

March 1, 2004

Senator John Valentine
Majority Leader, Utah State Senate
Utah State Capitol Building
Salt Lake City, UT 84144

Representative Steve Urquhart
Utah State House of Representatives
Utah State Capitol Building
Salt Lake City, UT 84144

Re: Opposition to H.B. 323

Dear Senator Valentine and Representative Urquhart:

We write to express our strong opposition to H.B. 323, the Spyware Control Act. We want to emphasize that we do not oppose the bill's intent to address the very serious concerns about "spyware." In fact, the signatories to this letter, who represent some of the world's leading Internet and technology companies, are themselves troubled by spyware and have already developed or are working on developing solutions to address this important issue.

Many of us have been working with the U.S. Federal Trade Commission and members of Congress to explore possible technological and legal solutions to the problem of spyware. While we believe that public policy solutions may play an important role in conjunction with technology to address this problem, we have found that creating a targeted legislative solution to be challenging.

Unfortunately, H.B. 323, while very well intentioned, would have serious unintended consequences on everyday, legitimate activities on the Internet. Because it has moved through the legislative process so quickly, we are just beginning to identify the enormous number of potential problems that this bill would pose. Some of the problems we have identified so far include:

- **Erecting Obstacles to Routine, Benign Internet Software:** H.B. 323 is structurally flawed and cannot be fixed through exceptions because its definition of spyware is extremely broad and would cover a host of important and beneficial Internet communication software, and even the communication of routine network information. These communications are essential to provide basic functions on the Internet. They may include information necessary to provide upgrade computer security to protect against hacker attacks, to provide interactivity on web sites, to provide software patches, to improve Internet browser performance, or enhance search capabilities. Consequently, the ability to communicate routine information may be severely impaired by the bill.
- **Interfering with Computer Security:** The bill also would create serious barriers to collection of data that Internet companies and security companies use to analyze and prevent hacker

attacks on the Internet. This security problem is exacerbated by the fact that computer hackers, and other criminals could refuse to consent to use the software that law enforcement officials need to be able to conduct investigations.

- **Slowing the Use of the Internet and Burdening Users with Notices:** It is hard to quantify the enormous number of notices that the bill would require. This kind of traffic would seriously interfere with the user experience on the Web. Some consumers would ignore all the disclosures, thereby missing a notice concerning software they wouldn't want installed on their computers. Other consumers will be so confused by the volume of notices that they will not permit the installation of software that they need.
- **Disadvantaging Local Businesses:** The bill would impair the ability of consumers to receive targeted advertisements based on, for example, the location of the user. These kinds of advertisements are extremely beneficial to small or regional companies that cannot afford to purchase advertisements that are broadcast nationwide over the Internet. Many of the companies that purchase these kinds of regional ads are located in states such as Utah.
- **Obstacle to Routine Uses of Internet Software :** The bill would make unlawful routine Web-based functions that consumers are increasingly relying on to improve their productivity and use of the Internet. The bill prevents the delivery of information that "partially or wholly covers" an advertisement or other content of an Internet web site. This provision would prohibit the delivery of a notice that a user has received a mail message or a reminder of an upcoming appointment.
- **Wasteful Litigation:** H.B. 323 risks creating many of the litigation problems caused by Utah's spam law. It contains strict liability and very large statutory damage bounties (\$10,000 per incident of collection of even anonymous information, or per advertisement) with treble damages for "knowing" violations without any cap on awards. This would give plaintiffs' lawyers incentives to file lawsuits against innocent companies on behalf of websites or trademark owners. Honest companies would be unable to get frivolous lawsuits dismissed because of subjective standards in the bill, such as whether a company has provided a "method by which a user may quickly and easily disable and remove" software from a user's computer in a way that does not impact the "non-affiliated" parts of a user's computer. These terms have no standard definition in the industry. The section includes a provision for treble damages without any cap on awards. The result would be a litigation bonanza.
- **Stifling Innovation:** The bill is so broad that it would severely impair the ability of our companies to develop innovative and consumer-friendly technologies that have been at the core of what has made the Internet such a dynamic medium.

Our coalition is ready and willing to work with you and others to explore targeted and effective legislative solutions to combat spyware. We cannot support, however, the overly broad and heavy-

handed approach of H.B. 323, which will create even more security and privacy problems for the consumers and companies that the bill is intended to help.

Thank you for considering our views.

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Amazon.com
Association for Competitive Technology
AT&T
AeA (American Electronics Association)
Business Software Alliance
CNET Networks
Computer & Communication Industry Association
eBay
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Information Technology Association of America
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