

Alan L. Sullivan (3152)
James D. Gardner (8798)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Celia Goldwag Barenholtz (admitted *pro hac vice*)
Michael D. Paley (admitted *pro hac vice*)
Jason M. Koral (admitted *pro hac vice*)
Ian Ross Shapiro (admitted *pro hac vice*)
Marisa L. Megur (admitted *pro hac vice*)
KRONISH LIEB WEINER & HELLMAN LLP
1114 Avenue of the Americas
New York, New York 10036
Telephone: (212) 479-6000
Facsimile: (212) 479-6275

Attorneys for Plaintiff WhenU.Com, Inc.

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

WHENU.COM, INC., a Delaware
corporation,

Plaintiff,

vs.

THE STATE OF UTAH, a body politic,
OLENE S. WALKER, in her official capacity
as Governor of Utah, and
MARK SHURTLEFF in his official capacity
as Utah Attorney General,

Defendants.

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR RECONSIDERATION**

Case No. 040907578

Honorable Joseph C. Fratto

SUMMARY

On June 22, 2004, following extensive briefing and an evidentiary hearing, this Court found that plaintiff WhenU.com, Inc. (“WhenU”) is entitled to a preliminary injunction barring Utah’s Spyware Control Act, Utah Code Ann. § 13-39-101 et seq. (2004 Supp.) (the “Act”) from going into effect. In issuing its ruling, the Court carefully considered each of the elements of a preliminary injunction, and determined that WhenU had established each of those elements. Although the Court was unable to conclude that WhenU is likely to show that every provision of the Act is unconstitutional, it held that WhenU is likely to succeed in showing that key features of the Act violate the Commerce Clause. The Court declined to reach the issue of whether any of the constitutional portions are severable from the unconstitutional portions, holding that: “I have concluded that such a division for purposes of a preliminary injunction cannot adequately be made, and presents a serious issue that should be the subject of further litigation.” June 22, 2004 Transcript (“Tr.”) 690.¹

The State now asks this Court to reconsider its decision that the issue of severability cannot be resolved on the preliminary injunction record. Specifically, the State asserts that the Court did not see any constitutional infirmity with respect to the Spyware Prohibition, that the Spyware Prohibition is severable from the Context Based Triggering Mechanism Prohibition, and that this Court therefore erred in preliminarily enjoining the Spyware Prohibition as well as the Context Based Triggering Mechanism Prohibition. As discussed below, however, the central premise of the State’s argument is incorrect. The Court

¹ A copy of the transcript is attached to Defendants’ Memorandum in Support of Motion for Reconsideration (“Def. Mem.”) as Exhibit 1.

explicitly found that the plaintiff is likely to succeed in showing that an integral part of the Spyware Prohibition (namely, its consent protocol) is unconstitutional.

The State's motion should be denied. The Utah Rules of Civil Procedure do not authorize parties to make motions for reconsideration. Indeed, less than three months ago, the Utah Supreme Court again expressed its frustration with the fact that parties file motions for reconsideration. *Shipman v. Evans*, No. 20020103, 2004 WL 1178243 (Utah), at *3 n.5 (Utah May 28, 2004). While the State also cites Rules 59 and 52 of the Utah Rules of Civil Procedure, the State has made no effort to demonstrate how the instant application satisfies the elements of either Rule and, in fact, it does not. Finally, even if the defendants' construction of the Court's opinion were correct, and it is not, the Court did not err in determining to enjoin the Act in its entirety. As the Court correctly held, the issue of whether the constitutional provisions of the Act can be severed from the unconstitutional provisions clearly presents "a serious issue that should be the subject of further litigation." Tr. 690.

STATEMENT OF FACTS

The Spyware Control Act contains four parts. Part 1 is entitled "General Provisions" and includes definitions of terms used elsewhere in the Act, including "context based triggering mechanism" and "spyware." § 13-39-101-102. Under the definition of "spyware," software which monitors usage is spyware (and prohibited under the Spyware Prohibition discussed below) unless it meets certain authorization and removal requirements.

Part 2 is entitled "Prohibited conduct." It establishes two prohibitions. The first prohibition (the "Spyware Prohibition") bars any person from installing "spyware" on another person's computer (or "causing" such installation). § 13-39-201(1)(a) and (b). "Spyware" is

defined in Part 1 of the Act, § 13-39-102(4), to include software residing on a computer that meets three requirements:

- (a) The software monitors the computer's usage;
- (b) The software *either* (i) sends information about usage to a remote server *or* (ii) displays ads in response to usage; and
- (c) The software *neither* (i) obtains the consent of the user *nor* (ii) provides simple removal instructions.

The second prohibition (the "Context Based Triggering Mechanism Prohibition"), § 13-39-201(1)(c), prohibits the use of a context based triggering mechanism (defined in § 13-39-102(1)) to display an advertisement that partially or wholly covers or obscures certain webpage content. The Context Based Triggering Mechanism Prohibition bars such advertising *regardless* of whether the user has consented to receive it. Thus, the consent protocol embodied in the definition of "spyware" does not apply to the Context Based Triggering Prohibition.

Part 3 is entitled "Enforcement" and provides a private right of action to various parties. § 13-39-301. Part 4 is entitled "Duties of Division" and establishes certain information gathering duties on the part of the Division of Consumer Protection. § 13-39-401.

On April 12, 2004, WhenU filed an application for a temporary restraining order and preliminary injunction seeking to enjoin the operation and effectiveness of the Act. Following the submission of lengthy briefs and 10 affidavits, the Court held an evidentiary hearing on June 10 and 11, 2004. On June 22, 2004, the Court heard extended oral argument. Following a recess, the Court issued an opinion from the bench granting WhenU's application and enjoining the operation and effectiveness of the Act.

The Court's June 22 opinion precisely tracks the requirements of Rule 65A of the Utah Rules of Civil Procedure for issuance of a preliminary injunction. First, the Court found that WhenU had demonstrated that it would suffer irreparable harm unless the Court issues an

injunction. Second, the Court found that the harm threatened to WhenU outweighs the harm to the defendants. Third, the Court found that an injunction enjoining the operation of the Act would not be adverse to the public interest. Tr. 684-87.

The Court then turned its attention to Rule 65A's fourth element which requires the plaintiff to demonstrate that there is a substantial likelihood that it will succeed on the merits of its claims, or that the plaintiff's claims present serious issues on the merits which should be the subject of further litigation. As applied to WhenU, the Court characterized the Act as doing three basic things:

First, it prohibits without consent or authorization installation of a context based program. Programming that discerns what you're doing on the computer and sends that information elsewhere.... Second, there's a prohibition of any trigger based mechanism pop-up advertising, regardless of whether there is authorization, that obscures to any degree the screen being viewed. Third, the statute outlines a protocol in making a presentation to a possible recipient that the context based program that must be followed before authorization from the recipient is perfected.

Tr. 688.

The Court then considered the constitutionality of each of these features. The Court held that while the State has the authority to ban the unauthorized installation of an advertising software program, the Spyware Prohibition goes beyond merely banning unauthorized installation. Accordingly, the Court held that WhenU is likely to succeed in showing that both the Spyware Prohibition and the Context Based Triggering Mechanism Prohibition are unconstitutional:

I am persuaded that to the extent that there is a prohibition on pop up advertising, and as I've previously indicated a protocol for [obtaining] authorization from the recipient of a programming to perfect consent, there is a substantial likelihood plaintiff will prevail on the basis that these provisions violate the Commerce Clause

Tr. 689. While the State asserts that the Court's ruling addressed only the Context Based Triggering Mechanism Prohibition, the above-quoted language holds that the Spyware Prohibition's consent protocol is also likely to be found unconstitutional. Indeed, any other construction of the Court's opinion would be nonsensical, as the Context Based Triggering Mechanism Prohibition does not contain a consent protocol.

Having concluded that both the Spyware Prohibition and the Context Based Triggering Mechanism Prohibition contain unconstitutional features, the Court explained that it had also considered whether it would be possible to craft a preliminary injunction which would permit enforcement of the portions of the Act that appeared to be constitutional. Tr. 689. The Court described why it was important to proceed carefully in making this determination:

I think it is important that such a division – that if such a division is to be made, that it be done with specificity. Enforcement of this statute goes beyond this plaintiff and these defendants. There probably are others and maybe many others who are subject to this statute. [They] must have that specificity so that they can determine what they can, cannot, and must do to both enforce the statute and be in compliance.

Tr. 690. The Court explained that it had examined the Act and taken into account the fact that under the circumstances the parties had not yet had a chance to fully litigate the issues in the case, and concluded that whether and how the Act could be divided to preserve that function “presents a serious issue that should be the subject of further litigation.” Id.

On July 7, 2004, the Court entered its preliminary injunction order. On July 14, 2004, the State filed the instant motion for reconsideration.

ARGUMENT

I. THE STATE HAS NOT SHOWN ANY BASIS FOR THE COURT TO RECONSIDER ITS DECISION.

The Utah Rules of Civil Procedure do not recognize motions for reconsideration. *See, e.g., Shipman v. Evans*, 2004 WL 1178243, at *3 n.5. Accordingly, the Utah Supreme Court has emphasized that a motion to reconsider should be regarded as appropriate only in a “rare” and “extraordinary circumstance.” *Id.* (“Although we have discouraged these motions, *see Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1063-65 (Utah 1991), they have proliferated in civil actions to the extent that they have become the cheatgrass of the litigation landscape.”) *See also Wisden v. Bangerter*, 893 P.2d 1057, 1058 (Utah 1995) (motion for reconsideration not a proper motion in Utah); *Peay v. Peay*, 607 P.2d 841, 843 (1980) (“practical expediency demands that there be some finality to the actions of the court”) (quoting *Drury v. Lunceford*, 415 P.2d 662 (1966)).

The State has not identified an “extraordinary circumstance” that warrants the Court’s reconsideration of its decision. Moreover, although the State cites Rules 52(b) and 59(e) of the Utah Rules of Civil Procedure as the basis for its reconsideration motion, it makes no effort to explain how it is entitled to the relief it seeks given the elements of those rules.

Rule 52(b) permits a party to make a motion requesting that the Court either amend its findings or make additional findings. But the State’s motion requests neither form of relief. To the contrary, it seeks to have the Court retract its decision to enjoin the Act in its entirety. This is a motion for reconsideration, not an application under Rule 52(b).

Rule 59 deals with new trial motions. To obtain a new trial, the movant must demonstrate the existence of one of the seven grounds enumerated in Rule 59. *Matter of Estate of Justheim*, 824 P.2d. 432, 433 (Utah App. 1991). Those seven grounds are as follows:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.
- (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.
- (3) Accident or surprise, which ordinary prudence could not have guarded against.
- (4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.
- (5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
- (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.
- (7) Error in law.

Rule 59(a)(1)-(7). The Court has discretion in ruling on a motion for a new trial. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991).

The State does not identify any of these grounds as the basis of its motion, and none are applicable. The only grounds that could conceivably apply are the sixth and seventh, but neither exists in this case. After hearing extensive evidence, the Court carefully considered each of the elements for issuing a preliminary injunction and concluded that each had been met. When the trial court's decision on a motion for preliminary injunction is based on consideration of the evidence presented in light of relevant legal principles, then the Court's decision as to whether to grant the injunction lies within its discretion. *See Hunsaker v. Kersh*, 991 P.2d 67, 69 (Utah 1999). Indeed, while the State argues that the Court should reconsider its decision to enjoin the Act, the State does not argue that the Court's decision lacks evidentiary support or is based on an error of law.

II. EVEN IF THE COURT WERE TO RECONSIDER ITS DECISION, ITS DECISION IS CORRECT AND SHOULD NOT BE CHANGED.

Even if the Court were to decide to reconsider its decision, its decision is correct and should not be changed. The State's argument hinges on the notion that the Court did not find any constitutional infirmity in the Spyware Prohibition. *See* Def. Mem. 2-3 ("The Court should alter and amend its preliminary injunction to only enjoin the enforcement of [the Context Based Triggering Mechanism Prohibition] because Plaintiff failed to demonstrate a reasonable likelihood of success regarding any other prohibition of the Spyware Act.").

However, as the Court's decision from the bench makes clear, the plaintiff is likely to succeed in showing that the Spyware Prohibition's consent protocol is unconstitutional. *See* Tr. 689 ("I am persuaded that to the extent there is a prohibition on pop-up advertising, and...a protocol for [obtaining] authorization from the recipient of a programming to perfect consent, there is a substantial likelihood plaintiff will prevail on the basis that these provisions violate the Commerce Clause..."). This finding can only apply to the Spyware Prohibition, as the Context Based Triggering Prohibition does not contain any consent protocol.

The consent protocol is an integral part of the Act's definition of "spyware" and therefore an integral part of the Spyware Prohibition. Given these facts, it is difficult to see how it can be severed from the Spyware Prohibition, §§ 13-39-102(4)(c)(i). *See Leavitt v. Jane L.*, 518 U.S. at 140-41 (severance inappropriate where the sections of the statute are so interrelated that the remainder of the statute cannot function effectively without the invalidated provision)(applying Utah law). Removing the consent protocol of §13-39-102(4)(c)(i) entirely would prevent consumers from obtaining a wide array of software programs that monitor computer usage regardless of whether they want them, which was clearly not the intent of the Utah Legislature. *See Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 686 (Utah 1985). This gap

cannot be remedied by the Court, which is not permitted to rewrite a statute to save it from unconstitutionality. *See Logan City v. Huber*, 786 P.2d 1372, 1377 (Utah Ct. App. 1990); *see generally* Plaintiff's Reply Memorandum In Support of Motion For Preliminary Injunction at 18-19.

But even if the State's interpretation of the Court's order were correct, there is still no basis for altering the Court's preliminary injunction order. The Court was correct in determining that efforts to sever the constitutional portions of the Act would present serious issues requiring further consideration. When courts consider whether to sever a statute, they are supposed to ask whether the legislature would have wanted to retain the part of the statute which is constitutional. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *Berry*, at 686. That inquiry entails unresolved questions concerning the interpretation of the Act. The severance issue is further complicated by the fact that the Legislature did not make any findings, or include a statement of purpose. Indeed, the Act does not even contain a "savings" clause. *Compare Leavitt* at 541 (severance required where statute in question contained a "savings" clause and Utah Legislature expressly stated in the statute itself its intent to pass each section of the act irrespective of the invalidity of any other section).

CONCLUSION

For all of the foregoing reasons, WhenU requests that this Court deny the State's motion for reconsideration.

Dated this 30th day of July, 2004.

SNELL & WILMER L.L.P.



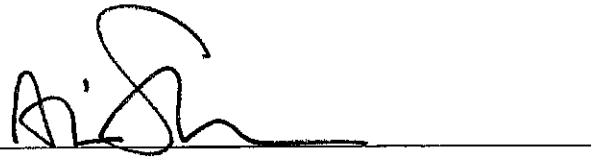
Alan L. Sullivan
James D. Gardner

Attorneys for Plaintiff WhenU.com, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2004, I caused to be mailed, postage prepaid, a true and accurate copy of the foregoing to the following:

Blake D. Miller
Paxton R. Guymon
MILLER, MAGLEBY & GUYMON, PC
170 South Main Street, #350
Salt Lake City, UT 84101



A handwritten signature in black ink, appearing to read 'B. D. Miller', is written over a horizontal line.