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Attorneys for Defendants

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**IN THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

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**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.**

**MEMORANDUM SUPPORT OF MOTION  
FOR RECONSIDERATION**

**Civil No. 040907578**

**Honorable Joseph C. Fratto**

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Pursuant to Rule 7(c)(1) of the Utah Rules of Civil Procedure, Defendants State of Utah, Olene S. Walker, and Mark Shurtleff (collectively the "State"), by and through counsel of record, submit this memorandum in support of the State's Motion for Reconsideration.

### INTRODUCTION

The State's Motion for Reconsideration requests that the Court reconsider its entering of a preliminary injunction enjoining the enforcement of the entire Spyware Control Act, which is codified at Utah Code Ann. § 13-39-101, et. seq. (the "Spyware Act" or "Act"). As dictated by Utah case-law, this Court should amend its June 22, 2004 Ruling and July 8, 2004 Preliminary Injunction to enjoin the enforcement of **only** the pop-up advertisement prohibition set forth in § 13-39-201(1)(c) of the Spyware Act regarding which the Court found that Plaintiff WhenU.com, Inc. ("Plaintiff") demonstrated a substantial likelihood of success rather than enjoining enforcement of the entire Spyware Act.<sup>1</sup> Severing the prohibition against contextually based triggering of advertising set forth in § 13-39-201(1)(c) does not defeat the operation of the remainder of the Spyware Act and the remaining prohibitions of the Act would fulfill the State's legitimate legislative purpose in passing the Spyware Act by protecting Utah citizens and Utah businesses from the unauthorized installation of spyware on their computers without the consent of the computer owner.

### ARGUMENT

The Court should alter and amend its preliminary injunction to only enjoin the enforcement of § 13-39-201(1)(c) because Plaintiff failed to demonstrate a reasonably likelihood

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<sup>1</sup> A true and correct copy of the transcript of the Court's June 22, 2004 Ruling is attached as Exhibit 1.

of success regarding any other prohibition of the Spyware Act. Severing § 13-39-201(1)(c) from the remainder of the Spyware Act would not make the Act inoperable or defeat the legitimate legislative purpose of the remaining portions. Utah law is absolutely clear in holding that “statutes, where possible, are to be construed so as to sustain their constitutionality.

Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done.” *Celebrity Club Inc. v. Utah Liquor Control Commission*, 657 P.2d 1293, 1299 (Utah 1982) (severing single sentence from statute in order to “effect the minimum necessary disruption of the statutory scheme”) (emphasis added); *see also Gallivan v. Walker*, 2002 UT 89, ¶87, 54 P.3d 1069, 1098 (holding that unconstitutional provision of statute was severable); *State v. Lopes*, 1999 UT 24, ¶18, 980 P.2d 191 (same); *Stewart v. Utah Public Service Commission*, 885 P.2d 759, 779 (Utah 1994) (same). The fact that a statute does not contain a “saving clause,” which provides for the severing of any section or portion of a statute or act that is determined to be invalid, does not prevent a court from severing any invalid portion of a statute or act. *See, e.g., Gallivan*, 2002 UT 89 ¶88. In *Gallivan* the Utah Supreme Court stated:

[w]hen the legislature’s intent is not expressly stated, [the court] turn[s] to the statute itself, and examine[s] the remaining constitutional portion in relation to the stricken portion. Upon reviewing the statute as a whole and its operation absent the offending subsection, if the remainder of the statute is operable and still furthers the intended legislative purpose, the statute will be allowed to stand.

*Id.* (internal quotations and citations omitted); *see also Lopes*, 1999 UT 24, ¶19. Accordingly, in determining severability absent a “saving clause”, Utah courts apply the two-part inquiry set forth in *Gallivan*, which is: (1) whether the remainder of the statute is operable, and (2) whether

the statute, absent the unconstitutional portion, still furthers the intended legislative purpose. *See, e.g., Id.* Stated succinctly, “[t]he test fundamentally is whether the legislature would have passed the statute without the objectionable part.” *Union Trust Co. v. Simmons*, 211 P.2d 190, 193 (Utah 1949) (holding that unconstitutional portion of statute was severable).

Because the Spyware Act does not expressly provide for severability of any portion of the act that may be found to be invalid, this Court should apply the two-part test set forth in *Gallivan* and other Utah cases to determine whether the Spyware Act absent § 13-39-201(1)(c)’s prohibition against context based triggered pop-up advertisements remains operable and whether the Act still furthers the intended legitimate legislative purposes.

Severing the prohibition against context based triggered pop-up advertisements does not effect the operation of the remainder of the Act. As the Court correctly pointed out in its ruling, the Spyware Act prohibits both the unauthorized installation of spyware and the use of context based triggering mechanisms to display pop-up advertisements that wholly or partially cover or obscure paid advertisements and other website content on the websites of Utah businesses. Significantly, these prohibitions are independent of one another and, therefore, the severing of the prohibition against pop-up advertisements would not render the prohibition against spyware installation inoperable. The Act would still operate effectively to prohibit the unauthorized installation of spyware by expressly prohibiting such installation and by providing the means for compliance and enforcement of the Act’s prohibition.

The Spyware Act without the pop-up advertisement prohibition still furthers the legitimate legislative purposes of the Spyware Act. The Spyware Act was enacted to further the

legitimate legislative purposes of (1) preventing the unauthorized installation of software on the computers of Utah residents and the accompanying unauthorized utilization and monitoring of their computer use; and (2) protecting businesses operating in Utah from deceptive and unfair trade practices. Both of these legitimate legislative purposes are fulfilled with or without the pop-up advertisement prohibition, particularly the first legislative purpose. The spyware prohibition fulfills these purposes by prohibiting the downloading of spyware on a Utah resident's or Utah business' computers without authorization and informed consent.

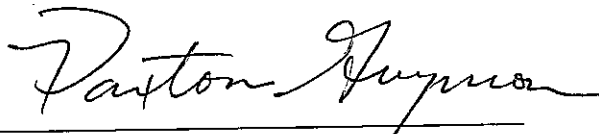
Accordingly, severing the prohibition against pop-up advertisements as set forth in § 13-39-201(1)(c) would not make the remainder of the Spyware Act inoperable and the legitimate legislative purposes of the Act would still be fulfilled.

### CONCLUSION

For the reasons stated above, this Court should reconsider its June 22, 2004 Ruling and July 8, 2004 Preliminary Injunction and amend the injunction to only enjoin the enforcement of § 13-39-201(1)(c).

Dated this 14<sup>th</sup> day of July, 2004.

Miller Magleby & Guymon, P.C.



Blake D. Miller  
Paxton R. Guymon  
Joel T. Zenger  
Special Assistant Attorneys General  
Attorneys for Defendants

### CERTIFICATE OF SERVICE

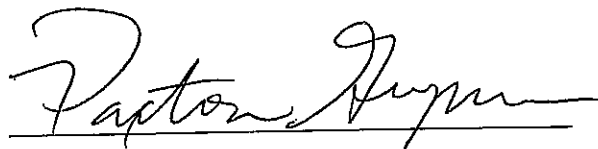
I hereby certify that I am employed by the law firm of MILLER MAGLEBY & GUYMON, P.C., 170 South Main Street, Suite 350, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION** was delivered to the following this 14<sup>th</sup> day of July, 2004 by:

- Hand Delivery
- Facsimile
- Depositing the same in the U.S. Mail, postage prepaid
- Federal Express
- Certified Mail, Receipt No. \_\_\_\_\_, return receipt requested

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# **Exhibit 1**

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

WHENUCOM, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 040907578
	)	
THE STATE OF UTAH,	)	
	)	
Defendant.	)	

**COPY**

Ruling Only  
Electronically Recorded on  
June 22, 2004

BEFORE: THE HONORABLE JOSEPH FRATTO  
Third District Court Judge

APPEARANCES

For the State:	<u>Alan L. Sullivan</u>
	<u>Celia Goldberg Barenholtz</u>
	<u>Ian Ross Shapiro</u>
	SNELL & WILMER
	15 West South Temple
	Suite 1200
	Salt Lake City, Utah 84101

For the Defendant:	<u>Blake L. Miller</u>
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Transcribed by: Beverly Lowe, CSR/CCT

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THE COURT: WhenU.com vs. The State of Utah and others.  
I'm sorry, I meant to say let's reconvene in an hour, and I  
think I probably said 45 minutes.

The matter is before the Court to consider plaintiff's  
application for a preliminary injunction restraining and  
enjoining defendant from enforcing the provisions of Title 13,  
Chapter 39, Section 101, and those sections that follow.

The governing rule for these proceedings is Rule  
65(a) of the Utah Rules of Civil Procedure. The rule has four  
requirements of proof, the burden on plaintiff, before the  
injunction may issue.

First, plaintiff must demonstrate that it will suffer  
irreparable harm unless the injunction issue. Towards that end  
plaintiff has presented evidence and argument attempting to

1 show that compliance with the provisions of the statute is  
2 either technologically impossible or possible but extensive.

3           Additionally, some vagueness to the statute adds  
4 an element of uncertainty as to what is required to be in  
5 compliance. That uncertainty and the private enforcement  
6 provisions expose plaintiff to a potential plethora of  
7 litigation.

8           Also, plaintiff is confronted with the possibility of  
9 regulation that may be different from, and even conflicting  
10 from state to state. The ability to accommodate these  
11 different and conflicting regulations may not be possible,  
12 but if possible it will likely entail some expense.

13           Further, this uncertainty coupled with the statutory  
14 restrictions on pop-up advertising and the severe penalties,  
15 plaintiff speculates, will discourage plaintiff's bundling  
16 partners.

17           Consequently plaintiff alleges that unless the  
18 injunction issue, it will incur expense, an inability to  
19 conduct business, a loss of necessary business partners, all  
20 resulting in economic damages and litigation from those seeking  
21 to enforce violations of the statute.

22           As it relates to the economic damages, typically these  
23 economic damages are not considered irreparable. If plaintiff  
24 prevails on its claims it usually anticipates and should  
25 anticipate that there will be an award for economic losses.

1           In this case, however, where the action is against the  
2 State of Utah and the claim is that the acts of the legislature  
3 are unconstitutional, plaintiff would at best, if it prevails,  
4 have judicial declaration that the statute is unconstitutional  
5 and permanent injunction prohibiting its enforcement. Economic  
6 loss will not be recovered through this lawsuit, and thus is  
7 irreparable.

8           In considering the submissions and the testimony on  
9 this necessary showing, the Court concludes that plaintiff has  
10 met its burden, and demonstrated, for the reasons I've already  
11 articulated, that irreparable harm will result to plaintiff if  
12 the injunction does not issue.

13           The second and third requirements imposed on plaintiff  
14 by the rule can be analyzed together. They require that the  
15 Court be persuaded that the threatened injury, as previously  
16 discussed, to plaintiffs, outweighs whatever damage may be  
17 caused to the defendants, and that the injunction prohibiting  
18 enforcement of the statute would not be adverse to the public  
19 interest.

20           It is not and nor should it be the problem of the  
21 Court to dictate to the legislature what it should do. On the  
22 other hand, when a case in controversy is properly before the  
23 Court, it is the Court's responsibility to determine whether an  
24 Act of the legislature runs contrary to the Constitution.

25           This responsibility should be exercised judiciously,

1 keeping in mind that there is a public policy to give full  
2 effect to the Acts of the legislature. However, it is  
3 in the public interest that Acts of the legislature meet  
4 Constitutional muster.

5           Consequently, where there are serious challenges to  
6 an Act of the legislature which could result in a declaration  
7 that the statute is unconstitutional, a preliminary injunction  
8 staying its enforcement while litigation of these challenges is  
9 concluded to a final resolution is not adverse to the public  
10 interest.

11           The damage defendants suffer if the injunction issue  
12 is twofold. First, a legislative Act would not take effect, as  
13 intended by the legislature. Second, that protection which the  
14 State seeks to confer would be delayed, and those consumers  
15 protected would be without that protection.

16           I appreciate the fact and I think there's some  
17 importance to this fact, that the consumer is not a party  
18 to these proceedings. However, this is a weighing process.  
19 Although the analysis is complicated and the arguments have  
20 been long and convoluted, I have concluded that all appropriate  
21 things considered, the threatened injury to plaintiff outweighs  
22 the injury to defendants.

23           Finally, plaintiff must demonstrate that there  
24 is a substantial likelihood that it will prevail on the  
25 Constitutional challenge, or there are serious issues that

1 should be the subject of further litigation.

2           The statute in question does three basic things.  
3 First, it prohibits without consent or authorization  
4 installation of a context based program. Programming that  
5 discerns what you're doing on the computer and sends that  
6 information elsewhere.

7           There are some exclusions, such as computer cookies,  
8 although there's a split of opinion whether these exclusions  
9 fit the definition of that which is prohibited.

10           Second, there's a prohibition of any trigger based  
11 mechanism pop-up advertising, regardless of whether there is  
12 authorization, that obscures to any degree the screen being  
13 viewed.

14           Third, the statute outlines a protocol in making a  
15 presentation to a possible recipient that the context based  
16 program that must be followed before authorization from the  
17 recipient is perfected.

18           Plaintiff argues that this statute violates several  
19 provisions of both the Constitution of the United States and  
20 of this state, the Federal Copyright Act.

21           The Court has viewed the pleadings, reviewed the  
22 pleadings, memoranda, the affidavits, and I have heard and  
23 considered all of the arguments on this issue. I am not  
24 persuaded that there is a substantial likelihood that plaintiff  
25 will prevail in any of its Constitutional challenges to the

1 statute, insofar as the statute prohibits unauthorized  
2 installation of a computer -- on a computer of context based  
3 advertising.

4           However, the statute attempts to do more, and I am  
5 persuaded that to the extent there is a prohibition on pop-up  
6 advertising, and as I've previously indicated, a protocol for  
7 paying authorization from the recipient of a programming to  
8 perfect consent, there is a substantial likelihood plaintiff  
9 will prevail on the basis that these provisions violate the  
10 Commerce Clause of Article 1, Section 1 of the United States --  
11 Article 1, Section 8, rather, of the Constitution of the United  
12 States.

13           In summary, I find plaintiff on its Constitutional  
14 claim demonstrates the substantial likelihood of obtaining an  
15 injunction, enjoining enforcement of some provisions but not  
16 all provisions of this statute.

17           The Court having come to this conclusion on the fourth  
18 requirement of Rule 65(a), the question becomes, "Can a  
19 preliminary injunction enjoin defendants from enforcing  
20 portions of the statute while allowing -- enjoin defendants  
21 from enforcing portions of the statute, while allowing  
22 enforcement of other portions?"

23           I think it is important that such a division --  
24 that if such a division is to be made, that it be done with  
25 specificity. Enforcement of this statute goes beyond this

1 plaintiff and these defendants. There probably are others and  
2 maybe many others who are subject to this statute. Plaintiff,  
3 defendants, and all others who may be subject, must have that  
4 specificity so they can determine what they can, cannot, and  
5 must do to both enforce the statute and be in compliance.

6 Having examined the statute and taken into account  
7 what is in terms of this process less than of course full  
8 litigation of the issues and of the facts and of the law,  
9 I have concluded that such a division for purposes of a  
10 preliminary injunction cannot adequately be made, and presents  
11 a serious issue that should be the subject of further  
12 litigation.

13 Accordingly, the motion for a preliminary injunction  
14 is granted. Defendants are preliminarily restrained and  
15 enjoined from enforcing Title 13, Chapter 39, Section 101, and  
16 those provisions that follow.

17 The bond. I am not requiring a bond. Two reasons.  
18 First, there has been no demonstration of attorney's fees,  
19 which is one of the conditions of the rule; and secondly,  
20 the damage to the web site owner or consumer of course are  
21 damages that are not recognized by this rule. I agree with  
22 Mr. Sullivan's analysis in that regard, and that's not what is  
23 anticipated.

24 Secondly, the rule would require a bond if the -- let  
25 me get the exact language here -- well, in terms of wrongdoing

1 or wrong order or wrong injunction. I think the implication  
2 there is that there be -- that the matter be frivolous in some  
3 way, in some fashion, but where there is serious and I find  
4 some merit, meritorious challenges, then I don't know that we  
5 can have a wrong injunction, a wrongful injunction. That's  
6 what I think the statute, the rule intends to focus the bond  
7 upon, which is wrongful injunctions.

8           So consequently, even though the final determination  
9 of this matter may go contrary to plaintiff's position, this  
10 injunction could not be character -- or this preliminary  
11 injunction could not be characterized as wrong. Consequently  
12 no bond will be required. If the plaintiffs will prepare the  
13 preliminary injunction.

14           Unless there is something further to consider, all of  
15 your presentation was greatly appreciated and thank you very  
16 much. We'll be in recess.

17           MR. SULLIVAN: Thank you, your Honor.

18           (Hearing concluded.)



REPORTER'S CERTIFICATE

STATE OF UTAH            )  
                              ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

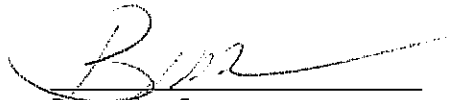
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 7<sup>th</sup> day of July 2004.

My commission expires:  
February 24, 2008



Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County

