

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**  
Alexandria Division

WASHINGTONPOST.NEWSWEEK  
INTERACTIVE COMPANY, LLC, *et al.*,

Plaintiffs,

v.

THE GATOR CORPORATION,

Defendant.

Civil Action No. 02-909-A

**DECLARATION OF BENJAMIN G. EDELMAN**

I, Benjamin G. Edelman, state and declare as follows:

1. I make this statement under penalty of perjury and from my own personal knowledge.
2. I hold a Bachelor of Arts degree in Economics from Harvard College and a Masters of Arts degree in Statistics from the Graduate School of Arts and Sciences at Harvard University.
3. I am presently employed as a Technology Analyst at the Berkman Center for Internet & Society at Harvard Law School. I have been employed as a technical consultant at the Berkman Center since May, 1998. While employed by the Berkman Center I have published the following: (1) The Effect of Editorial Discretion Book Promotion on Sales at Amazon.com (2001-2002), available at <http://cyber.law.harvard.edu/people/edelman/pubs/thesis-intro.pdf>; (2) Software Environments for Online Deliberative Discourse (1999-2000), available at <http://cyber.law.harvard.edu/projects.deliberation>; (3) Analysis of Domain Reregistrations Used For Distribution of Sexually-Explicit Content (2002), available at <http://cyber.law.harvard.edu/people/edelman/renewals>; (4) Large-Scale Intentional Invalid WHOIS Data (2002), available at <http://cyber.law.harvard.edu/people/edelman/invalid-whois/>; (5) .NAME Registrations Not Conforming to .NAME Registration Restrictions (2002), available at <http://cyber.law.harvard.edu/people/edelman/name-restrictions/>; (5) Alternative Perspectives on Registrar Market Share (2002), available at <http://cyber.law.harvard.edu/people/edelman/registrar-choice/>; (6) Analysis of Registrations in Alternative Root TLDs (2001), available at <http://cyber.law.harvard.edu/people/edelman/dotbiz> and <http://cyber.law.harvard.edu/people/edelman/dotweb>; (7) Documentation of Privacy and Security Shortcomings at Buy.com (2000), available at <http://cyber.law.harvard.edu/people/edelman/buy-privacy.html>; and (8) DNS as a Search Engine: A quantitative Evaluation (2002), available at <http://cyber.law.harvard.edu/people/edelman/dns-as-search>.

4. I was qualified as an expert and provided oral testimony in a lawsuit in United States District Court for the Eastern District of Pennsylvania captioned *Multnomah County Public Library v. United States of America*, No. CIV. A. 01-1322, 2002 WL 1126046 (E.D. Pa. 2002). My work in that case investigated and detailed the design of the Internet, the implementation of computer networks, and the capabilities of proposed methods of filtering access to certain types of Internet content.

5. I have been retained by Gibson, Dunn & Crutcher LLP as a technical expert in the above-captioned lawsuit to provide technical assistance regarding the operation of The Gator Corporation's ("Gator Corp.") software programs. I have conducted research regarding Gator Corp. on several previous occasions and am familiar with its operation.

6. I previously submitted a declaration to this Court in the above-captioned lawsuit regarding the operation of Gator Corp.'s free software programs, "Gator" and "OfferCompanion." This declaration is appended as Exhibit C to Plaintiffs' memorandum in support of its motion for preliminary injunction.

7. I have conducted research regarding the operations of leading instant messenger software programs, and I am familiar with their operations. Specifically, I have tested and am familiar with leading instant messenger programs AOL Instant Messenger 4.8 ("AIM"), Microsoft Network Messenger 4.6 ("MSN Messenger"), and Yahoo Instant Messenger 5.0 ("YIM"). I have used such programs in both a professional and personal capacity for more than four years.

8. Instant messenger programs are software applications that allow and facilitate real-time communications between distant users. Their primary function is to transmit text messages over the Internet for immediate display on the computers of designated recipients.

9. When a user of instant messenger software receives an instant message, her instant messenger software ordinarily causes a notification of that message to be immediately displayed on screen for the user's review. Users rely on this feature so as to receive prompt notification of pending incoming messages; because the sender of an instant message ordinarily anticipates receiving a rapid response, a simple off-screen queuing of incoming messages (as is ordinarily the case with email) would defeat the user's purpose in downloading an instant messenger program.

10. Pop-up windows from AIM, MSN Messenger, and YIM appear on a user's screen for the purpose of providing personal communications rather than for the purpose of suggesting commercial activity. In particular, pop-up displays are triggered by incoming instant messages from other IM users, not by the IM programs' desire to show advertisements for commercial gain. Users can choose from whom they wish to receive instant messages, and users can block messages from persons from whom they do not wish to receive messages. Although the main program windows of AIM and MSN Messenger display advertisements, as discussed below, the pop-up windows of AIM, MSN Messenger, and YIM do not contain any advertisements; their pop-up notifications solely provide access to incoming personal communications, without displaying advertising.

11. Further, the pop-up instant message notifications for AIM and YIM appear in the taskbar at the bottom of the screen and do not obscure any of the underlying website's content. The pop-up instant message notification for MSN Messenger appears in a small box to the right of the user's computer screen. In each instance, pop-up messages are displayed in a separate pop-up window only after a user requests the display of such a window, and no advertising is displayed along with the actual message. I have appended screen shots of the pop-up instant message notifications for AIM, MSN Messenger, and YIM, respectively, at Tabs A, B, and C.

12. The actual instant message ordinarily contains a clear identification of the product that provided it. For example, when an instant message arrives to a user of YIM, the message appears in a window that bears the name of the transmitting user as well as the fact the message is in fact an "Instant Message."

13. Although the instant messenger software programs do display on-screen advertisements, in my experience and testing, the chosen display format clearly communicates the advertisements' relationship to the instant messenger program. For example, when MSN Messenger displays an advertisement from AT&T Wireless, the AT&T advertisement appears in a designated area of the Messenger application window used only to display advertisements. The Messenger application continues to report as its title "MSN Messenger," and it continues to provide the ordinary Messenger features including menus, listings of online contacts, and the ability to send an instant message to a designated contact. Thus, it is clear to a typical end user that the AT&T advertisement at issue is provided by and linked to the MSN Messenger application. Gator Corp.'s pop-up advertisements lack all of these characteristics.

14. Screen shots for AIM, MSN Messenger, and Yahoo Instant Messenger are appended hereto as Tab D, E, and F, respectively. As is the case for MSN Messenger, AIM's advertisements are restricted to designated portions of AIM's application windows and are similarly linked to AIM's application windows. YIM does not display advertisements.

15. In my experience, users are generally aware of the source of their instant messenger software, and I have never heard a user complain of receiving instant messaging software without her knowledge or consent. Instead, a user ordinarily downloads a desired instant messenger program specifically, manually, and directly from its provider. In some instances, such programs may be bundled with related software; for example, as a portion of its Netscape Communicator package, Netscape has at times provided a web browser, an email client, a news reader, and the AIM program. However, a user must still consciously create a user identification and password to access and use the instant messenger programs. Further, I know of no instance of "drive-by" installations of instant messenger programs or of other instances in which such software is installed automatically upon viewing a web page, without a user's explicit request.

16. Because AIM, MSN Messenger and YIM pop-up windows clearly identify their source, and because computer users ordinarily specifically and manually download instant messenger programs directly from their providers, it is my opinion that users are not likely to be confused regarding the source or sponsorship of the AIM, MSN Messenger, and YIM pop-up windows that appear on their computer screens. It is also my opinion that it is unlikely that any user

would consider the instant messenger windows authorized, approved, sponsored by, or in any other way connected to the websites viewed while IM software is used or when instant messages arrive.

17. In recent testing, I sought to determine the types and categories of user information obtained by leading instant messenger applications and later sent to their respective servers. Using a proxy server placed between my ordinary testing computer and my connection to the Internet, I reviewed the transmissions from MSN Messenger and YIM to their corresponding servers. I reviewed transmissions taking place during a period of time in which each instant messenger client was operational and during which I accessed a variety of web pages at several distinct web sites. I saw no evidence of transmission by these programs to their respective servers of any information about the web pages or sites visited. I was unable to monitor the operations of AIM in this way, but I have no reason to think that AIM is any different in this regard.

18. The end user license agreements of the respective instant messenger programs do not indicate that the programs monitor a user's Internet connection or make any record of the specific web sites visited.

19. I am unaware of information that in any way suggests or states that instant messenger programs monitor web browsing patterns or modify their choice of advertisements on the basis of web sites visited.

20. It is my opinion, based on the advertisements that I reviewed on AIM and MSN Messenger, that the tested instant messenger programs did not alter their selection or timing of advertisements based on the specific web sites I visited. It is also my opinion that AIM and MSN Messenger do not deliver targeted advertising based on the specific web sites visited by their users. I draw this conclusion both on the basis of brief testing specifically for the purpose of preparing this declaration as well as on the basis of extended professional and personal usage of MSN Messenger over more than two years.

I declare under penalty of perjury that the foregoing is true and correct.

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Executed on this \_\_\_\_\_ day of July, 2002.

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Benjamin G. Edelman