

-1-

P R O C E E D I N G S

(Electronically recorded on June 22, 2004)

THE COURT: WhenU.com vs. The State of Utah and others.

I'm sorry, I meant to say let's reconvene in an hour, and I think I probably said 45 minutes.

The matter is before the Court to consider plaintiff's application for a preliminary injunction restraining and enjoining defendant from enforcing the provisions of Title 13, Chapter 99, Section 101, and those sections that follow.

The governing rule for these proceedings is Rule 65(a) of the Utah Rules of Civil Procedure. The rule has four requirements of proof, the burden on plaintiff, before the injunction may issue.

First, plaintiff must demonstrate that it will suffer irreparable harm unless the injunction issue. Towards that end plaintiff has presented evidence and argument attempting to show that compliance with the provisions of the statute is either technologically impossible or possible but extensive.

Additionally, some vagueness to the statute adds an element of uncertainty as to what is required to be in compliance. That uncertainty and the private enforcement provisions expose plaintiff to a potential plethora of litigation.

Also, plaintiff is confronted with the possibility of regulation that may be different from, and even conflicting

-2-

1 from state to state. The ability to accommodate these
2 different and conflicting regulations may not be possible,
3 but if possible it will likely entail some expense.

4 Further, this uncertainty coupled with the statutory
5 restrictions on pop-up advertising and the severe penalties,
6 plaintiff speculates, will discourage plaintiff's bundling
7 partners.

8 Consequently plaintiff alleges that unless the
9 injunction issue, it will incur expense, an inability to
10 conduct business, a loss of necessary business partners, all
11 resulting in economic damages and litigation from those seeking
12 to enforce violations of the statute.

13 As it relates to the economic damages, typically these
14 economic damages are not considered irreparable. If plaintiff
15 prevails on its claims it usually anticipates and should
16 anticipate that there will be an award for economic losses.

17 In this case, however, where the action is against the
18 State of Utah and the claim is that the acts of the legislature
19 are unconstitutional, plaintiff would at best, if it prevails,
20 have judicial declaration that the statute is unconstitutional
21 and permanent injunction prohibiting its enforcement. Economic
22 loss will not be recovered through this lawsuit, and thus is
23 irreparable.

24 In considering the submissions and the testimony on
25 this necessary showing, the Court concludes that plaintiff has

-3-

1 met its burden, and demonstrated, for the reasons I've already
2 articulated, that irreparable harm will result to plaintiff if
3 the injunction does not issue.

4 The second and third requirements imposed on plaintiff
5 by the rule can be analyzed together. They require that the
6 Court be persuaded that the threatened injury, as previously
7 discussed, to plaintiffs, outweighs whatever damage may be
8 caused to the defendants, and that the injunction prohibiting
9 enforcement of the statute would not be adverse to the public
10 interest.

11 It is not and nor should it be the problem of the
12 Court to dictate to the legislature what it should do. On the
13 other hand, when a case in controversy is properly before the
14 Court, it is the Court's responsibility to determine whether an
15 Act of the legislature runs contrary to the Constitution.

16 This responsibility should be exercised judiciously,
17 keeping in mind that there is a public policy to give full
18 effect to the Acts of the legislature. However, it is
19 in the public interest that Acts of the legislature meet
20 Constitutional muster.

21 Consequently, where there are serious challenges to
22 an Act of the legislature which could result in a declaration
23 that the statute is unconstitutional, a preliminary injunction
24 staying its enforcement while litigation of these challenges is
25 concluded to a final resolution is not adverse to the public

-4-

1 interest.

2 The damage defendants suffer if the injunction issue
3 is twofold. First, a legislative Act would not take effect, as
4 intended by the legislature. Second, that protection which the
5 State seeks to confer would be delayed, and those consumers
6 protected would be without that protection.

7 I appreciate the fact and I think there's some
8 importance to this fact, that the consumer is not a party
9 to these proceedings. However, this is a weighing process.
10 Although the analysis is complicated and the arguments have
11 been long and convoluted, I have concluded that all appropriate
12 things considered, the threatened injury to plaintiff outweighs
13 the injury to defendants.

14 Finally, plaintiff must demonstrate that there
15 is a substantial likelihood that it will prevail on the
16 Constitutional challenge, or there are serious issues that
17 should be the subject of further litigation.

18 The statute in question does three basic things.
19 First, it prohibits without consent or authorization
20 installation of a context based program. Programming that
21 discerns what you're doing on the computer and sends that
22 information elsewhere.

23 There are some exclusions, such as computer cookies,
24 although there's a split of opinion whether these exclusions
25 fit the definition of that which is prohibited.

-5-

1 Second, there's a prohibition of any trigger based
2 mechanism pop-up advertising, regardless of whether there is
3 authorization, that obscures to any degree the screen being
4 viewed.

5 Third, the statute outlines a protocol in making a
6 presentation to a possible recipient that the context based
7 program that must be followed before authorization from the
8 recipient is perfected.

9 Plaintiff argues that this statute violates several
10 provisions of both the Constitution of the United States and
11 of this state, the Federal Copyright Act.

12 The Court has viewed the pleadings, reviewed the
13 pleadings, memoranda, the affidavits, and I have heard and
14 considered all of the arguments on this issue. I am not
15 persuaded that there is a substantial likelihood that plaintiff
16 will prevail in any of its Constitutional challenges to the
17 statute, insofar as the statute prohibits unauthorized
18 installation of a computer -- on a computer of context based
19 advertising.

20 However, the statute attempts to do more, and I am
21 persuaded that to the extent there is a prohibition on pop up
22 advertising, and as I've previously indicated, a protocol for
23 paying authorization from the recipient of a programming to
24 perfect consent, there is a substantial likelihood plaintiff
25 will prevail on the basis that these provisions violate the

-6-

1 Commerce Clause of Article 1, Section 1 of the United States --
2 Article 1, Section 8, rather, of the Constitution of the United
3 states.

4 In summary, I find plaintiff on its Constitutional
5 claim demonstrates the substantial likelihood of obtaining an
6 injunction, enjoining enforcement of some provisions but not
7 all provisions of this statute.

8 The Court having come to this conclusion on the fourth
9 requirement of Rule 65(a), the question becomes, "Can a
10 preliminary injunction enjoin defendants from enforcing
11 portions of the statute while allowing -- enjoin defendants
12 from enforcing portions of the statute, while allowing
13 enforcement of other portions?"

14 I think it is important that such a division --
15 that if such a division is to be made, that it be done with
16 specificity. Enforcement of this statute goes beyond this
17 plaintiff and these defendants. There probably are others and
18 maybe many others who are subject to this statute. Plaintiff,
19 defendants, and all others who may be subject, must have that
20 specificity so they can determine what they can, cannot, and
21 must do to both enforce the statute and be in compliance.

22 Having examined the statute and taken into account
23 what is in terms of this process less than of course full
24 litigation of the issues and of the facts and of the law,
25 I have concluded that such a division for purposes of a

-7-

1 preliminary injunction cannot adequately be made, and presents
2 a serious issue that should be the subject of further
3 litigation.

4 Accordingly, the motion for a preliminary injunction
5 is granted. Defendants are preliminarily restrained and
6 enjoined from enforcing Title 13, Chapter 39, Section 101, and
7 those provisions that follow.

8 The bond. I am not requiring a bond. Two reasons.
9 First, there has been no demonstration of attorney's fees,
10 which is one of the conditions of the rule; and secondly,
11 the damage to the web site owner or consumer of course are
12 damages that are not recognized by this rule. I agree with
13 Mr. Sullivan's analysis in that regard, and that's not what is
14 anticipated.

15 Secondly, the rule would require a bond if the -- let
16 me get the exact language here -- well, in terms of wrongdoing
17 or wrong order or wrong injunction. I think the implication
18 there is that there be -- that the matter be frivolous in some
19 way, in some fashion, but where there is serious and I find
20 some merit, meritorious challenges, then I don't know that we
21 can have a wrong injunction, a wrongful injunction. That's
22 what I think the statute, the rule intends to focus the bond
23 upon, which is wrongful injunctions.

24 So consequently, even though the final determination
25 of this matter may go contrary to plaintiff's position, this

-8-

1 injunction could not be character -- or this preliminary
2 injunction could not be characterized as wrong. Consequently
3 no bond will be required. If the plaintiffs will prepare the
4 preliminary injunction.

5 Unless there is something further to consider, all of
6 your presentation was greatly appreciated and thank you very
7 much. We'll be in recess.

8 MR. SULLIVAN: Thank you, your Honor.