SPYWARE REGULATION

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Stephen H. Urquhart

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LONG TITLE

General Description:

 This bill enacts provisions within the Commerce and Trade Code relating to certain uses of spyware.

Highlighted Provisions:

 This bill:

  ▸ defines terms;

  ▸ prohibits spyware from delivering advertisements to a computer under certain circumstances;

  ▸ requires spyware to provide removal procedures;

  ▸ authorizes the attorney general to enforce the requirements;

  ▸ allows a website, trademark, or copyright owner to bring an action to enforce the requirements; and

  ▸ requires the attorney general to gather information and evaluate the provisions of this bill.

Monies Appropriated in this Bill:

 None

Other Special Clauses:

 None

Utah Code Sections Affected:

ENACTS:

 13-39-101, Utah Code Annotated 1953

28   **13-39-102**, Utah Code Annotated 1953

29   **13-39-201**, Utah Code Annotated 1953

30   **13-39-301**, Utah Code Annotated 1953

31   **13-39-302**, Utah Code Annotated 1953

32   **13-39-303**, Utah Code Annotated 1953

33   **13-39-401**, Utah Code Annotated 1953

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

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

37   **CHAPTER 39. SPYWARE CONTROL ACT**

38   **Part 1. General Provisions**

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

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

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

42   **13-39-102. Definitions.**

43   As used in this chapter:

44   (1) "Internet" is as defined in the Internet Tax Freedom Act, Pub. L. No. 105-277.

45   (2) "Spyware" means software residing on a computer that:

46   (a) monitors the computer's usage;

47   (b) (i) records information about the computer's usage; or

48   (ii) sends information about the computer's usage to a remote computer or server;

49   (c) causes an advertisement to appear when a user accesses an Internet website if the

50   advertisement:

51   (i) does not clearly identify the full legal name of the entity responsible for delivering

52   the advertisement;

53   (ii) uses a federally registered trademark as a trigger for the display of an advertisement

54   by a person other than:

55   (A) the trademark owner; or

56   (B) an authorized agent or licensee of the trademark owner;

57   (iii) uses a triggering mechanism to display advertisements according to the Internet

58   websites accessed by a user; or

59   (iv) covers or obscures paid advertising or other content on an Internet website in a

60 way that interferes with:

61   (A) an authorized advertiser's ability to reach a user; or

62   (B) a user's ability to view an Internet website; and

63   (d) does not:

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

65 software does any of the actions described in Subsections (2)(a) through (c), to:

66   (A) a license agreement:

67   (I) presented in full; and

68   (II) written in plain language;

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

70 result of the software installation;

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

72 be delivered;

73   (D) a truthful statement of the frequency with which each type of advertisement may be

74 delivered; and

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

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

77 advertisements generated by other software services; and

78   (ii) provide a method:

79   (A) by which a user may easily disable and remove the software from the user's

80 computer;

81   (B) that does not have other effects on the user's computer; and

82   (C) that uses usual and ordinary methods for removal of computer software.

83   (3) "User" means a person who accesses an Internet website.

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

85   **Part 2. Prohibition of Spyware**

86   **13-39-201. Prohibition on spyware.**

87   (1) A person may not:

88   (a) create spyware;

89   (b) cause spyware to be created;

90   (c) install spyware on another person's computer; or

91   (d) cause spyware to be installed on another person's computer.

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

93   advertisement caused by spyware.

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

95   **Part 3. Enforcement**

96   **13-39-301. Action by attorney general.**

97   (1) If the attorney general finds that the residents of Utah are threatened or adversely

98   affected by a violation of this chapter, the attorney general may bring an action:

99   (a) against a person who violates this chapter; and

100   (b) on behalf of the residents of Utah.

101   (2) In an action under Subsection (1), the state may:

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

103   (b) recover the greater of:

104   (i) actual damages; or

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

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

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

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

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

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

111   **13-39-302. Private action.**

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

113   (a) against a person who violates this chapter; and

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

115   (i) an Internet website owner or registrant; or

116   (ii) a trademark or copyright owner.

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   Section 6. Section **13-39-303** is enacted to read:

127   **13-39-303. Limitations on actions.**

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

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

130   violating this chapter.

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

132   Section 7. Section **13-39-401** is enacted to read:

133   **Part 4. Duties of Attorney General**

134   **13-39-401. Information gathering -- Evaluations.**

135   The attorney general shall:

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

137   attorney general, including:

138   (a) an Internet website; and

139   (b) a toll-free telephone number;

140   (2) compare and evaluate:

141   (a) alternative methods and procedures to protect privacy rights; and

142   (b) the cost and effectiveness of methods and procedures described in Subsection

143   (2)(a);

144   (3) evaluate public or private entities with the capacity to establish and administer

145   methods and procedures described in Subsection (2)(a); and

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

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

Legislative Review Note
        as of   2-4-04 2:47 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

State Impact

The Attorney General will need 0.25 investigator, 0.25 computer expert, 0.25 mid-level litigation attorney, 0.5 policy/research analyst, and a person to run the toll-free line. Cost to set up a toll-free telephone number is $10,000. This bill has a Legislative Review Note. There may be additional state costs if the bill is challenged in court.

	FY 2005 Approp.	FY 2006 Approp.	FY 2005 Revenue	FY 2006 Revenue
General Fund	$284,300	$266,800	$0	$0
TOTAL	**$284,300**	**$266,800**	**$0**	**$0**

Individual and Business Impact

No fiscal impact.

Office of the Legislative Fiscal Analyst