Representative Stephen H. Urquhart proposes the following substitute bill:

1 # SPYWARE REGULATION

2 ## 2004 GENERAL SESSION

3 ## STATE OF UTAH

4 ## Sponsor: Stephen H. Urquhart

5

6 **LONG TITLE**

7 **General Description:**

8   This bill enacts provisions within the Commerce and Trade Code relating to certain

9 uses of spyware.

10 **Highlighted Provisions:**

11   This bill:

12   ▸ defines terms;

13   ▸ prohibits spyware from delivering advertisements to a computer under certain

14 circumstances;

15   ▸ requires spyware to provide removal procedures;

16   ▸ allows a website, trademark, or copyright owner to bring an action to enforce the

17 requirements; and

18   ▸ requires the Division of Consumer Protection to collect complaints.

19 **Monies Appropriated in this Bill:**

20   None

21 **Other Special Clauses:**

22   None

23 **Utah Code Sections Affected:**

24 ENACTS:

25   **13-39-101**, Utah Code Annotated 1953

26   **13-39-102**, Utah Code Annotated 1953

27   **13-39-201**, Utah Code Annotated 1953

28   **13-39-301**, Utah Code Annotated 1953

29   **13-39-302**, Utah Code Annotated 1953

30   **13-39-401**, Utah Code Annotated 1953

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32 *Be it enacted by the Legislature of the state of Utah:*

33   Section 1. Section **13-39-101** is enacted to read:

34   **CHAPTER 39. SPYWARE CONTROL ACT**

35   **Part 1. General Provisions**

36   **13-39-101. Title.**

37   This chapter is known as the "Spyware Control Act."

38   Section 2. Section **13-39-102** is enacted to read:

39   **13-39-102. Definitions.**

40   As used in this chapter:

41   (1) "Context based triggering mechanism" means a software based trigger or program

42 that displays an advertisement according to:

43   (a) the Internet websites accessed by a user; or

44   (b) the contents or characteristics of the Internet websites accessed by a user.

45   (2) "Division" means the Division of Consumer Protection in the Department of

46 Commerce.

47   Ĥ [(4)] **(3)** ĥ Except as provided in Subsection Ĥ [(5)] **(4)** ĥ , "spyware" means software
residing on a

48 computer that:

49   (a) monitors the computer's usage;

50   (b) (i) sends information about the computer's usage to a remote computer or server; or

51   (ii) displays or causes to be displayed an advertisement in response to the computer's

52 usage if the advertisement:

53   (A) does not clearly identify the full legal name of the entity responsible for delivering

54 the advertisement;

55   (B) uses a federally registered trademark as a trigger for the display of an advertisement

56 by a person other than:

57   (I) the trademark owner;

58   (II) an authorized agent of licensee of the trademark owner; or

59   (III) a recognized Internet search engine;

60   (C) uses a triggering mechanism to display an advertisement according to the Internet

61   websites accessed by a user; or

62   (D) uses a context based triggering mechanism to display an advertisement that

63   partially or wholly covers or obscures paid advertising or other content on an Internet website

64   in a way that interferes with a user's ability to view the Internet website; and

65   (c) does not:

66   (i) obtain the consent of the user, after installation of the software but before the

67   software does any of the actions described in Subsection Ĥ [(4)] (3) ĥ (b);

68   (A) to a license agreement:

69   (I) presented in full; and

70   (II) written in plain language;

71   (B) to a notice of the collection of each specific type of information to be transmitted

72   as a result of the software installation;

73   (C) to a clear and representative full-size example of each type of advertisement that

74   may be delivered;

75   (D) to a truthful statement of the frequency with which each type of advertisement may

76   be delivered; and

77   (E) for each type of advertisement delivered by the software, a clear description of a

78   method by which a user may distinguish the advertisement by its appearance from an

79   advertisement generated by other software services; and

80   (ii) provide a method:

81   (A) by which a user may quickly and easily disable and remove the software from the

82   user's computer;

83   (B) that does not have other effects on the non-affiliated parts of the user's computer;

84   and

85   (C) that uses obvious, standard , usual, and ordinary methods for removal of computer

86   software.

87   Ĥ [(5)] (4) ĥ Notwithstanding Subsection Ĥ [(4)] (3) ĥ , "spyware" does not include:

88   (a) software designed and installed solely to diagnose or resolve technical difficulties;

89 or

90   (b) software or data that solely report to an Internet website information previously

91 stored by the Internet website on the user's computer.

92   Ĥ [(6)] **(5)** ĥ "User" means:

93   (a) a computer owner; or

94   (b) a person who accesses an Internet website.

95   Section 3. Section **13-39-201** is enacted to read:

96   **Part 2. Prohibition of Spyware**

97   **13-39-201. Prohibition on spyware.**

98   (1) A person may not:

99   (a) install spyware on another person's computer;

100   (b) cause spyware to be installed on another person's computer; or

101   (c) use a context based triggering mechanism to display an advertisement that partially

102 or wholly covers or obscures paid advertising or other content on an Internet website in a way

103 that interferes with a user's ability to view the Internet website.

104   (2) It is not a defense to a violation of this section that a user may remove or hide an

105 advertisement.

106   Section 4. Section **13-39-301** is enacted to read:

107   **Part 3. Enforcement**

108   **13-39-301. Private action.**

109   (1) An action for a violation of this chapter may be brought:

110   (a) against a person who:

111   (i) violates this chapter; or

112   (ii) causes a violation of this chapter; and

113   (b) by any of the following who are adversely affected by a violation of this chapter:

114   (i) an Internet website owner or registrant;

115   (ii) a trademark or copyright owner; or

116   (iii) an authorized advertiser on an Internet website.

117   (2) In an action under Subsection (1), a person may:

118   (a) obtain an injunction against committing any further violation of this chapter; and

119   (b) recover the greater of:

120   (i) actual damages; or

121   (ii) $10,000 for each separate violation of this chapter.

122   (3) In an action under Subsection (1), a court may:

123   (a) increase the damages up to three times the damages allowed by Subsection (2) if the

124 court finds the defendant willfully or knowingly violated this chapter; and

125   (b) award costs and reasonable attorney fees to a prevailing party.

126   (4) For purposes of this section, a separate violation occurs for each:

127   (a) occurrence of the creation of spyware;

128   (b) individual installation of spyware on a user's computer; or

129   (c) individual occurrence that results in:

130   (i) the transmission of information described in Subsection Ĥ [(4)] **13-39-102 (3)** ĥ (b)(i); or

131   (ii) display of an advertisement described in Subsection Ĥ [(4)] **13-39-102 (3)** ĥ (b)(ii).

132   Section 5. Section **13-39-302** is enacted to read:

133   **13-39-302. Limitations on actions.**

134   (1) A person may not bring an action for a violation of this chapter against an Internet

135 service provider for the routine transmission of information that contains an advertisement

136 violating this chapter.

137   (2) A person may not bring a class action under this chapter.

138   Section 6. Section **13-39-401** is enacted to read:

139   **Part 4. Duties of Division**

140   **13-39-401. Information gathering -- Evaluations.**

141   The division shall:

142   (1) establish procedures by which a person may report a violation of this chapter to the

143 division, including:

144   (a) an Internet website; and

145   (b) a toll-free telephone number; and

146   (2) make recommendations to the Public Utilities and Technology Interim Committee

147 if the division finds a need for additional provisions to this chapter.

Legislative Review Note
        as of   2-19-04 3:14 PM

This bill regulates software that creates advertisements on a computer as a result of visiting certain Internet websites, and that collects information regarding the computer's Internet use. Case law surrounding regulation of Internet activities is evolving. State regulations of Internet activities have been challenged for violating principles such as the Commerce Clause of the United States Constitution. Some courts have indicated that the need for national uniformity limits a state's ability to regulate Internet activities. Under other court rulings, however, this bill could be upheld if a court determined that the benefits this bill provides to Utahans outweigh the burden the bill places on interstate commerce.

Office of Legislative Research and General Counsel