

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

FILED
DISTRICT COURT
04 APR 12 PM 5:00
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY _____
DEPUTY CLERK

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

Attorneys for Plaintiff WhenU.Com, Inc.

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

WHENU.COM, INC., a Delaware
corporation,

Plaintiff,

vs.

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

Defendants.

COMPLAINT

Case No. 040907578

Honorable Fratto

Plaintiff WhenU.com, Inc. ("WhenU") by its attorneys, Snell & Wilmer L.L.P. and Kronish Lieb Weiner & Hellman LLP, alleges as follows:

NATURE OF THE CASE

1. This is a civil action for declaratory and injunctive relief. WhenU seeks a declaration that the recently-enacted Spyware Control Act, Utah Code Ann. § 13-39-101 *et seq.*, (the "Act") violates the United States Constitution, the Utah Constitution and is preempted by federal copyright law, and injunctive relief prohibiting the implementation and enforcement of the Act. Alternatively, WhenU seeks damages from the State of Utah on the ground that the Act effects a taking of WhenU's property in violation of the Utah Constitution.

2. According to the legislators who spoke in favor of its enactment, the Act was meant to combat software programs which invade computer users' privacy. While protecting the privacy of computer users is an important objective, the Act does little or nothing to achieve it. WhenU's software, one of the apparent targets of the Act, is installed only with user consent, and does not invade the privacy of computer users. The State of Utah does not have a valid interest in regulating a company like WhenU, nor, given the nature of the Internet, can it promulgate such regulations without impermissibly burdening interstate commerce.

3. According to its Highlighted Provisions, the Act is intended to prohibit "spyware" from delivering advertisements to computer users. In reality, the Act protects the websites of online merchants ("Website Merchants") from lawful competition from software-based contextually-relevant advertisements, regardless of whether the software invades user privacy. On information and belief, the Utah Legislature acted to prohibit such advertising as a result of information presented to the Legislature by certain Utah Website Merchants which

suggested, misleadingly, that software-based contextual advertising invades consumer users' privacy. In so doing, the State of Utah impermissibly interfered with WhenU's rights under the equal protection and freedom of expression provisions of the Utah Constitution and the Commerce Clause and the First and Fourteenth Amendments of the United States Constitution.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this case pursuant to Utah Code Ann. § 78-3-4(1), and venue is proper in this Court pursuant to Utah Code Ann. § 78-13-2.

PARTIES

5. Plaintiff WhenU is a Delaware Corporation with its principal place of business in New York, New York. Because WhenU operates through the Internet, it does business in all 50 states and in over 200 foreign countries.

6. Defendant the State of Utah, through its Legislature, enacted the statute that is the subject of this action. Unless enjoined by this Court, the Act will become effective on May 2, 2004.

7. Defendant Olene S. Walker is the Governor of the State of Utah. She is sued in her official capacity. She signed the Act on March 23, 2004. Her powers and duties include ensuring that the laws of the State are faithfully executed.

8. Defendant Mark Shurtleff is the Attorney General of the State of Utah. He is sued in his official capacity. He is the chief legal officer of the State and is charged with the duty of representing its interests, including its interest in sustaining the validity of enactments of the State's legislative branch.

FACTUAL ALLEGATIONS IN SUPPORT OF CLAIMS

The Internet

9. The Internet is a network of millions of interconnected computers, through which text, images and sounds are transported or displayed via a system called the World Wide Web (the "Web"). Much of the information on the Web is stored in the form of "webpages." "Websites" are locations on the World Wide Web containing collections of webpages. Webpages can be accessed through a computer connected to the Internet via an Internet service provider and viewed on a computer screen (or "desktop") using a program called a "browser."

10. While the display on a computer screen is physically two dimensional, it is perceived by users who employ the Microsoft Windows operating system as a three dimensional presentation. It is common for such computer users to simultaneously display multiple software applications or webpages on their computer screens. Each different application or webpage is typically displayed in one or more separate "windows." Computer users can select which window appears in front of any other window at any given time in much the same way that a person can reorder a stack of papers on his desk.

11. The Internet is a unique, rapidly-evolving medium of human communication and commerce. By its very nature, the Internet does not have any borders. Thus, persons who speak or do business over the Internet make their communications, goods and services available to computer users around the world. Given the broad reach of the Internet, it is virtually impossible for a local regulation to have a purely local effect.

Internet Advertising

12. Much of the financial support for the Internet is derived from advertising. Advertisements on the Internet can come from many different sources. Some online

advertisements are displayed by websites that consumers have accessed. For example, a consumer viewing ESPN.com might be shown an online advertisement for Labatt beer. Other advertisements are launched by Internet service providers (a website a user sees when first accessing the Internet) such as Microsoft Network or AOL. Internet advertisements can also be launched by search engines, such as Yahoo!. Still other advertisements, such as those in the preview release of Google's gmail application, are based on the content of computer users' e-mails.

13. Online advertisements also 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" button in the corner of the window. Typically, "pop-up" advertisements take up some portion of the computer user's screen "in front of" the webpage that the computer user is viewing; "pop-under" advertisements are designed to appear "behind" some or all of the webpages the computer user was viewing when the ad was generated.

14. Search engines typically use a form of advertising called "sponsored results" or "sponsored links." The user enters a search term, such as "contact lens," and the results displayed most prominently are links to the sites of Web Merchants such as www.1800contacts.com or www.visiondirect.com. Web Merchants pay the search engine for the placement of these listings, hence the reference to these results as "sponsored." This kind of advertising, which endeavors to advertise products and services to consumers who have a demonstrated interest in those products and services, is called "contextual marketing."

15. WhenU delivers an innovative kind of contextual marketing. WhenU delivers advertisements and coupons to participating consumers via a proprietary software program called SaveNow that consumers choose to download onto their computers. (In some instances, WhenU's software is branded "SAVE!" For convenience, both types of software will be referred to collectively as "SaveNow" unless indicated otherwise.) WhenU's advertising technology is distinctive because WhenU's software does not collect computer users' personal information, use "cookies," or create user profiles based on the computer users' past Internet activity.

16. As set forth in greater detail below, WhenU's software follows the user's activity in his Internet browser and uses that activity to determine the category of goods or services in which the user is interested. In order to protect user privacy, the software's decisions regarding which ads to retrieve and display are all processed on the user's own personal hard drive.

17. Because they are contextually relevant, WhenU's advertisements are useful to consumers and effective for advertisers. Thus, for example, a participating consumer who is considering refinancing his house might see an ad for a mortgage provider while accessing the Quicken Loans website; a participating consumer looking online for moving vans might see an ad for a discount moving service while viewing the U-Haul website.

18. WhenU also assists consumers by providing them with contextually relevant coupons that allow consumers to obtain savings in real time for products and services in which they have demonstrated an interest.

The Role of Utah Website Merchants in Obtaining Passage of the Act

19. The Spyware Control Act is aimed directly at the kind of technology employed by WhenU – software-generated, contextually relevant offers that appear on the

user's screen while the user is viewing a webpage. The Act does not bar contextual advertising – however intrusive or annoying – generated by a website which the user has accessed or by a “recognized” search engine. Under the Act, the website operator may even deliver advertising that is based on personally identifiable information of the user acquired or used without the user's explicit consent. Nor does the Act bar non-contextual advertising, such as pop-up advertisements that appear randomly and without regard to the consumer's interests.

20. On information and belief, the coverage and language of the Act are due in large part to the legislative lobbying efforts of a single company, 1-800 Contacts, Inc. (“1-800 Contacts”) a Draper-based retailer that sells replacement contact lenses over the Internet.

21. Since 2002, 1-800 Contacts has been engaged in a lawsuit against WhenU in federal court in New York, seeking to enjoin WhenU from distributing Internet advertisements for 1-800 Contacts' competitors. In addition to suing WhenU, 1-800 Contacts has sued two of 1-800 Contacts' competitors, Coastal Contacts, Inc. and Vision Direct, Inc., for engaging in online advertising campaigns through contextual marketing services.

22. According to reports in the Salt Lake Tribune, the Deseret Morning News and The Washington Internet Daily, the Act was passed by the Utah legislature at the prompting of, and following intense lobbying by, 1-800 Contacts. According to a recording of the committee hearing in the Utah House of Representatives -- the only committee hearing held with respect to the Act -- the only two scheduled witnesses were an “expert” who has been retained by 1-800 Contacts and 1-800 Contacts' Legislative Affairs Director. That same expert boasts on his website that he made suggestions to Utah legislators concerning the

proposed wording of the Act. On information and belief, 1-800 Contacts' Washington, D.C. counsel also claims a role in drafting the Act.

The Key Provisions of the Act

23. The Act contains two sweeping prohibitions, both of which violate the Utah Constitution and the United States Constitution.

24. The first prohibition bars any person from installing on another person's computer (or "causing" such installation) any "spyware" *as that term is defined in the Act*. Utah Code 13-39-201 (1)(a)&(b). (This prohibition is referred to below as the "Spyware Prohibition.") For the purposes of this provision, the Act expansively defines "spyware" as software residing on a computer that meets three requirements:

- a. The software monitors the computer's usage;
- b. The software EITHER (a) sends information about usage to a remote server OR (b) displays ads in response to usage; and
- c. The software NEITHER (a) obtains the consent of the user NOR (b) provides simple removal instructions.

25. The Act explicitly carves out from the definition of "spyware" any software or data that "solely report to a [] website information previously stored by the [] website on the user's computer." In other words, in an ironic twist, the Act appears to *exempt* from the definition of "spyware" the tools employed by Website Merchants to obtain personal information about individuals accessing their websites. For example, certain Website Merchants may collect data about the personal preferences or the characteristics of visitors to their sites and then sell that data to third party advertisers. Such activity, though certainly

invasive, may be exempted from the Act, so long as the Website Merchant initiates the data collection.

26. In contrast, although the precise scope of the Act is far from clear, it probably covers software like SaveNow which does not collect or report personally identifiable information about consumers. Thus, despite its name, the Act does not appear to prohibit “spyware” as the term is ordinarily used.

27. The second prohibition contained in the Spyware Control Act does not concern spyware at all. It 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.” Utah Code 13-39-201(1)(c). (This provision is referred to below as the “Context-Based Advertising Prohibition.”)

28. The Act purports to exempt from the Context-Based Advertising Prohibition advertisements that are generated by a website, even if that website is using a “context based triggering mechanism” to generate the advertisement. Thus, websites may continue to generate pop-up ads. Nor does the Act appear to apply to banner ads or sponsored links. Thus, search engines may continue to offer contextual advertising to consumers. Although the precise scope of this provision is also far from clear, the Context-Based Advertising Prohibition probably prohibits some SaveNow advertisement formats, because SaveNow uses a “context based triggering mechanism,” and because some SaveNow ads may momentarily “cover[] or obscure[]” a small portion of “paid advertising or other content on an Internet website.”

The Business of WhenU and Its Benefits to Consumers

29. WhenU is an online "contextual marketing" company. It delivers highly pertinent and timely information to participating consumers based on the consumers' immediate interests, as expressed by their contemporaneous Internet browsing activity.

WhenU operates across the globe. Its advertisers are located throughout the United States and abroad, and its software displays advertisements and offers to computer users located throughout the world.

30. Contextual marketing is an outgrowth of the decades-old database marketing industry, which relied on the assembly of vast databases containing a wide variety of personal information about individual potential customers and their past purchasing behavior. Many companies, including American Express, have used database marketing to analyze individual consumer's past purchasing behavior in an attempt to predict what offers to send them in the future.

31. WhenU has revolutionized contextual marketing by using the Internet to deliver contextual advertisements without collecting personally identifiable information about the consumer. Instead, WhenU advertisements are selected by SaveNow based on a proprietary analysis of the consumer's immediate Internet browsing activity.

32. Once SaveNow is installed on a consumer's computer, it generates advertisements through the use of a proprietary directory that is delivered to and saved on the consumer's desktop 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.

33. 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 regular basis and delivers those updates to the computers of consumers who have installed SaveNow.

34. 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 webpages the consumer visits for matches with various “keyword algorithms.” 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.

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

36. WhenU is a young company. It began operations in 2000. Despite its short history, WhenU has fostered advertising relationships with over 400 online advertisers 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.

How WhenU Distributes Its Software

37. The use of SaveNow is entirely consensual. Consumers obtain the SaveNow software because they choose to do so. Typically, they decide to download the SaveNow software and to accept the ads it delivers in return for obtaining a popular software

application for free, much like people who watch commercial television get programs for free, but are expected to watch commercials.

38. 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.

39. During the SaveNow installation process, the consumer always receives a notice stating that SaveNow is part of the download, and explaining how SaveNow functions.

40. To proceed with the installation, the consumer must affirmatively accept a license agreement for SaveNow (the “License Agreement”).

41. WhenU’s License Agreement is a short, two-page agreement written to be as intelligible as possible to the average computer user. It clearly explains that the software generates contextually relevant advertisements and coupons, utilizing “pop-up” and various other formats.

42. The software cannot be installed unless the consumer affirmatively accepts the terms of the License Agreement.

Uninstalling WhenU’s software

43. Consumers can easily uninstall WhenU’s software from their computers if they no longer wish to have it.

44. Tens of millions of computer users have successfully uninstalled these programs.

45. Once uninstalled, the software will cease to operate or show advertisements or coupons on the consumer’s computer.

46. Directions for uninstalling SaveNow are contained in a link included with every advertisement.

47. SaveNow is uninstalled through the computer's Control Panel Add/Remove option, the same straightforward process used for uninstalling most Windows-based software.

48. The Save program can be uninstalled by using the Control Panel Add/Remove feature in the same manner, by uninstalling the underlying software program supported by Save. Users are told this when they download the software and with each ad or coupon delivered by the Save software. Each ad or coupon contains a link to an information box. The information box provides users with a list of the Save supported programs they have on their desktops. At the same time, it notifies users that in order to uninstall Save, they must uninstall all the Save supported applications on their computer.

WhenU Protects the Privacy and Security of Its Users

49. Unlike many software applications, SaveNow does not collect any personally identifiable information about its users. It 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.

50. The SaveNow software's decisions regarding which ads to retrieve and display are all processed on the user's computer and isolated from WhenU's servers.

51. Thus, although the SaveNow software "monitors" the activity in a user's browser, this monitoring occurs on the user's own computer.

52. The only information WhenU collects is the information necessary to run its system and to be able to compensate its partners and invoice its advertisers. This information is collected by WhenU on an aggregate basis and is not associated with an individual user.

The Act Imposes Substantial, Arbitrary Burdens on WhenU and Risks Subjecting WhenU to a Patchwork of Local Laws

53. The classifications among different kinds of Internet businesses created by the Act are arbitrary and unrelated to the State's legitimate interest in protecting the privacy of Utahns. Compliance with the Act would impose a series of unreasonable, arbitrary and expensive burdens on WhenU, other marketing companies, and many other Internet-based businesses. Further, the scope of the Act is unclear because it contains numerous terms that are not specifically defined. It is impossible for WhenU to know how these terms will be interpreted, and thus how the Act will be enforced.

54. To insure compliance with the Act, WhenU would be required to make significant changes in the way it does business. Each of these changes would have to be implemented on a nation-wide basis. The Act does not require any nexus to activity occurring in Utah, but even if it did, it would be of little help to WhenU because WhenU cannot determine with reasonable certainty where its users are located or where its advertisements are being delivered. Thus, to comply with a Utah statute, WhenU would have to change the way it distributes its software across the board.

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

- a. While WhenU requires users to accept the terms of a license agreement, the license is often presented in a box with a scroll bar. On information and belief, it is very common for software license agreements to be presented in a box with a scroll

bar. 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 so that every word of its license agreement can be seen by the user at the same time. 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." None of these terms is defined. 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. (In fact, IP addresses cannot reliably be used 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 acts at its peril 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) arguably requires, in addition, 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 is defined. While WhenU considers its software to be easy to remove, and tens of millions of computer users have succeeded in removing it from their computers, 1-800 Contacts’ agents have claimed that the software is not easy to remove.

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 the pop-up format entirely in order to be sure that it does not violate this section.

56. The Act contains no nexus to Utah and, as written, would apply to Internet commerce in all 50 states. Therefore, as discussed above, any changes WhenU makes to comply with these provisions would 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 the delivery of advertising or software to 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.

57. If the Act is allowed to become effective, the Act would 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 them 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 Act Will Cause Irreparable Harm to WhenU

58. If the Act is allowed to become effective, WhenU would be required to make expensive, system-wide changes in order to comply with it. Even if all these changes were made, private enforcers, motivated by the Act's draconian penalties and the promise of attorneys' fees, may still seek to sue WhenU for allegedly violating the Act.

59. The notification requirements imposed by the Act (Section 102(c)(i)(A)-(E)) would make WhenU's software more cumbersome to download and therefore less attractive to the freeware providers who are the principal means by which WhenU distributes its software. As a result, WhenU's user base would be diminished with severe ramifications to WhenU, whose revenues and attractiveness to advertisers depend on the size of its user base.

60. The Act will force WhenU to abandon some advertising formats, and prevent WhenU from fully utilizing the new formats it develops. Preventing WhenU from using certain advertising formats will diminish the options available to WhenU advertisers and reduce the overall effectiveness and attractiveness of WhenU's services.

61. Thus, the Act presents WhenU with the impossible choice of either foregoing constitutionally-protected advertising and spending significant sums to comply with the Act (thereby reducing the effectiveness of its business), without any guaranty that it will avoid liability in doing so, or else being subjected to millions of dollars of claims by private litigants:

62. Regardless of what WhenU does to comply with the Act, the draconian penalties imposed by the Act (\$10,000 per each individual violation) will incentivize private plaintiffs to sue WhenU. The cost of defending numerous, protracted lawsuits may be prohibitive for a fledgling operation like WhenU, even if it is ultimately successful. If WhenU is not successful, however, it could face staggering penalties -- penalties that could bankrupt the business.

63. The Act has already had detrimental effects on WhenU. The prospect that the Act might be interpreted to prohibit WhenU's advertising has already caused a WhenU download distribution partner to remove SaveNow from its downloads, costing WhenU tens of thousands of new downloads per month. Other current download distribution partners have expressed concerns to WhenU and have indicated that they may discontinue downloading SaveNow if the Act goes into effect. If the Act goes into effect, an even more rapid exodus of download distribution partners may take place.

64. The Act will also affect WhenU's many employees and independent sales representatives who may decide that they would be better off seeking other opportunities than remaining with WhenU, given the difficulties and uncertainties associated with complying with the Act.

FIRST CAUSE OF ACTION

(For Defendants' Violation of the Commerce Clause of the United States Constitution)

65. WhenU repeats and realleges the allegations of paragraphs 1 through 64 of this Complaint as if fully set forth herein.

66. The Act impermissibly regulates commerce occurring wholly outside Utah's borders.

67. The burdens that the Act imposes on interstate commerce are excessive in relation to any local benefits it confers.

68. The Act subjects WhenU to inconsistent regulations.

69. WhenU is entitled to an order declaring that the Act is void and invalid because it interferes impermissibly with interstate commerce in violation of the United States Constitution.

70. WhenU is entitled to an order of the Court, effective during the pendency of this case, thereafter to be made permanent, enjoining effectiveness of the Act on the ground that it violates the Commerce Clause of the United States Constitution.

SECOND CAUSE OF ACTION

(For Defendants' Violation of the First and Fourteenth Amendments to the United States Constitution)

71. WhenU repeats and realleges the allegations of paragraphs 1 through 70 of this Complaint as if fully set forth herein.

72. The Act prohibits truthful and non-misleading commercial speech protected by the First and Fourteenth Amendments of the United States Constitution.

73. The restriction of WhenU's rights to expressive activity is not justified by any compelling state interest, and the Act is not properly tailored to advance any substantial governmental interest.

74. The restriction of WhenU's rights to expressive activity constitutes a deprivation under color of state law of rights, privileges, and immunities secured by the United States Constitution, within the meaning of 42 U.S.C. § 1983.

75. WhenU is entitled to an order declaring that the Act is void and invalid because it interferes impermissibly with free expression as protected by the First and Fourteenth Amendments of the United States Constitution.

76. WhenU is entitled to an order of the Court, effective during the pendency of this case, thereafter to be made permanent, enjoining effectiveness of the Act on the ground that it violates the First and Fourteenth Amendments of the United States Constitution.

THIRD CAUSE OF ACTION

(For Defendants' Violation of Article I, Section 15 of the Utah Constitution)

77. WhenU repeats and realleges the allegations of paragraphs 1 through 76 of this Complaint as if fully set forth herein.

78. The Act is vague and unclear such as to chill free expression as protected by Article I, Section 15 of the Utah Constitution.

79. The Act prohibits legal and truthful expressive conduct protected by Article I, Section 15 of the Utah Constitution.

80. The restriction of WhenU's rights to expressive activity is not justified by any compelling state interest, and the Act is not properly tailored to advance any substantial governmental interest.

81. WhenU is entitled to an order declaring that the Act is void and invalid because it interferes impermissibly with free expression as protected by Article I, Section 15 of the Utah Constitution.

82. WhenU is entitled to an order of the Court, effective during the pendency of this case, thereafter to be made permanent, enjoining effectiveness of the Act on the ground that it violates Article I, Section 15 of the Utah Constitution.

FOURTH CAUSE OF ACTION

(For Defendants' Violation of Article I, Section 24 of the Utah Constitution)

83. WhenU repeats and realleges the allegations of paragraphs 1 through 82 of this Complaint as if fully set forth herein.

84. The Act does not operate uniformly.

85. The Act creates a private right for Website Merchants but excludes other persons affected by "spyware."

86. The Act's Spyware Prohibition appears to permit online advertising by Website Merchants and others that (a) monitors the computer's usage or personally identifiable information of users; and (b) either sends that information to a remote server, or displays ads in response to that information; (c) without obtaining the user's consent.

87. The Act prohibits contextual advertising as defined in Utah Code 13-39-102(1), regardless of whether it is encompassed within the Act's Spyware Prohibition.

88. These classifications do not operate uniformly because they do not treat similarly situated persons similarly, or they treat persons in different circumstances as if their circumstances were the same.

89. These classifications do not have a reasonable tendency to further the objectives of the Act.

90. Alternatively, these classifications are neither (a) reasonable; (b) actually and substantially in furtherance of a valid legislative purpose; nor (c) reasonably necessary to further a legitimate legislative goal.

91. WhenU is entitled to an order declaring that the Act is void and invalid because it interferes impermissibly with WhenU's rights under Article I, Section 24 of the Utah Constitution.

92. WhenU is entitled to an order of the Court, effective during the pendency of this case, thereafter to be made permanent, enjoining effectiveness of the Act on the ground that it violates Article I, Section 24 of the Utah Constitution.

FIFTH CAUSE OF ACTION

(For Defendants' Violation of the Federal Copyright Act)

93. WhenU repeats and realleges the allegations of paragraphs 1 through 92 of this Complaint as if fully set forth herein.

94. Section 301(1)(b)(ii) of the Act provides special rights to "Copyright Owners" to bring actions under this Act.

95. This provision of the Act is preempted by the federal Copyright Act.

96. Sections 13-39-201 and 13-39-301 of the Act are also preempted by the Copyright Act insofar as they expand the rights of copyright holders.

97. WhenU is entitled to an order declaring that the Act is void and invalid because it is preempted by the Copyright Act.

98. WhenU is entitled to an order of the Court, effective during the pendency of this case, thereafter to be made permanent, enjoining effectiveness of the Act on the ground that it is preempted by the Copyright Act.

SIXTH CAUSE OF ACTION

(For Defendants' Violation of the Takings Clause of Article I, Section 22 of the Utah Constitution)

99. WhenU repeats and realleges the allegations of paragraphs 1 through 98 of this Complaint as if fully set forth herein.

100. The Act effects a taking of WhenU's property by denying WhenU economically viable use of its licensed, installed user base.

101. The Act damages WhenU's property by significantly decreasing the value of WhenU's licensed, installed user base.

102. The Act significantly interferes with WhenU's distinct investment-backed expectations in its licensed, installed user base.

103. In the event the Act is allowed to go into effect, WhenU is entitled to an order of the court declaring that the Act violates Article I, Section 22 of the Utah Constitution.

104. WhenU is entitled to damages in an amount to be proved at trial, but in any event no less than the just compensation provided by Article I, Section 22 of the Utah Constitution.

WHEREFORE, WhenU demands the following relief:

a. For an order declaring that the Spyware Control Act, Utah Code Ann. § 13-39-101 *et seq.*, interferes impermissibly with interstate commerce in violation of Article I, § 8 of the United States Constitution.

b. For an order declaring that the Spyware Control Act, Utah Code Ann. § 13-39-101 *et seq.*, violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 15 of the Utah Constitution;

c. For an order declaring that the Spyware Control Act, Utah Code Ann. § 13-39-101 *et seq.*, violates Article I, Section 24 of the Utah Constitution.

d. For an order declaring that the Spyware Control Act, Utah Code Ann. § 13-39-101 *et seq.*, is preempted by the federal Copyright Act.

e. For an order declaring that the Spyware Control Act, Utah Code Ann. § 13-39-101 *et seq.*, violates the Takings Clause of the Utah Constitution.

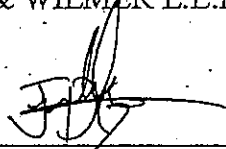
f. For an order of the court, effective during the pendency of this case, thereafter to be made permanent, enjoining the operation and effect of the Spyware Control Act, Utah Code Ann. § 13-39-101 *et seq.*

g. Pursuant to the terms of 42 U.S.C. § 1988, for WhenU's reasonable attorney fees and court costs in pursuing this action.

h. For such other and further relief as this court deems just and proper.

Dated this 12th day of April, 2004

SNELL & WILMER L.L.P.



Alan L. Sullivan
James D. Gardner

Attorneys for Plaintiff WhenU.Com, Inc.

Plaintiff's Address

WhenU.com, Inc.
494 8th Avenue, Floor 21
New York, NY 10001