

**Senator Curtis S. Bramble** proposes the following substitute bill:

**SPYWARE CONTROL ACT REVISIONS**

2005 GENERAL SESSION

STATE OF UTAH

**Sponsor: Stephen H. Urquhart**

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**LONG TITLE**

**General Description:**

This bill amends the Spyware Control Act.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ prohibits certain uses of pop-up advertisements;
- ▶ prohibits the purchase of pop-up advertisements that violate the chapter if the purchaser has actual notice of the violation;
- ▶ provides for the permissive removal of certain software; and
- ▶ defines the scope of actions and penalties authorized by the chapter.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

- 13-40-102**, as enacted by Chapter 363, Laws of Utah 2004
- 13-40-201**, as enacted by Chapter 363, Laws of Utah 2004
- 13-40-301**, as enacted by Chapter 363, Laws of Utah 2004



26 13-40-302, as enacted by Chapter 363, Laws of Utah 2004

27 ENACTS:

28 13-40-202, Utah Code Annotated 1953

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

31 Section 11. Section 13-40-102 is amended to read:

32 **13-40-102. Definitions.**

33 As used in this chapter:

34 ~~[(1) "Context based triggering mechanism" means a software based trigger or program~~  
35 ~~residing on a consumer's computer that displays an advertisement according to:]~~

36 ~~[(a) the current Internet website accessed by a user; or]~~

37 ~~[(b) the contents or characteristics of the current Internet website accessed by a user.]~~

38 (1) "Cookie" means a text file:

39 (a) that is placed on a computer by:

40 (i) an interactive computer service;

41 (ii) an Internet website; or

42 (iii) a third party acting on behalf of:

43 (A) an interactive computer service; or

44 (B) an Internet website; and

45 (b) the function of which is to record information that can be read or recognized when  
46 the user of the computer later accesses a particular:

47 (i) Internet website;

48 (ii) online location; or

49 (iii) online service.

50 (2) "Division" means the Division of Consumer Protection in the Department of  
51 Commerce.

52 (3) "Interactive computer service" means any information service, system, or access  
53 software provider that provides or enables computer access by multiple users to a computer  
54 server, including:

55 (a) an Internet or online service provider; or

56 (b) a service or system providing access to the Internet, including a system operated by

57 a library or educational institution.

58 ~~[(3)] (4) "Internet" is as defined in the Internet Tax Freedom Act, Pub. L. No. 105-277.~~

59 ~~[(4) Except as provided in Subsection (5), "spyware" means software residing on a~~  
60 ~~computer that:]~~

61 ~~[(a) monitors the computer's usage;]~~

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

63 ~~or]~~

64 ~~[(ii) displays or causes to be displayed an advertisement in response to the computer's~~  
65 ~~usage if the advertisement:]~~

66 ~~[(A) does not clearly identify the full legal name of the entity responsible for delivering~~  
67 ~~the advertisement;]~~

68 ~~[(B) uses a federally registered trademark as a trigger for the display of the~~  
69 ~~advertisement by a person other than:]~~

70 ~~[(I) the trademark owner;]~~

71 ~~[(H) an authorized agent or licensee of the trademark owner; or]~~

72 ~~[(III) a recognized Internet search engine;]~~

73 ~~[(C) uses a triggering mechanism to display the advertisement according to the Internet~~  
74 ~~websites accessed by a user; or]~~

75 ~~[(D) uses a context based triggering mechanism to display the advertisement that~~  
76 ~~partially or wholly covers or obscures paid advertising or other content on an Internet website~~  
77 ~~in a way that interferes with a user's ability to view the Internet website; and]~~

78 ~~[(e) does not:]~~

79 ~~[(i) obtain the consent of the user, at the time of, or after installation of the software but~~  
80 ~~before the software does any of the actions described in Subsection (4)(b):]~~

81 ~~[(A) to a license agreement:]~~

82 ~~[(f) presented in full; and]~~

83 ~~[(H) written in plain language;]~~

84 ~~[(B) to a notice of the collection of each specific type of information to be transmitted~~  
85 ~~as a result of the software installation;]~~

86 ~~[(C) to a clear and representative full-size example of each type of advertisement that~~  
87 ~~may be delivered;]~~

88 ~~[(D) to a truthful statement of the frequency with which each type of advertisement~~  
89 ~~may be delivered; and]~~

90 ~~[(E) for each type of advertisement delivered by the software, a clear description of a~~  
91 ~~method by which a user may distinguish the advertisement by its appearance from an~~  
92 ~~advertisement generated by other software services; and]~~

93 ~~[(ii) provide a method:]~~

94 ~~[(A) by which a user may quickly and easily disable and remove the software from the~~  
95 ~~user's computer;]~~

96 ~~[(B) that does not have other effects on the non-affiliated parts of the user's computer;~~  
97 ~~and]~~

98 ~~[(C) that uses obvious, standard, usual, and ordinary methods for removal of computer~~  
99 ~~software:]~~

100 ~~[(5) Notwithstanding Subsection (4), "spyware" does not include:]~~

101 ~~[(a) software designed and installed solely to diagnose or resolve technical difficulties;]~~

102 ~~[(b) software or data that solely report to an Internet website information previously~~  
103 ~~stored by the Internet website on the user's computer, including:]~~

104 ~~[(i) cookies;]~~

105 ~~[(ii) HTML code; or]~~

106 ~~[(iii) Java Scripts; or]~~

107 ~~[(c) an operating system.]~~

108 ~~[(6) "Usage" means:]~~

109 ~~[(a) the Internet websites accessed by a user;]~~

110 ~~[(b) the contents or characteristics of the Internet websites accessed by a user;]~~

111 ~~[(c) a user's personal information, including:]~~

112 ~~[(i) a first and last name of a user, whether:]~~

113 ~~[(A) given at birth or adoption;]~~

114 ~~[(B) assumed; or]~~

115 ~~[(C) legally changed;]~~

116 ~~[(ii) any of the following with respect to a user's home or other physical address:]~~

117 ~~[(A) the street name;]~~

118 ~~[(B) the name of the city or town; or]~~

- 119           ~~[(C) the zip code;]~~  
120           ~~[(iii) an electronic mail address;]~~  
121           ~~[(iv) a telephone number;]~~  
122           ~~[(v) a Social Security number;]~~  
123           ~~[(vi) any personal identification number;]~~  
124           ~~[(vii) a credit card number;]~~  
125           ~~[(viii) any access code associated with a credit card;]~~  
126           ~~[(ix) a date of birth, birth certificate number, or place of birth; or]~~  
127           ~~[(x) a password or access code; or]~~  
128           ~~[(d) a user's submission to forms or Internet websites.]~~  
129           (5) "Internet or online service provider" means an interactive computer service that  
130 provides software or other material that enables a person to:  
131           (a) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or  
132 translate content;  
133           (b) select or analyze content; or  
134           (c) allow or disallow content.  
135           (6) "Mark" means a registered trademark, registered service mark, or registered domain  
136 name in an Internet website address that is owned, licensed, or lawfully used by a person doing  
137 business in this state.  
138           (7) (a) Except as provided in Subsection (7)(b), "spyware" means software on the  
139 computer of a user who resides in this state that:  
140           (i) collects information about an Internet website at the time the Internet website is  
141 being viewed in this state, unless the Internet website is the Internet website of the person who  
142 provides the software; and  
143           (ii) uses the information described in Subsection (7)(a)(i) contemporaneously to  
144 display pop-up advertising on the computer.  
145           (b) "Spyware" does not include:  
146           (i) an Internet website;  
147           (ii) a service operated by an Internet or online service provider accessed by a user;  
148           (iii) software designed and installed primarily to:  
149           (A) prevent, diagnose, or resolve technical difficulties;

- 150 (B) detect or prevent fraudulent activities; or
- 151 (C) protect the security of the user's computer from unauthorized access or alteration;
- 152 (iv) software or data that reports information to an Internet website previously stored
- 153 by the Internet website on the user's computer, including cookies;
- 154 (v) software that provides the user with the capability to search the Internet; or
- 155 (vi) software installed with the consent of a user whose primary purpose is to prevent
- 156 access to certain Internet content.

- 157 (8) "Pop-up advertising" means material:
- 158 (a) offering for sale or advertising the availability or quality of a commercial property,
- 159 good, or service; and
- 160 (b) that is displayed:
- 161 (i) separate from an Internet website;
- 162 (ii) as a result of a user accessing an Internet website;
- 163 (iii) in a manner that covers paid advertising or other content on an Internet website in
- 164 a way that interferes with the user's ability to view the advertising or other content that the user
- 165 attempted to originally access; and
- 166 (iv) without the authority of the operator of the Internet website.

167 [~~(7)~~] (9) "User" means[:] the owner or authorized user of a computer.

168 [~~(a) a computer owner; or]~~

169 [~~(b) a person who accesses an Internet website.]~~

170 Section 22. Section **13-40-201** is amended to read:

171 **13-40-201. Prohibited conduct.**

172 (1) A person may not[:] display a pop-up advertisement by means of spyware if the

173 pop-up advertisement:

174 [~~(a) install spyware on another person's computer;]~~

175 [~~(b) cause spyware to be installed on another person's computer; or]~~

176 [~~(c) use a context based triggering mechanism to display an advertisement that partially~~

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

178 ~~that interferes with a user's ability to view the Internet website.]~~

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

180 ~~advertisement.]~~

181 (a) (i) is displayed in response to a specific mark; or  
182 (ii) is displayed in response to a specific Internet website address;  
183 (b) constitutes infringement of a registered trademark under federal or state law; and  
184 (c) is purchased or acquired by a person other than:  
185 (i) the mark owner;  
186 (ii) a licensee of the mark;  
187 (iii) an authorized agent of the owner of the mark;  
188 (iv) an authorized user of the mark;  
189 (v) a person advertising the lawful sale, lease, or transfer of products bearing the mark  
190 through a secondary marketplace for the sale of goods or services; or  
191 (vi) a person engaged in a fair or otherwise permissible use of a trademark or service  
192 mark under applicable trademark law.

193 (2) (a) A person using spyware to display a pop-up advertisement under Subsection (1)  
194 is not guilty of violating this chapter if:

195 (i) the person requests information about the user's state of residence before sending  
196 the spyware or displaying a pop-up advertisement to the user after May 2, 2005; and

197 (ii) the user indicates a residence outside this state.

198 (b) A person purchasing or acquiring advertising under Subsection (2) is not guilty of  
199 violating this chapter if the person reasonably determines that the person delivering a pop-up  
200 advertisement by use of spyware under Subsection (1) has complied with Subsection (2)(a).

201 (c) A person requesting information about a user's state of residence under Subsection  
202 (2)(a) may not prompt, ask, or otherwise encourage a user to indicate a residence outside this  
203 state.

204 (d) No action may be brought under this chapter, for the use of a mark or Internet  
205 website address that constitutes a fair or otherwise permissible use of the mark or Internet  
206 website address under federal or state law.

207 Section 33. Section **13-40-202** is enacted to read:

208 **13-40-202. Permissive removal of potentially harmful software.**

209 If a provider of computer software or an interactive computer service provides prior  
210 notice to a user with whom the provider has an established business relationship, that provider  
211 is not liable under the law of this state, or a political subdivision of this state, for identifying,

212 removing, or disabling, preventing installation of a program on the user's computer that is used  
213 to, or that the provider reasonably or in good faith believes will likely be used to:

214 (1) violate a provision of this chapter; or  
215 (2) to engage in surreptitious collection of information concerning the user's use of the  
216 computer without the consent of the owner of the computer, except that no notice is required  
217 for:

218 (a) preventing the installation of a program; or  
219 (b) in the case of an enterprise network, removing, disabling, or preventing the  
220 installation of a program on the computer of an employee.

221 Section 44. Section **13-40-301** is amended to read:

222 **13-40-301. Private action.**

223 (1) An action for a violation of this chapter may be brought~~[(a)]~~ against a person  
224 who~~[:]~~ violates Section 13-40-201 by:

225 ~~[(i) violates this chapter; or]~~  
226 ~~[(ii) causes a violation of this chapter; and]~~  
227 ~~[(b) by any of the following who are adversely affected by a violation of this chapter:]~~  
228 ~~[(i) an Internet website owner or registrant;]~~  
229 ~~[(ii) a trademark or copyright owner; or]~~  
230 ~~[(iii) an authorized advertiser on an Internet website.]~~

231 (a) the attorney general; or  
232 (b) a mark owner who:  
233 (i) does business in this state; and  
234 (ii) is directly and adversely affected by a violation of this chapter.

235 (2) In an action under Subsection (1), a person may:  
236 (a) obtain an injunction against committing any further violation of this chapter; and  
237 (b) subject to Subsection (3), recover the greater of:  
238 (i) actual damages; or  
239 (ii) [\$10,000] up to \$500 for each separate [violation of this chapter] occurrence  
240 resulting in the display of an advertisement prohibited by Section 13-40-201.

241 (3) In an action under Subsection (1), a court may:  
242 (a) increase the damages up to three times the damages allowed by Subsection (2)(b) if



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

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

245 (4) For purposes of this section, a separate violation occurs for each individual

246 occurrence that results in the display of an advertisement described in Subsection

247 13-40-102~~[(4)(b)(ii)]~~(8).

248 (5) Except as provided in Subsection 13-40-201(2)(b), an action for a violation of this

249 chapter may be brought against a person who purchases or acquires advertising described in

250 Subsection 13-40-201(1) if:

251 (a) the person against whom the action is brought receives actual notice from a mark

252 owner of an alleged violation of Section 13-40-201;

253 (b) the notice required under Subsection (5)(a) contains a detailed explanation of the

254 alleged violation; and

255 (c) the person against whom the action is brought fails to take reasonable steps to stop

256 the violation of Subsection 13-40-201(1) described in the notice provided under Subsection

257 (5)(a).

258 (6) (a) At the time of commencement of an action for a violation of Subsection

259 13-40-201(1), the person filing the action shall serve a copy of any summons and complaint

260 upon any person against whom an action is brought under Subsection (5).

261 (b) A person against whom an action may be brought under Subsection (5) may

262 intervene in an action for a violation of Subsection 13-40-201(1) in accordance with Rule 24(c)

263 of the Utah Rules of Civil Procedure or Rule 24(c) of the Federal Rules of Civil Procedure.

264 Section 55. Section **13-40-302** is amended to read:

265 **13-40-302. Limitations on actions.**

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

267 ~~service provider for the routine transmission of]~~ a person other than:

268 [~~(a) security information; or~~]

269 [~~(b) information that contains an advertisement violating this chapter.]~~

270 (a) a person who displays a pop-up advertisement by means of spyware in violation of

271 Subsection 13-40-301(5); or

272 (b) a person who purchases or acquires an advertisement in violation of Subsection

273 13-40-201(2).

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

275 (3) This chapter does not preclude any person accused of violating this chapter from  
276 asserting any fair use or other defense that is available to persons alleged to have engaged in  
277 trademark infringement.