of computer software, to require clear disclosure to computer users of certain computer software features that may pose a threat to user privacy.”

Efforts by Certain Website Owners to Shut WhenU Down

42. I am informed and believe that the Spyware Control Act is the culmination of a two-year campaign by a group of companies and their lawyers to drive WhenU and similar online contextual marketing companies out of business and to block online competition.

43. These merchants have sued WhenU and sought preliminary injunctions in courts across the country, in an attempt to stop WhenU from delivering advertisements for their competitors. These lawsuits have met with little success.

44. Three courts have reached decisions in cases brought by such plaintiffs against WhenU. One court granted summary judgment in favor of WhenU. *U-Haul Intern., Inc. v. WhenU.com, Inc.*, 279 F.Supp.2d 723 (E.D. Va. 2003). A second court denied the plaintiffs' demands for a preliminary injunction, finding that the plaintiffs had not shown a substantial likelihood of success on the merits of their claims. *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734 (E.D. Mich. 2003). The third court rejected the plaintiff's claims under the Copyright Act but granted a limited injunction based on the plaintiff's trademark infringement theory. *1-800 Contacts, Inc. v. WhenU.com, Inc.*, No. 02 Civ. 8043, 2003 WL 22999270 (S.D.N.Y. Dec. 22, 2003). The United States Court of Appeals for the Second Circuit expedited WhenU's appeal from that decision, and heard argument on April 5, 2004.

45. Faced with the growing judicial consensus that WhenU advertising does not violate any laws or infringe on the rights of any website operators or any trademark or copyright owners, it is my understanding that some of these plaintiffs and other individuals hired by those companies lobbied intensely for Utah's Spyware Control Act. My understanding is based on, among other things, my meeting with Representative Stephen Urquhart, the House sponsor of the Act, and is confirmed by published news reports.

46. On March 3, 2004, the Utah Legislature passed the measure, and on March 23, 2004, Governor Walker signed it into law. The Act is scheduled to go into effect on May 2, 2004.

The Impact of the Act on WhenU

47. The Act, which I have read, presents WhenU with the impossible choice of either foregoing certain kinds of advertising and spending significant sums to comply with the Act (without any guarantee that it will avoid liability under the Act by doing so) or else inviting millions of dollars of claims by private enforcers. That choice is wholly unnecessary. As set forth above, SaveNow is not “spyware” as that term is ordinarily understood and already protects user privacy.

48. The Act does not use precise terms, and, as a consequence, I believe there will be disagreement as to whether WhenU’s current business practices are prohibited. For example, as I understand Utah Code 13-39-102(4)(c)(ii), software that can be removed “quickly and easily” without any “effects” on “non-affiliated parts” of the computer is not “spyware” within the meaning of the Act. I believe that WhenU’s straightforward and standard removal method (described in ¶¶ 27-30 above) meets these criteria. However, the Act does not define these terms (e.g., “non-affiliated parts”), and I have heard 1-800 Contacts’ paid expert express the opinion that SaveNow is difficult to uninstall.

49. In my view, SaveNow ads also do not violate Utah Code 13-39-201(1)(c). The familiarity of online consumers with the Windows environment and the ease with which the WhenU window containing the advertisement can be moved, minimized or closed satisfy me that SaveNow ads do not, in any meaningful way, “interfere[] with a user’s ability to view” a website. However, the Act also states that “It is not a defense to a violation of this section that a user may remove or hide an advertisement.” Thus, I fear that someone might

argue -- and a court might agree -- that certain WhenU advertising formats “interfere” within the meaning of the Act. Accordingly, because of the vagueness of the Act, and the certainty that at least some ad formats can appear in front of windows displaying webpages a user is viewing, WhenU will have to consider eliminating some formats entirely in order to be sure that it does not violate this section. This would be a significant percentage of WhenU’s advertisements.

50. Among the other issues WhenU would have to consider with respect to compliance with the Act are the following:

- a. The WhenU software License Agreement is typically presented in a box with a scroll bar, a common practice on the Internet. It is up to the computer user to scroll through the box to see the License Agreement in its entirety. If WhenU wants to comply with Section 102(4)(c)(i)(A) of the Act, it will have to take the risk that the phrase “presented in full” includes a presentation in a scroll box or change its method of displaying its License Agreement. This problem would be exacerbated by the fact that the other coercive disclosure provisions of the Act would force WhenU to expand considerably the length of its License Agreement. Thus, WhenU may be forced to adopt a method of presenting its License Agreement that is not used by other software distributors, including distributors of WhenU’s software.
- b. To comply with Section 102(4)(c)(i)(B), WhenU would have to develop a new notice that advises users of “each specific type of information to be transmitted as a result of the software installation.” WhenU

describes its privacy policy in the License Agreement, but the License Agreement does not describe every single type of data that is transmitted as a result of using the Internet. For example, like most entities that operate on the Internet, WhenU needs to use the IP address of its users in order to direct content to their computers. WhenU does not use IP addresses to identify individual users. Nevertheless, to comply with Section 102(4)(c)(i)(B) WhenU may have to inform users of the use of IP addresses and obtain their consent to even routine use required to direct content to users, which has nothing to do with user privacy.

- c. To comply with Section 102(4)(c)(i)(C), WhenU would have to figure out how to provide “a clear and representative full-size example of each type of advertisement that may be delivered.” Currently, WhenU delivers a number of different kinds of advertisements, including pop-ups, pop-unders, panoramics, scroll ups and sliders. WhenU is constantly developing new advertising formats, and its advertisers may develop formats of their own to suit particular WhenU campaigns. Under the Act, WhenU faces serious risks if it delivers new advertising formats to users who have already downloaded its software, as those users may not have been given “a clear and representative full-size example of” that type of advertisement at the time the software was installed.

- d. To comply with Section 102(4)(c)(i)(D), WhenU would have to develop “a truthful statement of the frequency with which each type of advertisement may be delivered.” But the frequency with which WhenU ads appear is determined by the SaveNow software, depending on the Internet surfing behavior of individual computer user, and varies by category and user response. Some participating users may see one ad per week; others may see several per day. The Act does not explain, for example, whether a statement which addresses the average number of advertisements delivered is sufficient, whether it is necessary to relate frequency to the nature of the user’s browsing activity, or whether the statement of frequency must specifically identify how many ads the a user will see with respect to specific activities.
- e. Compliance with Section 102(4)(c)(i)(E) would require “a clear description of a method by which a user may distinguish the advertisement by its appearance from an advertisement generated by other software services.” SaveNow advertisements are prominently branded with the WhenU name, service mark (“SaveNow”) and logo (a neon green \$). While not entirely clear, Section 102(4)(c)(i)(E) may require that WhenU also provide an explanation to consumers of what these obvious branding symbols mean.
- f. Compliance with Section 102(4)(c)(ii) requires that the software provide consumers with a method to “quickly and easily” disable and remove it that does not have any “other effects on the non-affiliated parts of the

user's computer" and which uses "obvious, standard, usual, and ordinary methods for removal of computer software." None of these terms are defined, however, thereby putting WhenU at risk of private enforcement actions pursuant to the Act. WhenU considers its software to be easy to remove, and tens of millions of computer users have succeeded in removing it from their computers.

- g. The Act is ambiguous as to the duties of software providers to update the consumer consent and disclosures set out in Section 102(4)(c)(i). To be absolutely certain of compliance, every time WhenU wanted to make any change to the text of its License Agreement, the operation of its software, its advertisement formats, the frequency of advertisement delivery, or its branding elements, WhenU would have to figure out a way to send each of its users an updated disclosure and consent form. Paradoxically, that might require WhenU to adopt methods to identify and track its users which provide less privacy to consumers.
- h. Section 201 prohibits the "use [of] a context based triggering mechanism to display an advertisement that partially or wholly covers or obscures paid advertising or other content on an Internet website in a way that interferes with a user's ability to view the Internet website." While all WhenU ads are easily removed from the screen by a click of the mouse, the Act further provides that it is not a defense to a violation of Section 201 that "a user may remove or hide an advertisement." Whether a pop-up advertisement meets this definition depends on

factors beyond WhenU's knowledge or control, including the manner in which the user has configured his browser. Nevertheless, because of the vagueness of the Act, and the certainty that at least some pop-up ads can appear in front of windows displaying webpages a user is viewing, WhenU would have to consider eliminating pop-up ads entirely in order to be sure that it does not violate this section.

51. The notification requirements imposed by the Act (Section 102(c)(i)(A)-(E)) would make WhenU's installation process more cumbersome than the installation process for its freeware partners, and thus less attractive to the free software providers who are the principal means by which WhenU distributes its software. As a result, if the Act becomes effective, WhenU's user base may be diminished with severe ramifications to WhenU, whose revenues and attractiveness to advertisers depend on the size of its user base. Likewise, if the Act causes WhenU to abandon some advertising formats, and prevents WhenU from fully utilizing the new formats it develops, the overall effectiveness and attractiveness of WhenU's services will be reduced, thus causing a further loss of revenue.

52. Any changes WhenU makes to comply with these provisions will have to be implemented system-wide -- even for advertisements that are not transmitted to or from Utah, have no effect on Utah consumers or businesses or any other connection with Utah. The Act does not exempt computers located outside of Utah, but even if it did, given the mobility of computer users, the realities of the Internet, and WhenU's own privacy policies (which forbid the collection of personal information such as addresses), there is no way for WhenU to place geographical limitations on the download of SaveNow software or the delivery of SaveNow advertisements.

53. If allowed to become effective, the Act would also threaten WhenU with the specter of being required to comply with numerous local regulatory schemes. One jurisdiction might require license agreements to be presented in "plain language;" another might require the use of particular technical terms. One jurisdiction might require license agreements to be in large type; another might require it to fit on a single screen. Each new statute would require WhenU to review 50 states' laws to make sure that complying with the new statute would not create a compliance issue with respect to a previously enacted statute.

The Threat of Litigation by Private Enforcers

54. Even if WhenU made expensive, system-wide changes in order to comply with the Act, private enforcers, motivated by the Act's draconian penalties (\$10,000 per violation, trebled for willful or knowing violations, plus attorneys' fees), may still seek to sue WhenU for allegedly violating the Act.

55. The cost of defending numerous, protracted lawsuits would be prohibitive for a fledgling operation like WhenU, even if it is ultimately successful. The threat of litigation is far from remote or hypothetical, since the advocates for the bill include companies and lawyers who are already suing WhenU with little success under state and federal trademark and copyright laws.⁷

56. Since the statute is not expressly limited to Utah-based conduct or plaintiffs, the number of possible lawsuits under the Act is enormous. That fact, coupled with the Act's

⁷ 1-800 Contacts has sued WhenU in federal court in New York on the theory WhenU's advertisements infringe 1-800 Contacts' trademark and copyrights. It has sued two of its competitors, Coastal Contacts, Inc. and Vision Direct, Inc. in federal court in Utah and New York, respectively, based on their use of WhenU or similar technology to distribute online advertisements. In addition, 1-800 Contacts' counsel in these cases has sued WhenU and another online contextual marketing company on behalf of several other Website Merchants in cases across the country.

staggering penalties, means that the possibility that a court would agree with one of these companies that WhenU advertisements violate the Act creates a tremendous risk. If a court were to find WhenU in violation of the Act, the damages could be crippling.

57. By casting doubt on the legality of WhenU's core business model, the Act could result in the loss of many of WhenU's download distribution partners (*i.e.*, the software companies which distribute SaveNow in conjunction with the free installation of popular software.) This will undoubtedly cost WhenU millions of dollars in lost revenue. The mere *prospect* that the Act might be interpreted to prohibit WhenU's advertising has *already* caused WhenU download distribution partner Bonzi to remove SaveNow its download. Based on the past performance of this partner and the business plans it had agreed to pursue before the Act passed, the loss of this partnership alone will cost WhenU tens of thousands of new subscribers each month.

58. Other current download distribution partners (AdDrive, SearchForIt, MindSet and Freeze) have expressed concern to WhenU about potential liability or negative publicity associated with potential litigation and have indicated that they may discontinue downloading SaveNow if the Act goes into effect. So far, none of the companies that have expressed these concerns are even located in the State of Utah. If the Act does go into effect, there is no doubt that an even more rapid exodus of download distribution partners would take place. To make matters worse, some of the companies that sell WhenU advertising to advertisers have also questioned whether they will continue to do business with WhenU if the Act goes into effect.

59. WhenU's revenues, the effectiveness of its advertisements, and the rates that WhenU can charge its advertisers ultimately depend on the number of its subscribers, since

the number of subscribers affects the number of people who view the advertisements, the number of people who respond to them within a given period of time, and the amount that advertisers will pay.

60. WhenU employs the services of 50 individuals to maintain its operations, and relies on the efforts of roughly 70 independent sales representatives, many of whom derive most of their revenue from sales generated on behalf of WhenU. The Act and the associated financial losses would severely hinder WhenU's ability to recruit talented people and would greatly increase the likelihood that present employees would leave the company.

The Act Will Harm Consumers

61. WhenU designed the SaveNow software to enhance competition in the Internet marketplace and to provide millions of consumers with additional options when they contemplate a purchase online. When creating this novel form of advertising, WhenU's founders sought to develop effective advertising software that would increase competition and provide significant cost savings to consumers while being highly protective of consumer privacy. WhenU succeeded in doing so with the SaveNow software. The SaveNow software is a step forward toward an Internet marketplace that creates greater access to information, ultimately benefiting consumers and the economy by increasing competition and choice. By forcing WhenU to make costly changes which would, among other things, diminish the effectiveness of its advertisements, the Act would deprive SaveNow users of access to useful information about products and services that WhenU provides.

62. Ironically, the Act specifically exempts pop-up ads delivered by search engines and website owners, as well as random pop-up ads. Thus a consumer searching for a car rental company could legally get bombarded with advertisements for contact lenses,

mortgage re-financings and office supplies that may be of no interest to the consumer. Yet the same consumer would not get an advertisement for a great deal on a car rental. None of the ads permitted by the Act have the same benefits to consumers in that they do not provide consumers with an alternative source for a product that they are likely to be interested in buying at a time when they are interested in making a purchase.

63. The Act is also harmful to consumers' privacy insofar as it would prohibit companies like WhenU from delivering relevant advertisements even though SaveNow does not collect consumers' names, addresses, phone numbers or other personally identifiable information. At the same time, it places no limits on the ability of website owners to collect, store and do as they please with whatever personal information they glean from a consumer's computer.

64. The Act will also adversely affect WhenU's ability to improve its contextual advertising technology to deliver more specific real-time advertising. WhenU is a start-up company, and its technology is constantly evolving.

65. In sum, the harm to WhenU in the absence of an injunction – including the harm resulting from the required changes to its business, the loss of subscribers, advertisers and revenue and the accompanying diminution in the effectiveness and attractiveness of its marketing services -- would be devastating to WhenU and not capable of remedy. In contrast, the issuance of an injunction against the operation of the Act would terminate WhenU's present uncertainty about the application of the Act to WhenU's business.

The Act Would Have Terrible Consequences for the Internet

66. Ultimately the Act threatens not only to cripple WhenU, but also to hinder effective competition in the Internet marketplace and to preclude consumers from access to competition-enhancing information about the purchasing choices available to them. It is this


inhibition of free competition that presumably motivated the companies and attorneys who lobbied for the Act.

67. Paid online search, a model promoted currently by companies such as Yahoo! and Google, represented a very small part of the online advertising market in the year 2000, but has since become a major component of that market as advertisers recognize the power of delivering relevant ads to consumers seeking specific products. WhenU believes that software-based advertising will similarly emerge as an engine of major growth for the Internet in the future, as advertisers and consumers continue to experience the power and richness of software as a medium for delivering highly targeted and useful information and advertising online.

CONCLUSION

For the foregoing reasons, WhenU requests that its application for a temporary restraining order and preliminary injunction be granted.

Dated: April ____, 2004



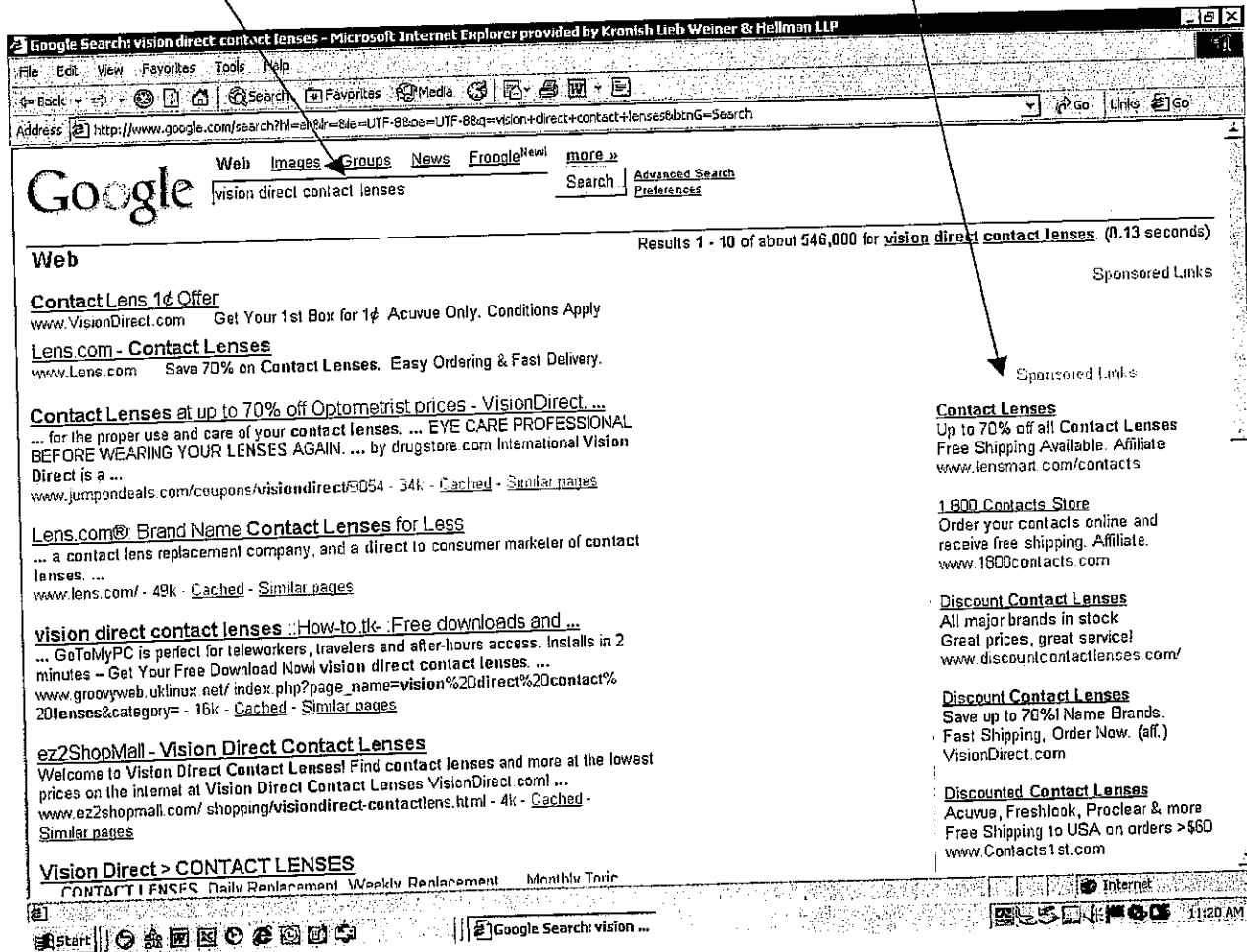
Avi Naider

Exhibit A

Sponsored Advertisements on Search Engines

User enters search for "Vision Direct Contacts Lenses" into Google search engine

Search results include "sponsored links" to lensmart.com and 1-800 contacts.com





License Agreement & Privacy Statement

PLEASE READ THE FOLLOWING TERMS AND CONDITIONS BEFORE DOWNLOADING, INSTALLING AND USING THE SAVE! BUNDLE (THE "SOFTWARE") PROVIDED BY WHENU.COM, INC. ("WHENU.COM"). USE OF THE SOFTWARE IS SUBJECT TO THE TERMS AND CONDITIONS SET FORTH IN THIS LICENSE AGREEMENT (THE "LICENSE AGREEMENT"). BY INSTALLING THE SOFTWARE YOU INDICATE YOUR ACCEPTANCE OF THE TERMS AND CONDITIONS SET FORTH HEREIN. WHENU.COM RESERVES THE RIGHT TO REVISE THIS LICENSE AGREEMENT AND PRIVACY STATEMENT AT ANY TIME.

Functionality

WhenU.com's Save! software shows you relevant coupon offers, contextual information and services as you surf the Web. Save! attempts to display offers at the moment when they are most relevant to you. Offers and information are displayed in the form of interstitials ("pop-up ads") and various other ad formats.

The Save! software selects which ads and offers to display to individual users based on several factors, including: URLs associated with web pages visited by the user, search terms typed by the user into search engines, HTML content of the web pages viewed by the user and the local zip code of the user. Save! ads and offers are delivered in a separate, independent window controlled by WhenU.com, are not endorsed or affiliated with anyone other than WhenU.com and may in fact be competitive with some of the sites visited by the user while online.

Save! software enables users to receive advertising-supported versions of many popular software applications for free. Use of Save! is required to continue using these applications for free. As a result, Save! cannot be uninstalled from your computer's Control Panel independently. In order to completely remove Save! from your computer, you must uninstall all of the Save!-supported software from your computer. Once you do so, your Save! software will automatically be uninstalled as well.

The License

The software is licensed to you for your personal, non-commercial use only. Other than the rights expressly granted to you hereunder, no other right is granted to you. Without limitation, you may not: (a) modify or create any derivative works of the software or documentation; (b) decompile, disassemble, reverse engineer, or otherwise attempt to derive the source code for the software; or, without limitation, redistribute, sublicense, or otherwise transfer rights to the software.

Age Limitation

WhenU.com products and services are not available to individuals below the age of 13. By accepting this installation, you are representing that you are not a minor below the age of 13.

Disclaimer of Warranty

You expressly agree that the use of this software is at your own risk. The software is provided on an "As Is" basis, without warranty of any kind, including without limitation the warranties that it is free of defects and errors, fit for a particular purpose, or non-infringing. WhenU.com reserves the right to periodically update and/or upgrade the software at the company's discretion. Your installation of the software indicates your acceptance of potential future updates and/or upgrades to the software.

The information and services provided by the software and/or WhenU.com are similarly provided on an "As Is" basis, without warranty of any kind. The accuracy and reliability of any information content or services provided by the software and/or WhenU.com should be independently verified by you as the user prior to making purchase decisions and/or any other decisions based on such information content and services.

Limitation of Liability

To the maximum extent permitted by law, in no event will WhenU.com or its agents be liable for any damages arising from the use of or inability to use the software, including, without limitation, damages to users' systems and/or software and/or data, computer failure or malfunction, computer virus transmission, performance delays or communication failures, security breaches or any and all other damages or losses.

PRIVACY STATEMENT

By downloading the Save! software, you give permission to WhenU.com to display relevant contextual information and offers. The Save! software selects which ads and offers to display to individual users based on several factors, including: URLs associated with web pages visited by the user, search terms typed by the user into search engines, HTML content of the web pages viewed by the user and the local zip code of the user.

The software protects users' privacy by uploading a database of content in small chunks to individual desktops and then determining on the desktop whether or not to retrieve information from WhenU.com or third-party servers. To protect user privacy, the same database of content is sent to all desktops. Decisions regarding which ads to retrieve to an individual desktop are all processed on the user's desktop - and isolated from WhenU.com servers. User privacy is also protected in the following manner:

1. Personally identifiable information is NOT required in order to use the software and WhenU.com does NOT know the identity of individual users of the software
2. As the user surfs the Internet, URLs visited by the user (i.e. the user's "clickstream data") are NOT transmitted to WhenU.com or any third party server
3. WhenU.com does NOT assemble personally-identifiable browsing profiles of users
4. WhenU.com does NOT assemble anonymous machine-identifiable browsing profiles of individual users
5. WhenU.com does NOT track which ads and offers are seen or clicked on by individual machines - analysis and tracking is done in the aggregate

Each individual desktop is assigned an anonymous, unique machine ID. This machine ID is used ONLY to enable WhenU.com to count unique, active desktops in the network. The machine ID is NOT used to determine which ads to serve individual users or to create browsing profiles of users. When ads are displayed by the software, impressions and clickthroughs are reported to WhenU.com servers. To protect user privacy and prevent WhenU.com or any third party from assembling user profiles, the unique machine ID is NOT included in the impression and clickthrough reports sent by the desktop to WhenU.com servers.

Save! does NOT place any cookies on your desktop. It is possible that a third party advertising on our network might place a cookie on your desktop. If you wish to opt-out from third party cookies, please click on the following link and follow the instructions:

http://www.networkadvertising.org/optout_nonppii.asp

WhenU.com may update privacy statements for the Save! software at any time. A current version of the Save! privacy statement is available at www.whenu.com/about_save.html

Exhibit C

Save Now Coupon

OLD NAVY

Men Women Boys Girls Baby Boys Baby Girls Maternity

DESTINATION: Summer

PACK UP THE PERFECT STYLES FOR YOUR FAMILY GETAWAY! Starting at \$7.50*

Shop for MEN WOMEN BOYS GIRLS BABY BOYS BABY GIRLS

Sign Up for Email

Old Navy's Famous \$5 Flag Tees & Tanks NOW AVAILABLE! Select Here

YOU COULD SAVE \$10

Old Navy Shoppers... **SAVE instantly** on this purchase

Click for Coupon Details special online coupon

SAVE NOW!

THIS IS A SPECIAL OFFER AND IS NOT SPONSORED OR DISPLAYED BY THE WEBSITE'S YOU ARE VISITING, HERE.

Start | Welcome to oknavy.com | Save Now! | 12:24 PM

OLD NAVY Sunday's Ad Find a Store Shopping Bag

Men Women Boys Girls Baby Boys Baby Girls Maternity

DESTINATION: Summer

PACK UP THE PERFECT STYLES FOR YOUR FAMILY GETAWAY!
 Starting at \$7.50

Shop for MEN WOMEN BOYS GIRLS BABY BOYS BABY GIRLS

Sign Up for Email

Old Navy's Famous \$5 NOW AVAILABLE

Flag Tees & Tanks \$10 YOU COULD SAVE

ONLY AT OLD NAVY
 Sunday's Newspaper Ad
 Item of the Week
 Old Navy Account Credit Card
 Gift Card Info
 Old Navy Canada

CUSTOMER SERVICE
 Where's My Order?
 Gifts & Exchanges
 Returns & Exchanges
 Shipping & Handling
 and more!

OUR SITE
 Sign In or Sign Up
 Privacy & Security
 Terms & Conditions
 Site Map
 and more!

ABOUT
 Store in the Area
 Affiliate Center
 and more!

Free Shipping when U buy \$75!
 Coupon Code: STARSWPS

Write down the above coupon code NOW! Once you close this window this information will disappear.

1. Select your merchandise.
2. Proceed to check-out.
3. On the "Billing Information" page of checkout, enter your coupon code in the field labeled "Promo Code?".
4. Click "Next Step".
5. Your order total will recalculate on the "Order Review" page and save U money!

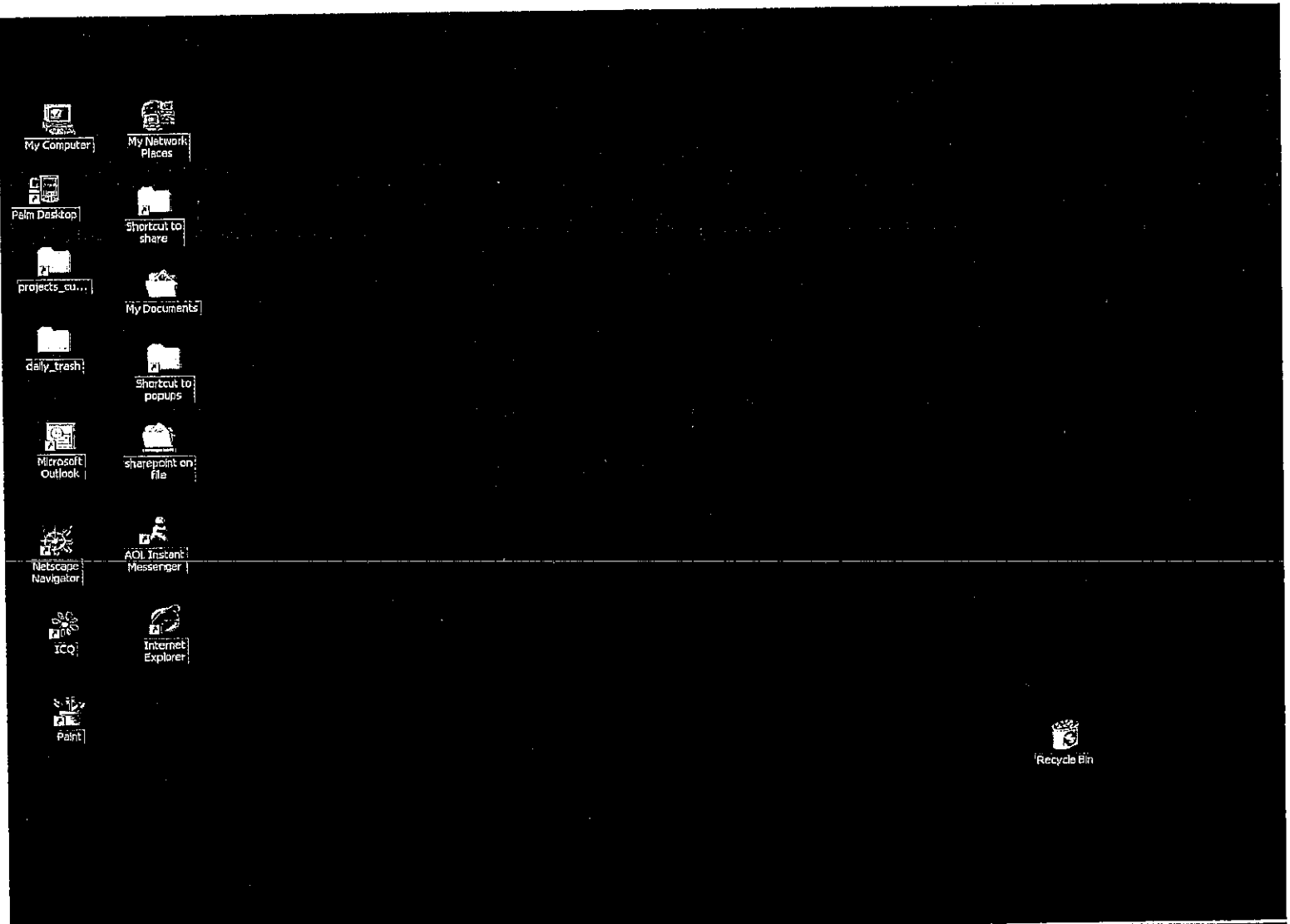
• When entering the site through promotional URL links your discount will automatically be applied to your order at checkout once purchase requirements are met.

SAVE NOW!

THIS IS A GENERAL OFFERING. IS NOT SPONSORED OR DISPLAYED BY THE CREDITORS YOU ARE LISTING HERE.

Exhibit D

In the standard windows environment for desktop computers, open software application windows are represented by "buttons" on the taskbar at the bottom of the screen.



Example
Email Application
"Microsoft Outlook"

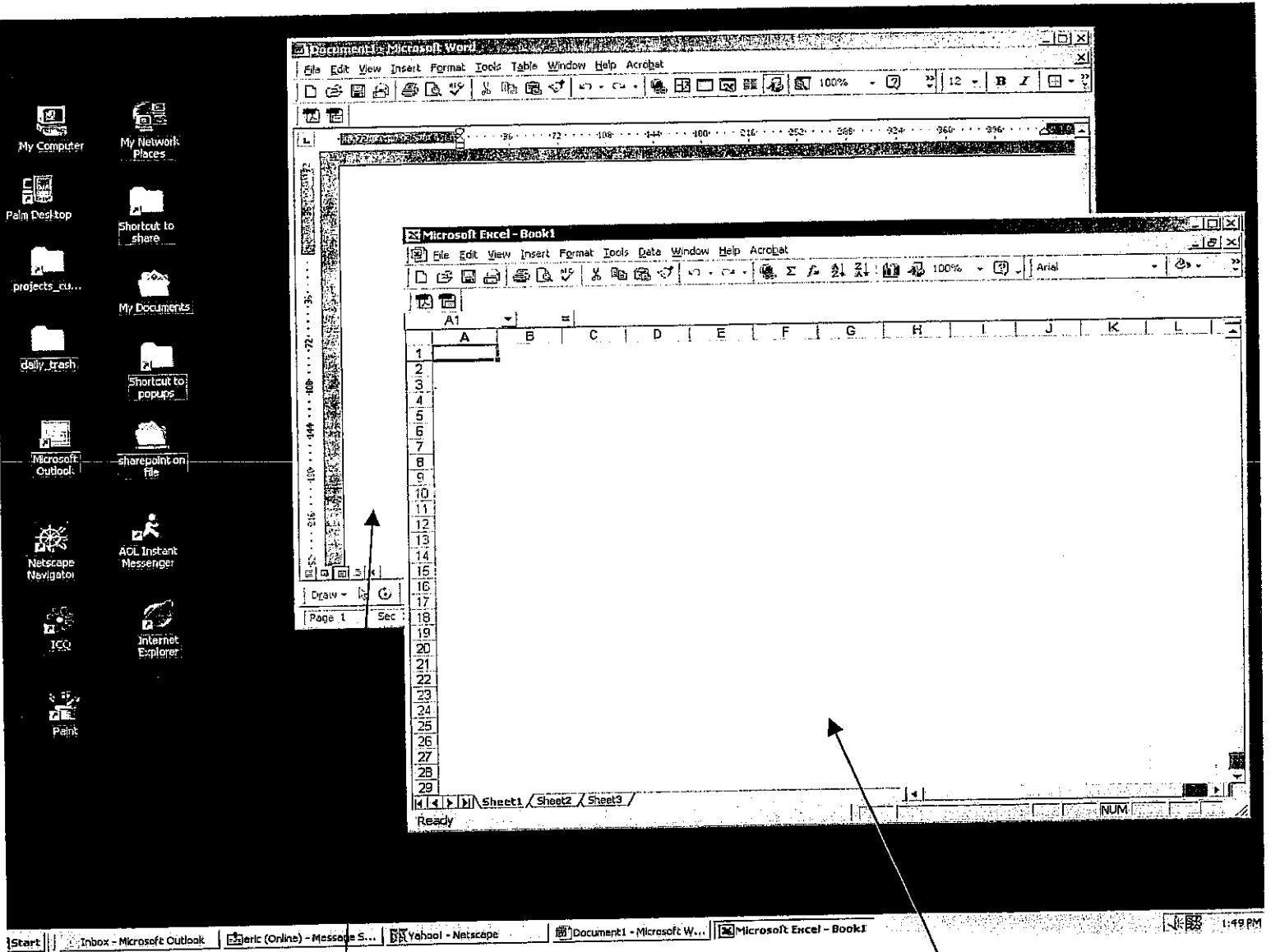
Example
Instant Messaging Application

Example
Internet Browser Applications
"Netscape"

Exhibit E

In the standard windows environment, consumers use multiple software applications at the same time.

Each software application is contained within its own independent window – and multiple windows often appear on a consumer's screen stacked one in front of the other.



Example

Window in which the consumer interacts with the word processing application "Microsoft Word."

Example

Window in which the consumer interacts with the spreadsheet application "Microsoft Excel."

Exhibit F

In the standard windows environment, browser windows can be stacked one in front of the other.

Example 1:

The screenshot displays a Windows desktop environment with three overlapping Internet Explorer browser windows. The desktop background is dark, and the left side features a vertical column of icons including 'My Computer', 'My Network Places', 'Palm Desktop', 'Shortcut to share', 'projects_cu...', 'My Documents', 'daily_trash', 'Shortcut to popups', 'Microsoft Outlook', 'sharepoint on file', 'Netscape Navigator', 'AOL Instant Messenger', 'ICQ', 'Internet Explorer', and 'Paint'. The taskbar at the bottom shows the Start button and several open applications: 'Inbox - Microsoft Outlook', 'Kmart.com - Microsoft Int...', 'ANN TAYLOR ONLINE ST...', and 'Kenneth Cole Online St...'. The system tray on the right shows the Recycle Bin icon and the time '1:51 PM'.

The top browser window is titled 'Kmart.com - Microsoft Internet Explorer' and shows the Kmart website with the slogan 'The stuff of life'. The middle window is titled 'ANN TAYLOR ONLINE STORE - HOME - Microsoft Internet Explorer' and displays the Ann Taylor brand name and navigation links. The bottom window is titled 'Kenneth Cole Online Store - Microsoft Internet Explorer' and features a 'Semi-annual Sale' advertisement for '30 to 60% off storewide'. The advertisement includes the text 'New Year's Resolutions: #1. save money' and an image of a hand holding a black handbag. A sidebar on the left of the Kenneth Cole window lists categories: 'KENNETH COLE new york', 'MEN', 'WOMEN', 'FRAGRANCE', 'GIFT CARD', 'CATALOG', 'COLE POLL', and 'REACTION'.

Example 2:

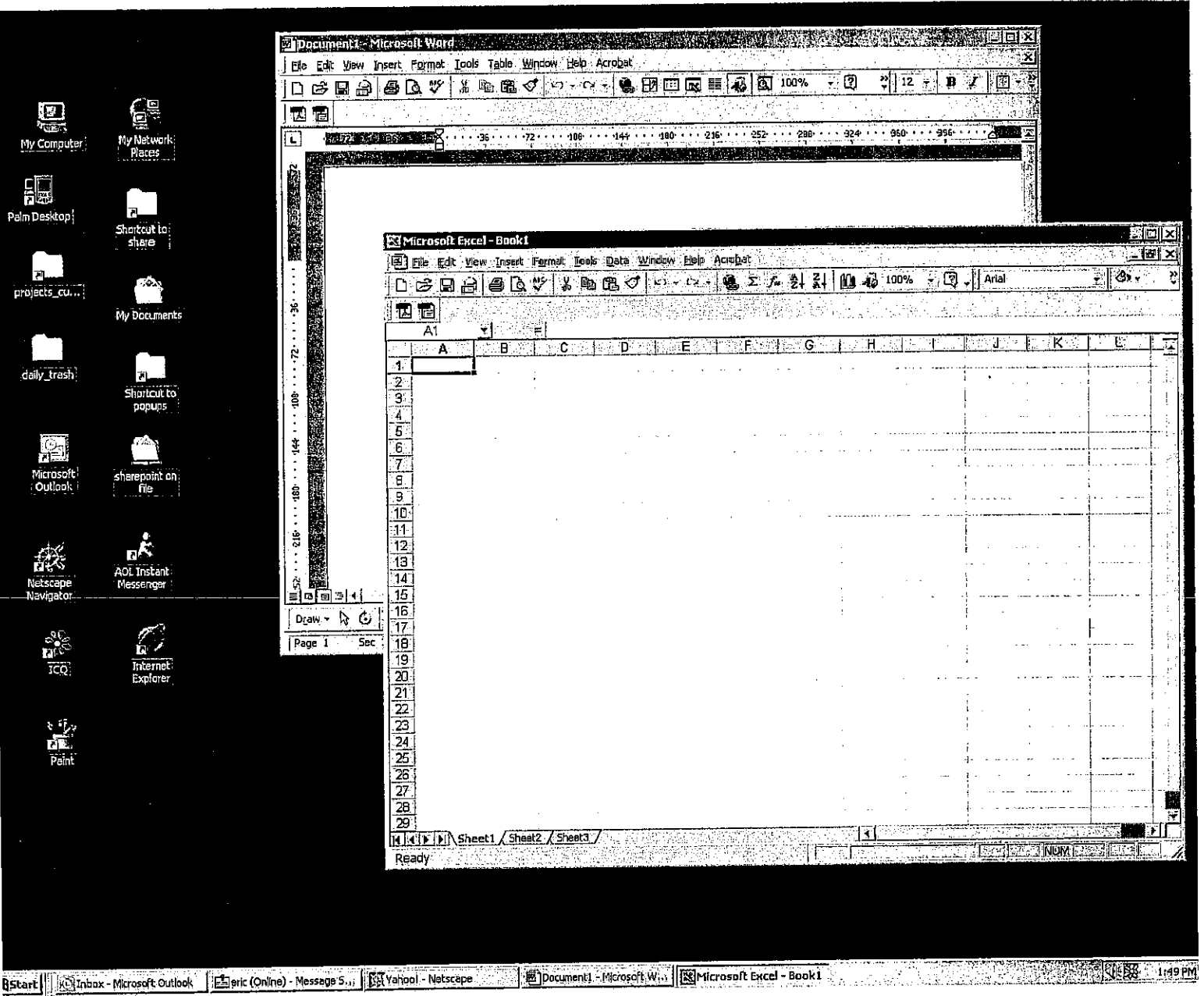


Exhibit G

SaveNow Pop-Up Ad

The screenshot shows a web browser window with the address bar containing <http://www.ameriquestmortgage.com/index.html?ad=ameriquest.com>. The main content area features the Ameriquest Mortgage logo and a navigation menu with links for ABOUT US, LOANS, LOAN CALCULATORS, CONSUMER SMARTS, CURRENT CUSTOMERS, CAREERS, PARTNERS, and ABS INVESTORS. A central image shows a family with a dog and the text "You Are More than a credit report". A "REQUEST A LOAN" button is visible. Footer text includes "Find a Branch", "Site Map", "Contact Us", "Security/Privacy", "Equal Housing Lender", "Licensing | Legal", "Baseball Sweepstakes", and "© 2000-2003 Ameriquest Mortgage Company®. All Rights Reserved.".

The SaveNow pop-up advertisement is titled "Save Now!" and contains the text "Get an Orange Mortgage. Apply online today!". At the bottom of the pop-up, it states "This is a WhenU offer and is not sponsored or displayed by the websites you are visiting. More...". The system tray at the bottom of the browser shows the time as 7:46 PM.

Exhibit H

SaveNow Pop-Under Ad

Home Mortgage Loans - Bad Credit Loans - Debt Consolidation - Ameriquest Mortgage - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Search Favorites Media

Address http://www.amerquestmortgage.com/index.html?ad=ameriquest.com

AMERIQUEST MORTGAGESM

You Are More than a credit report

Call us today
1-800-397-9937

REQUEST A LOAN

Find a Branch • Site Map • Contact Us • Security/Privacy
Equal Housing Lender. Licensing | Legal
Baseball Sweepstakes
© 2000-2003 Ameriquest Mortgage Company. All Rights Reserved.

AMERIQUEST MORTGAGE COMPANY

ABOUT US

LOANS

LOAN CALCULATORS

CONSUMER SMARTS

CURRENT CUSTOMERS

CAREERS

PARTNERS

ABS INVESTORS

Start Home Mortgage Loans... Save Now! 7:55 PM

The SaveNow pop-under window is placed BEHIND the viewer's open Internet browser window.

The SaveNow Pop-under unit is visible after the user closes the open Internet browser window

My Network Places

My Computer

Save Now!

Get an Orange Mortgage.

Apply online today!



This is a WhenU offer and is not sponsored or displayed by the websites you are visiting. [More...](#)

Start | Save Now!

7:55 PM

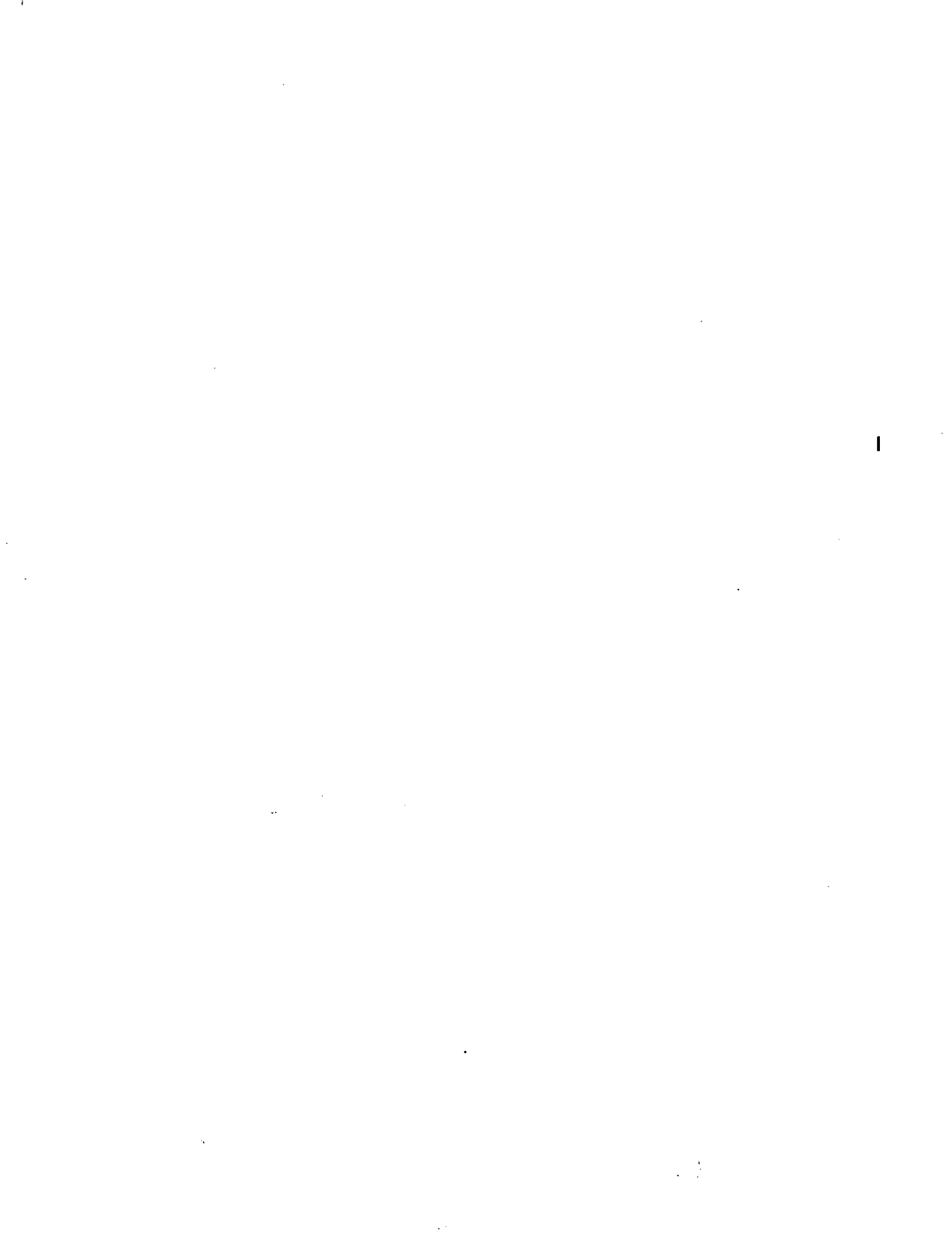


Exhibit I

SaveNow Panoramic Ad

The screenshot shows a web browser window displaying the Ameriquest Mortgage website. The browser's address bar shows the URL: <http://www.ameriquestmortgage.com/index.html?ad=ameriquest.com>. The website header features the logo "AMERIQUEST MORTGAGESM".

The main content area is a panoramic advertisement. On the left, it features a photograph of a family (a man, a woman, and a child) with a dog. The text reads: "You Are More than a credit report". Below the photo, it says "Call us today 1-800-397-9937" and includes a "REQUEST A LOAN" button. On the right side of the advertisement, there is a vertical navigation menu with the following items: "ABOUT US", "LOANS", "LOAN CALCULATORS", "CONSUMER SMARTS", "CURRENT CUSTOMERS", "CAREERS", "PARTNERS", and "ABS INVESTORS".

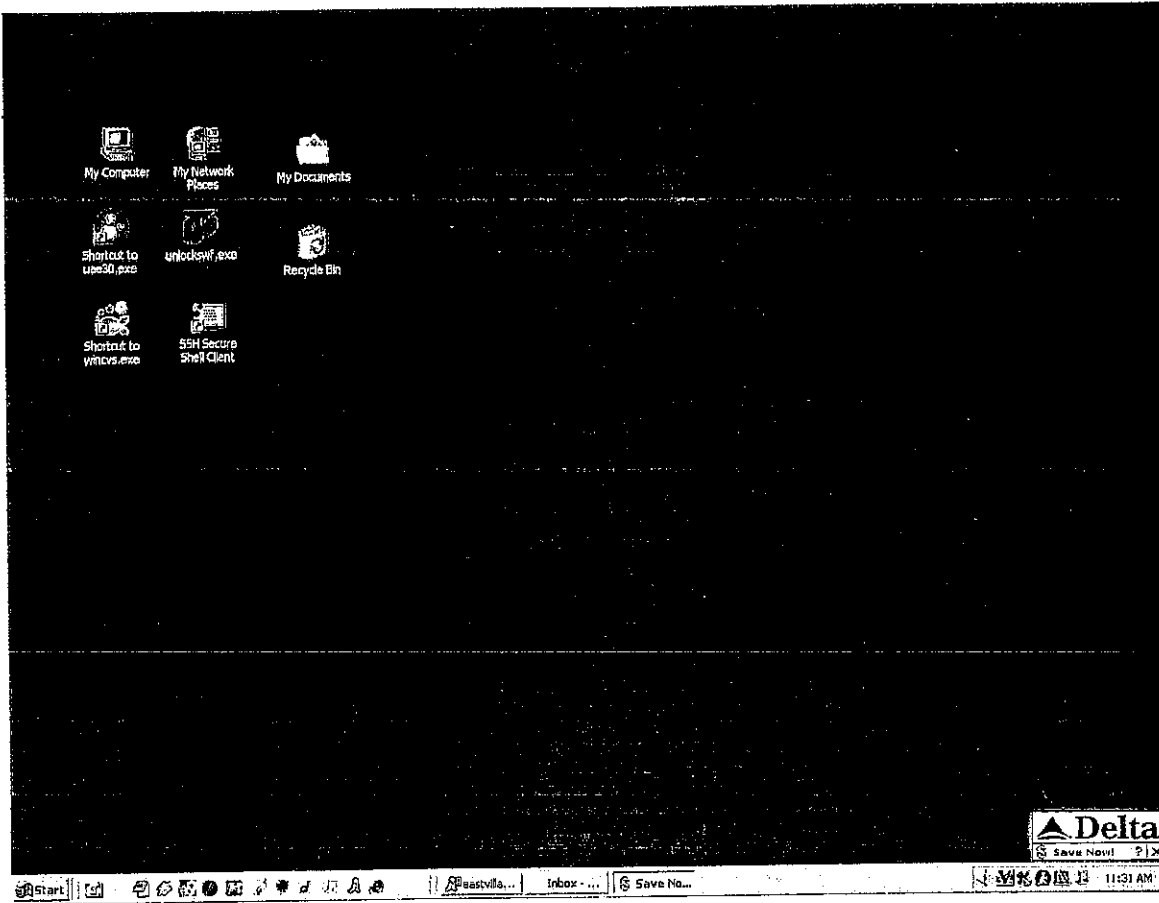
At the bottom of the advertisement, there is a footer with the text: "Find a Branch • Site Map • Contact Us • Security/Privacy", "Equal Housing Lender. Licensing | Legal", "Baseball Sweepstakes", and "© 2000-2003 Ameriquest Mortgage Company. All Rights Reserved.".

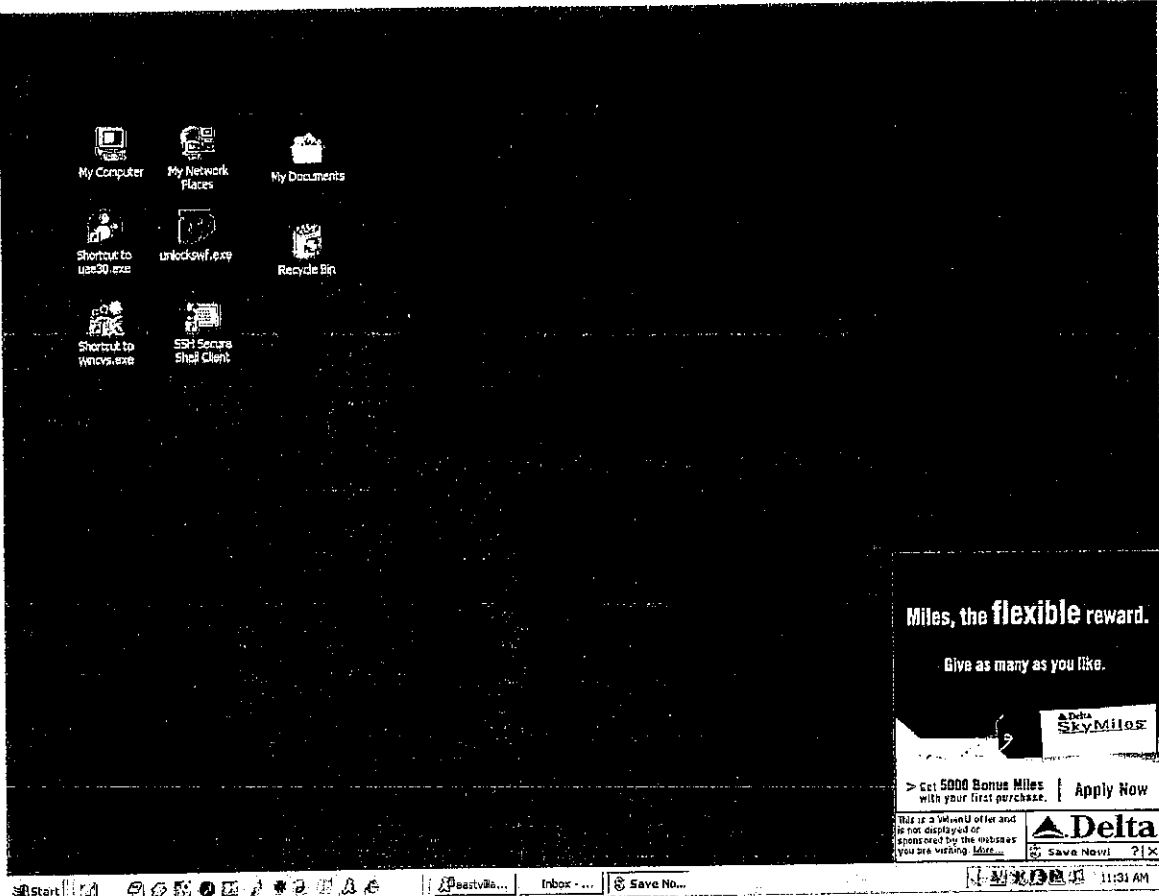
Below the advertisement, there is a "SaveNow" banner with the text: "SaveNow: This is a WhenU offer and is not sponsored or displayed by the websites you are visiting. More...". The banner also features the Ameriquest Mortgage logo and the text "Buying a home? Refinancing?".

The browser's taskbar at the bottom shows the Start button, several open windows including "Home Mortgage Loans - B...", and "Save Now!". The system clock in the bottom right corner shows "7:55 PM".

Exhibit J

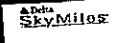
Scroll-Up Advertisement





Miles, the flexible reward.

Give as many as you like.



> Get 5000 Bonus Miles with your first purchase. **Apply Now**

This is a limited offer and is not displayed or sponsored by the website you are visiting. [Learn...](#)



Start | [Taskbar Icons] | [System Tray Icons] | 11:31 AM

K

Evolution Softworks

www.evolutionsoftworks.com • 212-604-9658 • 35 W. 14 St.; Fl. 3; New York, NY 10011

**SaveNow
Privacy Policy
Verification Report**

April 12, 2002

M. Simon Cavalletto
Evolution Softworks
simonm@cavalletto.org

SaveNow Privacy Policy Verification Report

This report describes an investigation of the SaveNow software in an effort to verify that it adheres to its stated privacy policy.

Summary

I was retained by WhenU.com to provide an independent audit of the operation of their SaveNow software product, in order to determine whether it conforms to the user assurances contained in the published privacy policy. In particular, I sought to discover:

- Whether SaveNow collected personal information from the machine it was installed on.
- Whether SaveNow collected information about the web pages a user visited or values entered in forms.
- Whether SaveNow collected information from third-party applications with which it was bundled.
- Whether SaveNow transmitted personal information in the course of displaying popup advertisements.
- Whether WhenU.com processed or analyzed data collected by their servers in order to create profiles of the individual users of SaveNow and their web browsing patterns or advertisement interactions.
- Whether the installation of SaveNow provided a channel, either intentionally or unintentionally, by which third parties could gain access to information about users which they would not normally have.

As described elsewhere in this report, I installed and used the SaveNow software on a computer in my office over a period of several weeks, while monitoring its activities with a network sniffer and other standard system utilities. I then cross-checked material from a variety of sources in order to understand and document the nature of the information that was collected and transmitted throughout this test period. This report aims to synthesize these sources of information, including:

- Testing and direct observation, by installing the SaveNow software and monitoring its behavior.
- Review of network traffic to WhenU.com's servers, and logs and databases maintained on those servers.
- An informal survey of third-party comments concerning the potential privacy implications of SaveNow.
- Information provided by WhenU.com on its public web site and in internal technical documentation.

I reviewed the descriptions of the SaveNow privacy policy included in the SaveNow license agreement and user documentation and identified the following specific assurances to users:

- SaveNow does not ask for, store on the user's computer, transmit over the network, or record on the server side any personal information.
- SaveNow does not store on the user's computer, transmit over the network, or record on the server side the various web addresses accessed by the user for which no popups are shown.
- When SaveNow displays popups, it does not transmit the user's identity, and the WhenU.com servers do not track profiles of which advertisements are seen or clicked on by particular users or machines.

Conclusions

During the course of the investigation I have made the following determinations, which are illustrated more fully elsewhere in this report:

- SaveNow does not collect personal information, such as the user's name or email address, from web forms or software settings.
- SaveNow does not collect information about the user's web browsing activity in general, such as lists of the URLs or host names visited.
- WhenU.com does not collect any server-side profile of which popup advertisements have been shown to or clicked on by specific users.

I found no evidence of such information being stored in files or registry settings on the user's computer, being transmitted over the network to WhenU.com or their partners, or being collected on WhenU.com's servers

While the SaveNow software does pass a limited amount of data back and forth with WhenU.com's servers, it is designed in a way that excludes sensitive personal information. The data elements that are passed to the server — which version of the software a user is running, and which advertisements have been shown on particular web pages — do not appear to exceed the limits set forth in the license

agreement:

- The SaveNow software periodically notifies the WhenU.com servers that it is still in use, along with codes identifying the distribution partner that bundled SaveNow and the configuration of the system software it's using, but no personal information is disclosed in the process.
- The SaveNow software periodically checks the WhenU.com web site for new advertiser information and software updates, and automatically installs these, but no private information is disclosed in the process.
- SaveNow collects some kinds of information about the popup advertisements it shows to the user, including tracking which ads have been seen on the client side to reduce repetition, and passing part of the address of the web page on which they were shown to the servers. However, SaveNow does not transmit personal information or unique machine identifiers with ad requests, and the WhenU.com servers use this data only to report aggregate advertising activity, rather than to create profiles of individual users.

Although delivered by an uncommon mechanism controlled by the end-user's computer rather than the operator of a web site, the popup advertisements shown by SaveNow operate much like other forms of web advertising and do not seem to pose any substantive and unique privacy concerns:

- The advertisements displayed by SaveNow consist of web documents with links and images that operate in much the same way as standard web popup ad windows, and viewing or clicking on them does not appear to pose any greater privacy risk than does equivalent use of standard popups or banner ads.
- The information passed by SaveNow is analogous to that passed by a browser requesting a banner advertisement: IP address, browser software, which advertisement is being viewed, and which page it's being viewed on. In fact, banner ad servers which use a permanent cookie can be used to associate multiple impressions into a client profile, a capability which SaveNow specifically avoids.
- While some Internet sites and discussion groups contained comments from individuals expressing concern about SaveNow or making vague allegations that it was "spyware," none of the comments I saw contained any supporting information that would identify a specific way in which their privacy was violated.
- While WhenU.com theoretically might alter the behavior of their client-side software in the future, or devise a method of correlating existing sources of information in order to assemble personally identifiable profiles of SaveNow users, they have not done so to date, and in fact all indications are that they have deliberately and consistently taken steps throughout the SaveNow system to ensure that user privacy is protected, including never dealing with any personal data (name, email, physical address) and not using unique machine IDs to associate advertisement activity into personal profiles.

Report Contents

The remainder of this document is divided in sections as follows:

- The SaveNow Privacy Policy details the specific assurances made in the SaveNow privacy policy.
- Test Procedure outlines the measures I took to monitor the installation and run-time activity of SaveNow.
- Types of Data Analyzed summarizes the kinds of information captured and reviewed during the test.
- Data Analysis describes the types of data collected during the test procedure and its privacy content.

About the Author

Matthew Simon Cavalletto is the proprietor of Evolution Softworks (www.evolutionsoftworks.com), an Internet technology consultancy. I have acted as project manager and technical lead for a range of web application development projects, and am also the primary architect of Evolution's technology strategy and open-source toolkits.

After attending Stuyvesant, I studied for several years at the New School, Columbia University, and Cooper Union before leaving to work as a freelance technologist for a series of New York City financial service firms, where I provided graphics production, custom database application development, and deployment of mixed-platform local area networks. After working briefly on the front-end of Pipeline, an early online service, I was hired as a programmer at MindVox, Manhattan's first public ISP. I was one of the original members of the Evolution Online Systems team at its founding in 1994, and the managing partner from 1997 until the company's reorganization at the end of 2001. Now, as the proprietor of Evolution Softworks, I lead a team of developers on e-commerce development contracts and other Internet-centric technology projects.

I have provided WhenU.com with server technology consulting services from time to time over the last eighteen months, including setting up and maintaining Apache web servers and networking equipment. This relationship allowed me to directly access the WhenU.com servers to audit the information that was collected there. However, care was taken throughout the course of this investigation to maintain its independence, and the findings have not been directed by or altered at the request of WhenU.com or its personnel.

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Exhibit L

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HEADLINE: Burns, Wyden Told to Focus Anti-Spyware Bill on Action, Not Technology

BODY:

Sponsors of a Senate anti-spyware bill Tues. were told by a software representative and a privacy advocate that legislation needs to focus on the actions of spyware makers, not the technology. Senate Communications Committee Chmn. Burns (R-Mont.), sponsor of the SPY BLOCK Act (S-2145) with Sen. Wyden (D-Ore.), held a hearing on the bill and the broader issue Tues., the same day a Utah anti-spyware bill was poised to become law. (WID March 23 p3).

Burns told us after the hearing that he hoped to mark up the bill at the subcommittee level soon, and didn't anticipate many changes being made to the bill. As for the witnesses who expressed concern that the bill might be targeting technology, Burns acknowledged that "it will boil down to the definitions, that's what we've got to work on." He said that was the same issue throughout the years-long debate on spam legislation.

Utah Gov. Olene Walker (R) hadn't announced at our deadline Tues. if HB-323 by State Rep. Stephen Urquhart (R-St. George) would be vetoed. The bill would permit private right-of-action against a software provider that has software that covers another company's web site, a bill that dozens of high-tech companies and ISPs lobbied against last week after it rapidly cleared the state legislature. Business Software Alliance (BSA) Pres. Robert Holleyman, a witness at Burns' hearing, said the bill had caused a great deal of concern and that such legislation would justify federal legislation. Gov. Walker had scheduled a press conference for 7 p.m. ET to announce bills she would be vetoing. If not vetoed before midnight Tues., HB-323 would become law.

"Computer snooping or spying on computer users is reprehensible behavior," Holleyman said, but "the problem is bad behavior, not bad software." He said "Congress should ban only the behavior not the technology." S-2145 provides provisions requiring software downloaded to one's computer to give notice about its intent and to be easily removable. Holleyman said Congress and the FTC last year targeted telemarketing but not telephones. Center for Democracy & Technology Pres. Jerry Berman said he agreed with Holleyman that "we need to step back here and say what gets us upset here."

Berman said there are larger privacy issues at stake and it wouldn't make sense to impose privacy protections related to one type of technology but not another. CDT has filed a complaint at the FTC against a spyware company, and Berman said Congress should wait to see what the FTC does with that complaint "so we're not duplicating and creating another law." He also said companies such as AOL are developing software that may help solve the problem. But he said Congress had a role to play. "We need federal intervention here, we don't need a plethora of state statutes," he said. CDT also is concerned with the Utah bill.

"I look at this from the perspective of a privacy issue," Sen. Allen (R-Va.) said, while at the same time saying the bill's definition of spyware seemed to be "common sense." He acknowledged there are existing laws that could be used, and perhaps Congress can make them tougher, and Holleyman said "we need aggressive enforcement of existing laws." Allen also said he'd prefer a "market-based solution." But he said "we may need to have federal legislation in light of Utah." Sen. Boxer (D-Cal.) agreed. Burns said "we spend a lot of time on definitions.. especially when you talk about privacy." "We want to work with you on definitions," he told the witnesses.

"What is going on here," Wyden said, "is that snoops and spies are trying to set up base camp in millions of computers across this country." "Computer owners ought to have control over what software gets installed on their computer," he said. "It is my computer," Burns responded: "I bought and paid for it, for my use only, not for some leech." "Mr. Chairman, I couldn't top that," said Boxer, another cosponsor. She said spyware is "even worse than looking in a window, it's really getting into someone's head and someone's life." Boxer said the bill was both pro-consumer and pro-industry.

Wyden and Boxer both said they understood Holleyman's concern about regulating technology, but they also railed against pop-up ads. Allen said "pop-ups are worse than spam." He described how his computer came to have adware on it that had him bombarded with pop-up ads, and he had to bring in a computer expert to remove the software. Berman, however, said pop-up ads are different from spyware: "We need to put things in boxes and figure out what we want to deal with." He said it was unfortunate the privacy bill that cleared the Senate Commerce Committee in the 107th Congress didn't become law, and suggested spyware is benefiting from that absence of online privacy laws. "We'd have a cookies bill and a spyware bill, it would become a crazy quilt," he said.

Wyden focused on Holleyman's suggestion that legislation target an entity distributing personal information without that individual's explicit consent. He said he was "hopeful" that this meant BSA had changed its position and now was prepared to back a broad online privacy bill, given the use of the phrase "explicit permission." Holleyman said BSA wasn't prepared to back such an approach.

An adware company executive said "I back the provisions in the bill." WhenU offers free software that when installed will permit pop-up ads to appear that are linked with web sites visited by the consumer. CEO Avi Naider said "WhenU is anything but spyware," because consumers receive notice before they download the free software, they must affirmatively accept a license agreement, pop-up ads are branded as being from WhenU, and the software can be uninstalled. He said WhenU doesn't violate privacy because the company doesn't maintain any databases or consumer profiles; the direct marketing occurs directly on the individual's computer, not from WhenU.

Naider said he backs a "national legislative solution," calling some state bills "overly broad." The Utah bill resulted from WhenU triumphing in court over 1-800-Contacts, a Utah company that sued to stop WhenU ads from popping up over its web site. "Ironically, carelessly worded spyware legislation will do more to harm consumers" because it would outlaw legitimate companies, while "rogue and unscrupulous companies that play by no rules will be given the upper hand in the marketplace."

But Boxer seemed to believe WhenU's service is a privacy violator, saying she doesn't want an ad to pop up pitching shoes when she goes to a shoe web site. "This kind of thing has to go." Naider said 2 years ago, adware was a positive word but he won't use it now, because "so many companies say they're adware when they're really spyware." He's seeking an industry-wide definition of adware that involves privacy protection, clear disclosure and easy uninstall procedures. Allen said he has no interest in signing up for such a service, but told Naider that "you seem to have some standards that make a great deal of sense, that others don't." "It seems to me Mr. Naider is running a legitimate business," Burns added. -- Patrick Ross

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