

**BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C.**

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In the Matter of)
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Spyware Workshop – Comment)
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_____)

FTC File No. P044509

REPLY COMMENTS OF WHENU.COM, INC.

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WHENU.COM, INC.

May 21, 2004

The comments filed in this proceeding include at least two unfounded attacks on WhenU.com and its business model. Neither stems from an unbiased source. One set of critical comments was filed by Benjamin Edelman, a paid witness for WhenU's litigation adversaries. The second set of comments, based on an unscientific and unreliable consumer survey, was filed by PC Pitstop, the publisher of a website devoted heavily to the promotion of its commercial partner's "Pest Patrol" software. PC Pitstop's livelihood and the market for its partner's Pest Patrol program depend on creating a perception among consumers that contextual advertising programs pose threats to their privacy interests and to the stability of their computer systems that justify the purchase of a \$39.95 "spyware protection" program. These interested commenters presumably attacked WhenU in an effort to discredit the company, and, by extension, its comments, and to undermine the statements of its Chief Executive, Avi Naider. As explained below, the arguments advanced by both Mr. Edelman and PC Pitstop are entirely without merit and should not color the Commission's view of WhenU or affect the consideration given to WhenU's comments.

A. Response to Comments of Benjamin Edelman

Benjamin Edelman, a Ph.D. candidate and law student at Harvard University, filed comments dated March 19, 2004 titled "Methods and Effects of Spyware." In these comments, Mr. Edelman argues that adware should be classified categorically as "spyware."¹ He asserts that that this broad-brush treatment of adware programs as "spyware" is appropriate because they allegedly "transmit extensive personal information from users' computers to the servers of these programs' designers," and that such

¹ Edelman comments, ¶ 12.

transmissions are “often contrary to stated license agreements [and] consumer expectations”²

Whether or not the characteristics ascribed to adware by Mr. Edelman may be present in software products distributed by other companies, his characterization of adware is patently inaccurate as applied to WhenU’s products. As explained in greater detail in our initial comments, WhenU does not collect *any* personally-identifiable information about its users. WhenU does not use cookies to track consumers, it does not maintain a database of users and does not create user browsing profiles of any kind, even anonymously.

The presence and operation of WhenU’s software applications is transparent to users. Every ad, offer and coupon served by WhenU is displayed in a separate, WhenU-branded window that includes the “Save!” or “SaveNow” marks and a conspicuous notice that: “This is a WhenU offer and is not sponsored or displayed by the websites you are visiting.” The functionality of WhenU’s software is described explicitly in a clear and concise license agreement, which users must affirmatively accept before the software is installed on their computers. This license agreement explains that WhenU’s software generates contextually relevant advertisements and coupons, utilizing “pop-up” displays and other advertising formats.

By design and in operation, the SaveNow software is highly protective of consumer’s privacy interests. As explained in greater detail in WhenU’s initial comments, WhenU’s SaveNow software operates on the user’s desktop and makes the determination of which advertisements to serve without the intervention of any software outside of the user’s computer. As Mr. Edelman observes, when the SaveNow software

² *Id.*

displays an advertisement, it does send a limited amount of anonymous information back to WhenU's servers that is used to optimize the performance and relevancy of the ads that WhenU displays. When an ad is displayed by SaveNow, a record of each impression or click-through, including the factor that caused the ad to be displayed (*e.g.*, a URL, keyword, and/or search term), is transmitted to WhenU's servers. These transmissions *do not include any personally-identifiable information about users*, and the data they do contain are similar to the information that any publisher of conventional Internet advertising is likely to receive whenever a user views a web page that displays the publisher's ad.³ Moreover, these infrequent communications are not only anonymous, they are also non-uniquely identifiable, because WhenU intentionally excludes the unique machine ID from these communications.⁴

Contrary to Mr. Edelman's suggestion, all material aspects of these data transmissions were accurately described in WhenU's SaveNow privacy policy. Specifically, the privacy policy states that "[w]hen ads are displayed by the software, impressions and click-throughs 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 click-through reports sent by the desktop to WhenU.com servers." Mr. Edelman makes a strained and tenuous argument that the transmissions described above are inconsistent with another provision of WhenU's privacy policy that explains that the company does not monitor its users'

³ Such information generally includes the user's IP address, the web page that the user clicked on to reach the page on which the advertisement is displayed, and information regarding the type of computer operating system and web browser employed by the user. For a concise discussion about the types of information that web servers generally collect in the course of normal operation, *see* <http://www.usability.gov/serverlog>.

surfing habits or clickstream data. Mr. Edelman opines that this provision in WhenU's privacy policy "seems to promise" not to transmit *any* URLs for webpages viewed by its users. This interpretation is unreasonable, however, and contrary to the plain language of the provision, which clearly applies to transmissions of the user's "clickstream data."

As explained above, WhenU's SaveNow software only transmits a URL to the company's servers at the moment when an advertisement is displayed. The privacy policy that Mr. Edelman criticizes does not say otherwise. The relevant provision makes clear that WhenU does not collect or record its users' clickstream data: "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." Webopedia, a leading online encyclopedia dedicated to computer technology, defines "clickstream" as follows:

A virtual trail that a user leaves behind while surfing the Internet. A clickstream is a record of the user's activity on the Internet, including every Website and every page of every Web site that the user visits, how long the user was on a page or site, in what order the pages were visited, any newsgroups that the user participates in and even the e-mail addresses of mail that the user sends and receives.⁵

The glossary published by the Internet Advertising Bureau similarly defines "clickstream" to mean "the electronic path a user takes while navigating from site to site, and from page to page within a site" or "a comprehensive body of data describing the sequence of activity between a user's browser and any other Internet resource"⁶

⁴ Mr. Edelman also asserts that these communications include personal information such as the user's IP address, but fails to mention that an IP address is a fundamental part of any HTTP communication and, as noted above, is typically included in communications to most web publishers.

⁵ <http://www.webopedia.com/TERM/C/clickstream>

⁶ http://www.iab.net/resources/glossary_c.asp. Another popular Internet glossary service, Whatis.com, likewise describes clickstream data as "aggregate data about which pages visitors visit in what order -- which are the result of the succession of mouse clicks each visitor makes" while surfing the Internet. *See* http://searchcrm.techtarget.com/sDefinition/0,,sid11_gci786594,00.html.

Each of these definitions recognize that a user’s “clickstream” data reflect a succession or sequence of online activities that collectively trace the path that the user takes as he or she navigates the Internet. “Clickstream data” provides a comprehensive record of a journey that a user takes online rather than a single footprint left along the way.

Because the transmissions from users’ desktops to WhenU servers relating to the display of an advertisement include at most *only* a single, isolated URL , these communications cannot fairly be said to convey a user’s “clickstream data.” WhenU’s practices are entirely consistent with the privacy statement challenged by Mr. Edelman. Nevertheless, to be sure that no one (not even a paid witness for WhenU’s adversaries in litigation) could misunderstand WhenU’s policies, the company recently posted a revised privacy statement that explains in relevant part that:

As you surf the Internet, your “clickstream data” (i.e., a log of all the sites you visit) is not transmitted to WhenU or any third-party server

. . .

The software does send back a limited amount of information from your desktop in order to count the number of users in our network and optimize the performance and relevancy of the ads. For example, the software may send WhenU a communication that includes information about the webpage you were viewing when you saw or clicked on a particular ad. WhenU has intentionally designed these communications back to WhenU to be highly protective of user privacy, in the following ways:

(a) Each individual desktop is assigned an anonymous, unique machine ID. This machine ID is used only to enable WhenU 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.

(b) When ads are requested and/or displayed by the software, impressions and click-throughs, including the factor (e.g., such as the URL, the keyword, or the search term, or some combination thereof) that caused the ad to be displayed are reported to WhenU. To protect your privacy and prevent WhenU or any third party from assembling individual user profiles or knowing which websites you visit, your unique machine ID is intentionally excluded from the limited communications sent back to WhenU that may include a URL or such other browsing-specific information.⁷

This revised statement makes it unmistakably clear that, although WhenU does not collect its users' clickstream data, it may transmit to company servers on an anonymous basis individual URLs, keywords, or search terms that trigger the delivery of advertisements. This information is never linked to an individual user or even to a unique machine ID, and it is very similar to the information that all online advertising publishers receive as computer users browse webpages that display their ads.

B. Response of WhenU.com to Comments of PC Pitstop

Comments filed by PC Pitstop on April 13, 2004 and reply comments filed on April 27, 2004 purport to summarize the results of a survey conducted by that organization that attempted to determine the percentage of WhenU users who were aware that WhenU's software was running on their computers and who knowingly consented to its installation. The survey compared users' recollections of their installation experiences with WhenU's software, Claria's Gator software and Grisoft's AVG antivirus program. According to PC Pitstop, the AVG program was chosen "as a useful baseline" because it is distributed free over the Internet.

To attract a pool of survey respondents, PC Pitstop offered visitors to its website what it describes as "a free diagnostic test" to determine whether the software in question

⁷ See <http://www.whenu.com/privacy.html>

was installed on their computers. According to PC Pitstop, 86.69% of the surveyed WhenU users were unaware that WhenU's software had been installed on their systems (compared to 75.09% for Claria and 3.52% for AVG).

PC Pitstop contends that these survey results indicate that WhenU rarely receives the "informed consent" of users before installing its software on their computers. However, as is more fully explained below, Pitstop's survey design and implementation were contrary to fundamental principles of survey research science,⁸ the survey data are meaningless, and the conclusions drawn by PC Pitstop from those data are wholly unsupported. The following highlights only a few of the many fundamental flaws in methodology and reasoning that pervade Pitstop's survey and related analysis and conclusions.

First, the questions posed in the survey were not germane to its stated purpose, which was to test whether users were aware *at the time of installation* that the specified software was being installed on their machines. The survey was not in fact designed to test consumers for awareness of WhenU's software or notice of its licensing conditions at the moment of installation. Instead, it attempted only to measure computer users' recall of an installation process that for most respondents probably occurred weeks or months before the survey questions were posed. Whether consumers remember installing a free

⁸ The standards for evaluating the reliability and validity of a survey have been described in a several widely recognized sources, including the criteria described by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997) and *Kumho Tire Co., Ltd. et al. v. Carmichael et al.*, 526 U.S. 137 (1999). Other criteria are set forth in the Federal Rules of Evidence 702 Advisory Committee notes of December 1, 2000, the Federal Judicial Center's ("FJC") *Manual for Complex Litigation* (3rd Ed.) § 21.493, and the "Reference Guide on Survey Research" and "Reference Guide on Statistics" that appear in the FJC's *Reference Manual on Scientific Evidence* (2000, Second Edition). Among the criteria for a proper survey recognized by such authorities are: (a) the choice and definition of an appropriate population; (b) the use of questions that are clear and not leading; and (c) the use of proper controls and ruling out alternative explanations for the data.

software application – an event that is inherently unlikely to be memorable for most people – weeks or months after the fact has little or no bearing on whether they were aware of the installation when it occurred. The installation of bundled applications like SaveNow is especially unlikely to be a memorable event given that the primary motivation for the installation is to receive a different piece of software.

Second, PC Pitstop failed to ask any control questions designed to determine whether the survey respondent was the sole user of his or her computer or the only person who might be responsible for installing software on that computer. As a result, PC Pitstop’s conclusions fail to account for the obvious possibility that many users who reported they were unaware of installing WhenU’s software were not in fact the users who actually installed the software.

Third, PC Pitstop failed to use an appropriate universe for its survey.⁹ Instead of drawing a sample from WhenU’s entire installed user base, PC Pitstop surveyed a highly atypical collection of users best described as “WhenU users who, regardless of whether they were actually responsible for installing WhenU’s software on their machines, suspect they may have a problem with their computers and visit PC Pitstop’s website to take a free diagnostic test.” Common sense suggests that this latter universe may not only be atypical, but also biased. Visitors to a website that is openly hostile to contextual advertising companies probably would be less inclined than the average user to acknowledge a voluntary installation of a contextual advertising program. Moreover, the only WhenU users who would be likely to take PC Pitstop’s diagnostic

⁹ See *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 767 (E.D. Mich. 2003) (noting that “[a] survey must use respondents from the appropriate universe because ‘there may be systematic differences in the responses . . . given by persons [with a particular] characteristic or preference and the responses given

test, and therefore be included in the survey, would be users who were unsure about which programs were running on their systems and/or perceived some problems with their system performance. Findings predicated on the impressions of such an atypical universe of users cannot be extrapolated to apply to WhenU's entire user base, and they undermine the basis for PC Pitstop's conclusions.

Fourth, Grisoft's AVG antivirus software is not a valid subject for the comparative baseline measurements used by PC Pitstop to interpret the results of its survey of WhenU users. However, a fundamental principle of survey research science is that the subjects of baseline measurements must have the same attributes as the subjects of the measurements to which they are compared.¹⁰ PC Pitstop violated this principle by purporting to compare software products with fundamentally different distribution models and installation processes.

Although both WhenU and Grisoft require users to accept a license agreement before installation, installation of the AVG software requires several steps that are not required to install a WhenU application. Many WhenU users downloaded the WhenU software, and agreed to receive the ads it delivers, to get for free software for which they would otherwise have had to pay. But a prospective user of the AVG antivirus program must affirmatively search for that software and identify a website from which a free download of the software is available.¹¹ In addition, AVG requires new users to complete a questionnaire prior to installation, AVG emails a serial number to prospective

to those same questions . . . by persons who do not have that characteristic or preference") (internal citation omitted).

¹⁰ See *Reference Guide to Survey Research*, *supra* note 10, at 258 ("In designing a control group study, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible.")

users that they must use to install the software and, during the AVG installation process, users are prompted to make a series of choices regarding how the software will be configured.¹² Nothing analogous to these steps is involved in the WhenU installation process, and each of these steps undoubtedly increases the likelihood that AVG users will recall an otherwise easily forgotten experience.

Fifth, PC Pitstop compounded the errors in its survey design by asking leading questions.¹³ Based on the report, it appears that the survey consisted of two questions, one that asked about the installation experience associated with the WhenU software, and another that asked about the installation experience associated with the AVG Antivirus software. The survey question about WhenU is introduced with sinister, biasing language. It begins “[w]e have detected one or more programs installed on your PC that were created by the WhenU Corporation. These programs display advertising based on the web sites you visit and other data they collect while you use your computer. . . .” (Emphasis added). The ominous “loaded” language (*i.e.*, “We have detected”) is reinforced when the respondent is next told about a corporation that “collects” some mysterious and unexplained “other data” from the respondent “while you use your computer.” In sharp contrast, the question asked of the AVG antivirus program users does not employ loaded words and phrases. The AVG question begins innocuously with: “Grisoft’s AVG Antivirus software appears to be installed on your PC. . . .” This discrepancy in tone could materially affect the respondents’ answers, renders the data

¹¹ The free edition of AVG Antivirus is available from Grisoft’s website at http://www.grisoft.com/us/us_dwnl_free.php.

¹² *See id.*

¹³ *See Manual for Complex Litigation, supra* note 10, at 102 (noting that one of the factors in evaluating the validity of a survey is whether “the questions asked were clear and not leading”).

obtained from these answers non-comparable, and completely undermines the objectivity of the survey.

In sum, the PC Pitstop survey, as designed and implemented, was incapable of answering the very question it purported to address, failed to use proper controls and failed to rule out obvious alternative explanations of the data. It also failed to use a representative sample of a relevant user universe or a valid “baseline” model for comparative measurements. And the survey questions were leading; consequently, the survey lacked any semblance of objectivity. For all of these reasons, the conclusions that PC Pitstop purports to draw from its survey cannot be considered reliable, and should be given no weight in this proceeding.

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Respectfully submitted,

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