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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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.

**FINDWHAT.COM'S MEMORANDUM
OF AMICUS CURIAE IN SUPPORT OF
PLAINTIFF WHENU.COM INC.'S
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Civil No. 040907578

Honorable Joseph C. Fratto

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STATEMENT OF INTEREST

FindWhat.com is a leading developer and provider of performance-based marketing and commerce enabling services. FindWhat.com does not currently deliver advertisements in a manner that violates Utah Code Ann. § 13-39-201(1)(c) (the “Context Marketing Restriction”). However, to serve its customers and users, FindWhat.com must continuously improve the relevancy and usefulness of its advertisements. Over time, the Context Marketing Restriction may interfere with the natural development of FindWhat.com’s services, to the detriment of users, advertisers, FindWhat.com and similarly situated commercial content providers.

In that case, the Context Marketing Restriction will constrain FindWhat.com’s ability to communicate relevant information to its users. This restriction impermissibly interferes with an advertiser’s right to speak and users’ right to receive wanted information. Therefore, FindWhat.com submits this brief to ensure that the Context Marketing Restriction’s impact on performance-based marketing companies, advertisers and Internet users is considered.

BACKGROUND ABOUT FINDWHAT.COM

FindWhat.com creates and offers proprietary performance-based marketing and commerce enabling services that help businesses of all sizes throughout the business cycle: finding, getting and keeping customers. Its marketing division creates online marketplaces where buyers are introduced to sellers at exactly the right moment, when they are searching for products and services on the Internet. This introduction is based on a bid-for-position, pay-per-click, keyword-targeted advertising service. FindWhat.com offers this service directly to advertisers through the FindWhat.com Network™, and offers a private label version of this service to large companies and portals worldwide.

The FindWhat.com Network is an online marketplace that connects businesses with entities that are likely to purchase specific goods and services from the businesses' websites and provides an additional revenue stream to browser applications and websites which provide Web directories, search engines or contextually relevant listings. The FindWhat.com Network is similar to the Yellow Pages in the offline world—it acts as a tool for people or businesses that are actively looking to research or purchase goods or services. FindWhat.com advertisers' listings are available at www.findwhat.com; however, FindWhat.com's advertisers' listings are primarily viewed by people using FindWhat.com's distribution partners' websites and browser applications. FindWhat.com distributes its advertiser listings to hundreds of high traffic websites and applications. Many of these distribution partners, who offer full search functionality, combine search results from other providers with FindWhat.com listings to offer a search experience that can satisfy an Internet user's query, whether it was research-based or e-commerce-based.

Advertisements from the FindWhat.com Network are rank-ordered through a competitive bidding process in which each advertiser's bid represents the amount it will pay FindWhat.com for each visitor, or "click-through," FindWhat.com sends to the advertiser's website. The advertiser with the highest bid is listed first in the search results, with the remaining advertisers appearing in descending order of their bids. Because advertisers must pay for each click-through to their website, FindWhat.com believes that they select and bid only on those keywords or phrases that are most relevant to their business offerings. FindWhat.com also employs relevancy algorithms that consist of an automated editing program and review by its editorial staff to ensure that advertisers do not bid on irrelevant keywords.

INTRODUCTION

The success of performance-based marketing like the FindWhat.com Network depends heavily on the ability to provide relevant information to users. *See* Press Release, NetRatings, Inc., One in Three Americans Use a Search Engine, According to Nielsen/NetRatings (Feb. 23, 2004), available at http://direct.www.nielsen-netratings.com/pr/pr_040223_us.pdf (Jason Levin, NetRatings analyst, says that “[t]he message is loud and clear – search engine users value relevant and credible information over all else and they are choosing their search engines accordingly.”). Generally, performance-based marketing programs, like the FindWhat.com Network, infer a user’s search objectives based solely on the search keywords chosen by the user.

In some cases, performance-based marketing providers can gain additional insight into Internet users’ objectives by considering more information about the user than just the keyword used to initiate a query. One source of information about the user can be the “context” in which the user is conducting the query. By combining a user’s search query with information gleaned from the user’s online activities, the provider can better guess the user’s objectives.¹ *See* Stefanie Olsen, *Searching for the Personal Touch*, CNET News.com, Aug. 11, 2003, at http://news.com.com/2102-1024_3-5061873.html?tag=st_util_print.

Drawing information from the user’s context helps solve search problems inherent in ambiguous search keywords like “squash.”² A user selecting that keyword could be interested in

1 On this front, consider two nascent initiatives by Google, the most popular search engine. First, Google’s “Gmail” email service triggers ads based on the content of users’ email. *See* About Gmail, Google.com, at <http://www.google.com/gmail/help/about.html> (last visited April 30, 2004). Second, Google’s personalized search allows users to sort search results based on the personal interests the user communicates to Google. *See* Google Personalized Beta, Google.com, at <http://labs.google.com/personalized> (last visited April 30, 2004).

2 It is tempting to assume that searchers select keywords precisely and thoughtfully, but the empirical evidence overwhelmingly suggests otherwise. *See* Declan Butler, *Souped-Up Search Engines*, NATURE, May 11, 2000, at 112, 116 (up to 70% of searchers use only a single keyword as a search term); Jakob Nielsen, *Search: Visible and*

the sport of squash or information about the vegetable. How can a search results provider determine the user's objectives? It would be much easier to do so if the results provider knew that the user has been looking at recipes prior to initiating the search.

Thus, if a performance-based marketing provider can draw upon information from the user's online context, the provider can deliver more relevant results to that user and everyone wins: the user gets useful information without having to spend extra time educating the search provider, the advertiser presents its message to a targeted group of interested users, and the provider gets more money from the advertisers by referring more motivated users to them.

In contrast, by regulating the process of making inferences from a user's context, the Context Marketing Restriction limits a performance-based marketing provider's ability to find the optimal way to infer a user's objectives and deliver useful information to them. In effect, Utah has made a method of generating and delivering information to users verboten, even if users and search engines would prefer to communicate with each other that way. Further, unlike the other restrictions in Sec. 13-39-201, users and search engines cannot agree to waive the Context Marketing Restriction. As a result, the law may detrimentally impact the information marketplace by limiting the ability of search engines to optimize relevancy for users and deliver value to advertisers.

Therefore, this case is not about how users feel about spyware or pop-up advertisements. The Context Marketing Restriction does a deliberately incomplete job regulating the technologies,³ and it indiscriminately limits pop-up advertisements from those users who might affirmatively choose to receive them. Instead, this case is about user autonomy to get the

Simple, Useit.com, May 13, 2001, at <http://www.useit.com/alertbox/20010513.html> (discussing users' inability to use advanced searching techniques like Boolean logic).

³ For example, the law does not regulate all pop-up advertising. Providers can still deliver pop-up advertising in compliance with the law so long as the advertising is not triggered by the online context. Alternatively, providers can deliver other forms of advertisements, such as pop-under advertisements, even if those ads are triggered by the online context.

information that they want, the rights of performance-based marketing companies to communicate that information to them, and the detrimental effects of the law on this information exchange.

SUMMARY OF THE ARGUMENT

The Context Marketing Restriction is a censorship law. It restricts speech solely because some people do not like it. As a censorship law, the Context Marketing Restriction should be subjected to heightened judicial scrutiny, a standard of review that the law cannot survive. The Context Marketing Restriction has no purpose except to provide economic protectionism to commercial actors who want to suppress information that would help users make more informed marketplace decisions. Furthermore, by curtailing user autonomy over how to receive desired information, the Context Marketing Restriction impermissibly interferes with the users' constitutional rights to receive information. Therefore, this court should strike down the Context Marketing Restriction as violating the U.S. and Utah Constitutions.

ARGUMENT

1. The Context Marketing Restriction Is Subject to Heightened Scrutiny.

The Context Marketing Restriction governs advertisements displayed “according to (a) the current Internet website accessed by a user; or (b) the contents or characteristics of the current Internet website accessed by a user.” UTAH CODE ANN. § 13-39-102(1) (2004). The law prohibits the display of those advertisements in a manner “that partially or wholly covers or obscures paid advertising or other content on an Internet website in a way that interferes with a user’s ability to view the Internet website.” *Id.* § 13-39-201(c). A plaintiff can seek an injunction and either actual damages or statutory damages of \$10,000 for each separate violation, with the possibility of treble damages and attorneys’ fees and costs. *Id.* § 13-39-301.

The Context Marketing Restriction is subject to constitutional challenges on two principal grounds: free speech (under both the U.S. and Utah Constitutions) and the dormant commerce clause.⁴ Under any applicable constitutional principle, the Context Marketing Restriction is subject to heightened scrutiny, not rational basis scrutiny.

The U.S. Supreme Court recently considered the level of constitutional scrutiny applicable to Internet content regulations in *Reno v. ACLU*. See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). That case involved Congress’ attempt to regulate the Internet-based dissemination of non-obscene sexual content. As the court said, “[o]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to

⁴ The Supremacy Clause may be a third constitutional conflict because the law extends the rights of copyright owners beyond the rights granted by Congress in 17 U.S.C. § 106. See, e.g., *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999) (en banc), *cert. denied*, 529 U.S. 1012 (2000).

[the Internet].” *Id.* at 870. Thus, the Court concluded that it should apply “the most stringent review of [the law’s] provisions.” *Id.* at 868.

Non-Internet cases further support the application of strict scrutiny. The Context Marketing Restriction interferes with the ability of information providers to speak with their users based on the subject of the communication. Because the law affects only speech (advertising) triggered by certain types of content (the underlying websites), it should be characterized as a subject matter-based restriction and be evaluated using strict scrutiny. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).⁵

1. Under Heightened Scrutiny, the Context Marketing Restriction Lacks Sufficient Governmental Interests and Is Not Adequately Tailored to Those Interests.

Heightened scrutiny requires a careful look at the governmental interests and the tailoring of the law to serve those interests. This inquiry is hindered by the law’s lack of legislative findings explaining its rationale. *See* Spyware Control Act, Utah H.B. 323 (2004).

At minimum, we know that the Context Marketing Restriction does not serve any governmental interest in protecting users. The restriction does not give users or government protection agencies any standing to sue, nor can users choose to waive the restriction if they feel it is not in their interest. Further, the law indiscriminately restricts both false and truthful advertising, and by hindering users’ access to truthful commercial information, the restriction may prevent users from obtaining relevant information they want.

Instead, the law appears to be nothing more than an attempt to provide economic protectionism to website operators. The law was initiated and passed at the request of a small

⁵ Alternatively, if the law is characterized as a regulation of commercial speech or a time/place/manner restriction, the law should be evaluated using intermediate scrutiny. *See Central Hudson Gas & Elec. v. Public Serv. Comm’n*,

number of companies who used the legislative system to supplement their protectionist efforts in the courts. *See* Memorandum in Support of Plaintiff WhenU.com, Inc.'s Application for a Temporary Restraining Order and Motion for Preliminary Injunction, *WhenU.com, Inc. v. Utah*, No. 040907578, at 7 n.6 (Utah Dist. Ct. filed April 12, 2004).

As an economic protectionist measure, the law cannot survive heightened scrutiny because this is not an appropriate government interest, nor does the law adequately serve that interest. The theory underlying protectionism is that prohibited pop-up advertisements siphon off or “divert” the plaintiff’s customers. *See 1-800 Contacts, Inc. v. WhenU.com*, No. 02-CIV-8043 (DAB), 2003 WL 22999270, *22 and *27 (S.D.N.Y. Dec. 22, 2003). However, concerns about diversion are theoretical, not empirical. There is no credible evidence that pop-up advertising diverts users who actually want to transact with a website operator. Furthermore, even if diverted users transact with the advertisers instead of the website operator, there is no credible evidence that those transactions are the result of anything other than legitimate, socially-beneficial competitive factors.

2. The Context Marketing Restriction Interferes with Users’ Rights to Receive Information.

Like so many other censorship laws, the Context Marketing Restriction takes away a user’s autonomy to determine the information available to him or her. A user cannot ask a search engine (or any software vendor) to use a context-based triggering mechanism to deliver pop-up ads, even if the user wants such information delivered in this manner.

By interfering with a user’s autonomy over the receipt of information the user wants, the Context Marketing Restriction violates the users’ First Amendment right to read and receive

447 U.S. 557 (1980) (commercial speech regulations); *United States v. O’Brien*, 391 U.S. 367 (1968)

information.⁶ As Justice Marshall declared in *Stanley v. Georgia*, an “individual's right to read or observe what he pleases...[is] fundamental to our scheme of individual liberty.” *Stanley v. Georgia*, 394 U.S. 557, 568 (1969). The Content Marketing Restriction deprives users of that essential right.

Users’ rights to receive information have been acknowledged in several dozen Supreme Court cases, but the *Virginia Pharmacy* case is particularly illustrative. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). That case involved a Virginia licensure requirement that prevented licensed pharmacists from advertising the price of prescription drugs. The licensed pharmacists did not challenge the regulation; instead, the lawsuit was brought by a consumer and two consumer advocacy groups arguing that their right to receive information was violated. *Id.* at 753-54. The regulation did not prevent consumers from getting this pricing information from other sources, but this was immaterial to the Court. *Id.* at 757 n.15. Instead, the Court rejected the “paternalistic approach” and held that the state may not deprive the public of this information. *Id.* at 770.

Here, Utah has granted to some private citizens the power to determine if and how other citizens can receive truthful information. By taking away user autonomy about receiving information, Utah has gone too far. The restriction interferes with the free flow of socially-beneficial information that would help users make more informed economic decisions.

Perhaps the Context Marketing Restriction would survive constitutional scrutiny if it gave users the power to override the law. Such a restriction, which empowers users, might be a constitutionally appropriate way of allowing users to protect their own interests. Instead, the

(time/place/manner restrictions).

⁶ For articles discussing this principle in more detail, see, e.g., Thomas L. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; William E. Lee, *The Supreme Court Term and the Right to Receive Expression*, 1987 SUP. CT. REV. 303; Susan N. Mart, *The Right to Receive Information*, 95 LAW LIBRARY J. 175 (2003);

restriction impermissibly intrudes on a dialogue taking place between users and performance-based advertising companies like FindWhat.com, depriving users of their core constitutional rights to get the information they want.

3. The First Amendment Problems With the Context Marketing Restriction Also Undercut the State's Position in the Dormant Commerce Clause Analysis.

Whether the Context Marketing Restriction is subjected to strict scrutiny as an extraterritorial restriction, or to a balancing test because it creates inconsistent burdens between states, the considerations include the government's interests and the impact on the regulated party. Thus, in either case, the previous discussion—about the lack of any appropriate governmental interest and the detrimental impact on conversations taking place between users and information providers like FindWhat.com—should be weighed against the constitutionality of the Context Marketing Restriction.

CONCLUSION

This case is not really about spyware or pop-up advertisements (or any user antipathy towards them). Although the Spyware Control Act claims to target those, the law goes much further. It targets context-driven assessments of user needs and eliminates user autonomy over the methods they want to use to get the information they want.

Thus, this case is about the ability of performance-based marketing companies and other information providers to deliver relevant information to users and the ability of users to get this

Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 227-33 (1999).

information. On that front, the Context Marketing Restriction is precisely backwards. Instead of helping users satisfy their informational needs, this law erects a barrier to that goal.

A commentator has observed that “[t]he right to read, listen, or see is so elemental, so close to the source of all freedom that one can hardly conceive of a system of free expression that does not extend it full protection.” Thomas L. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 6. Yet, the Context Marketing Restriction forces us to ponder that system. At its core, the Context Marketing Restriction is a state-sanctioned private right of censorship. The law gives plaintiffs the ability to squelch speech that they, in their sole discretion, do not like. This private censorship imposes significant and unnecessary costs on socially beneficial speech, rendering the law unconstitutional. As a result, FindWhat.com urges the court to invalidate the Context Marketing Restriction.

DATED this _____ day of May, 2004.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of May, 2004, true and correct copies of the foregoing instrument were hand delivered to the following counsel:

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