

UTAH SPYWARE LEGISLATION

Spyware Control Act, Utah Code Ann. § 13-40-101 to -401 (2004)

WHENU.COM, INC. v. UTAH

No. 040907578 (D. Utah June 22, 2004)

In 2004, the state of Utah enacted H.B. 323, the Spyware Control Act ("SCA"), codified at UCA § 13-40-101 to -401 (2004). The Act makes installing spyware or causing spyware to be installed on another person's computer illegal. In June 2004, a federal district court in Utah granted a preliminary injunction ceasing enforcement of the statute on constitutional grounds.

The SCA defines spyware as any software that monitors computer usage; reports information about usage; or displays ads in response to usage and (1) does not identify the entity responsible for an ad, and/or (2) uses certain triggering mechanisms. Software that generates ads can be exempt if it meets rigorous consent standards including: plain language license agreements; notice of all information collected; examples of the ads that will be displayed; notice of the frequency of ads; an ability to tell these ads from other ads; and the ability to uninstall the software. The statute provides a private right of action allowing for recovery of the greater of actual damages or \$10,000 for each violation, with treble damages available for willful violators. The statute also includes a safe harbor provision for Internet service providers that merely transmit information which may include spyware, and prohibits class actions.

WhenU.com, an Internet advertising company that engages in the use of spyware, filed suit in a Utah district court alleging that the SCA is unconstitutional. The court granted a preliminary injunction against enforcement of the statute, holding that WhenU.com was likely to prevail on a claim that the pop-up ad ban portion of the statute violated the United States Constitution, that irreparable harm would result if an injunction was not granted, and that potential injury to WhenU outweighed injury to the defendants and the public.

The plaintiff demonstrated irreparable harm by showing that compliance with the SCA was either technologically impossible, or possible but prohibitively expensive. The court also noted that vagueness in the statute made compliance difficult, raised the specter of widespread litigation, and may deter the plaintiff's business partners. These economic losses would not be recoverable because the defendant is the state of Utah.

On the balancing question, the court held that the threatened injury to the plaintiff outweighed damage to the government and was not counter to the public interest. Even taking into account how consumers could be harmed by delaying the enforcement of this statute and the public interest in giving full effect to legislation, the court also noted the public interest in guaranteeing that laws are constitutional in finding that the balance weighed toward granting the injunction.

Finally, the court held that WhenU was substantially likely to succeed on the merits of its constitutional claim against some provisions of the SCA. Specifically, the court found that the prohibition on pop-up advertising could violate the Commerce Clause of the United States Constitution.