

PC Pitstop's response to WhenU.Com and Claria Corporation

PC Pitstop would like to point out several inconsistencies in comments filed by Claria Corporation and WhenU.Com when compared to our own research. As many participants indicated during the FTC workshop, the labels of "adware" and "spyware" are difficult to define. The FTC's focus should be on preventing behavior that is harmful to consumers, regardless of how a company might like to label its products and practices.

Claria and WhenU have both filed comments to the FTC regarding the workshop:

<http://www.ftc.gov/os/comments/spyware/040416clariacorporation.pdf>

<http://www.ftc.gov/os/comments/spyware/040419whenu-com.pdf>

Claria asserts that the FTC already has the jurisdiction and authority to regulate software that exhibits unfair and deceptive practices, which it goes on to define as a program that:

- "Gathers information from a consumer's computer without permission;
- Reports the information to the creator of the software or to one or more third parties;
- Is installed on a consumer's computer without having given adequate notice to consumers;
- Is installed without the consent of the consumer; and
- Provides the consumer with little or no control over removing the software."

WhenU's position essentially parallels Claria's, saying "At WhenU, we understand and share the FTC's concerns about software that is designed to deceive and harm consumers, and we support efforts to curb the spread of pernicious programs that threaten consumer privacy and security interests. Consistent with our own practices, WhenU believes that users should always receive notice about any application before they install it, should be required to affirmatively accept a license agreement ..."

PC Pitstop concurs with Claria and WhenU on those points. The issue of informed consent is at the heart of this issue. But what constitutes informed consent? Current logic seems to be that if software is installed and running on the PC, users are informed of it and have consented to its license terms. This seems to be true for many legitimate programs; for example our research showed that only 4% of users of the free AVG Antivirus program were unaware it was running. However, our research indicates the opposite in the case of Claria and WhenU products; 74% of Claria users and over 80% of WhenU users were unaware that the software was installed on their computer. Our research is consistent with the results of a survey submitted to the FTC by the Hertz Corporation and L.L. Bean that indicated a lack of awareness and consent regarding the actions of Claria's products.

This level of consumer "unawareness" has several serious affects. Users cannot uninstall software that they don't know is running, because they don't realize it is installed. Further, how can users have consented to a license agreement for software they are

unaware they are running? We also believe it drives the visceral responses displayed in comments filed by consumers on the FTC web site. When consumers realize that software such as Claria's or WhenU's may be taking advantage of their computers--and of them--they feel cheated and angry. These are not reactions that you would expect from users who have chosen to install and run an application after reading its license agreement.

As Claria has pointed out, the FTC already has the authority to regulate unfair and deceptive practices. PC Pitstop believes that the incredibly high levels of unauthorized Claria and WhenU software installations found in our surveyed users may be indicative of such practices. Without the clear informed consent of the user, which our survey shows has not been given in the vast majority of cases, the list of undesirable traits described by Claria and WhenU actually fit their own software.

PC Pitstop believes that there are two important questions that the FTC must address with companies such as Claria and WhenU. First, why are so few consumers aware that this type of software is installed? Second, how can consumers be held to the license agreements of these companies when they are unaware the software is installed, and as a result they clearly did not agree to the license terms?

Companies making ad-supported software have a financial incentive to drop their software onto every possible computer, so they should also bear the responsibility of ensuring that the installation was done with consent. At the moment this consent is being implied by the mere presence of the software on PCs; research from PC Pitstop and others shows that this assumption is usually incorrect.

There are probably many underlying causes for the lack of consumer awareness of products from Claria and WhenU, including the use of confusing drive-by downloads and the nature of the applications themselves. In the end, however, the best measure of progress on this issue is whether the large majority of Claria and WhenU users are aware they have installed the product. Once these companies provide clear and verifiable notification, consumers can be said to have provided informed consent.