

**SB**

**140**





# Spyware 101



Curtis Clothier  
Data Processing Manager  
Legislative Affairs Agency  
April 25, 2005

# What is Spyware?

- Software that collects personal information, or makes changes to your computer without your knowledge or consent.
  - Personal information can include website visits, or passwords and account numbers.
- Spyware is sometimes accompanied by 'Adware' (software that launches 'custom' advertisements on your computer.)

# Occurrences of Spyware

- In 2003,
  - It was estimated that 2 out of 100 support calls concerned spyware (IDC).
- In 2005,
  - It is now estimated to be 2 out of every 5 support calls concern spyware (IDC).
  - 20% of calls to Dell support involve Spyware (Dell)
  - 50% of calls to Microsoft involve Spyware (Microsoft).

# Signs of Spyware

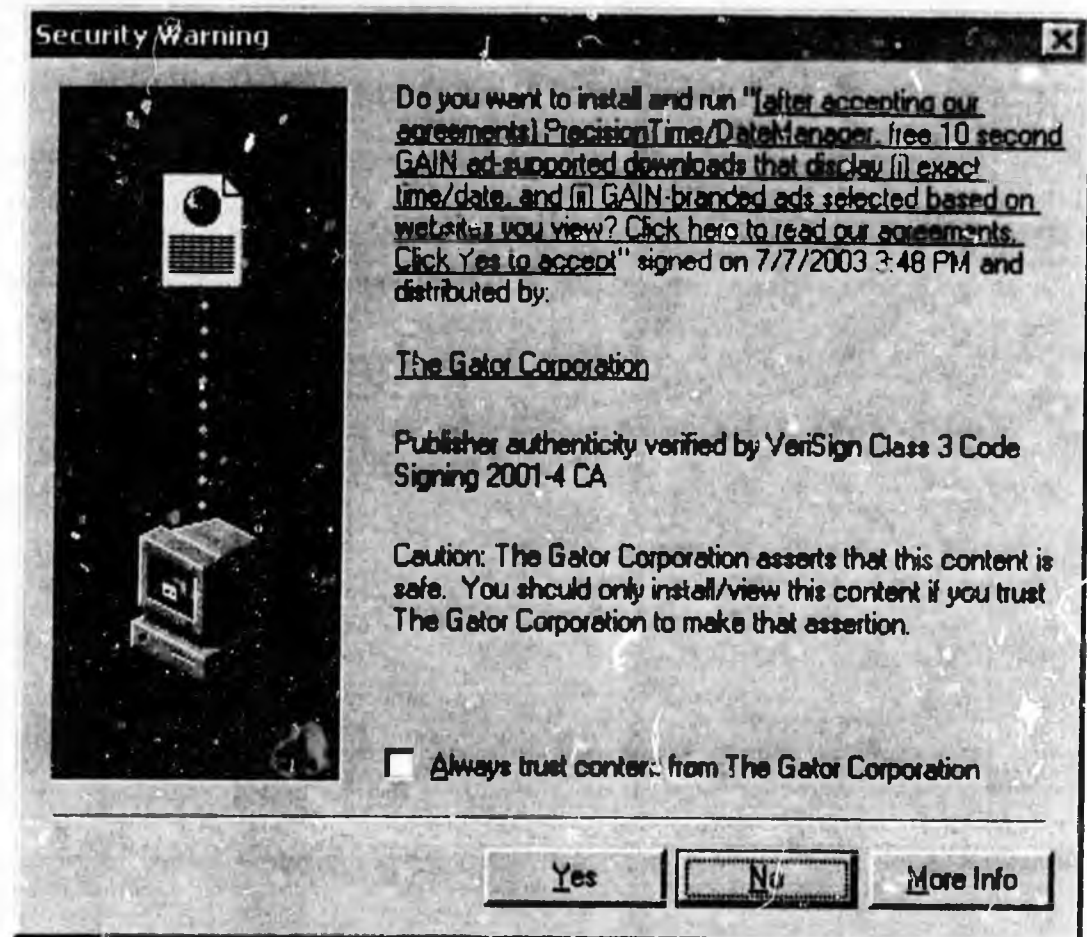


- Lots of pop-up ads, sometimes when you aren't surfing the web.
- Homepage or other settings are changed.
- New toolbars appear.
- New icons appear on your desktop.
- Computer slows down or crashes a lot.



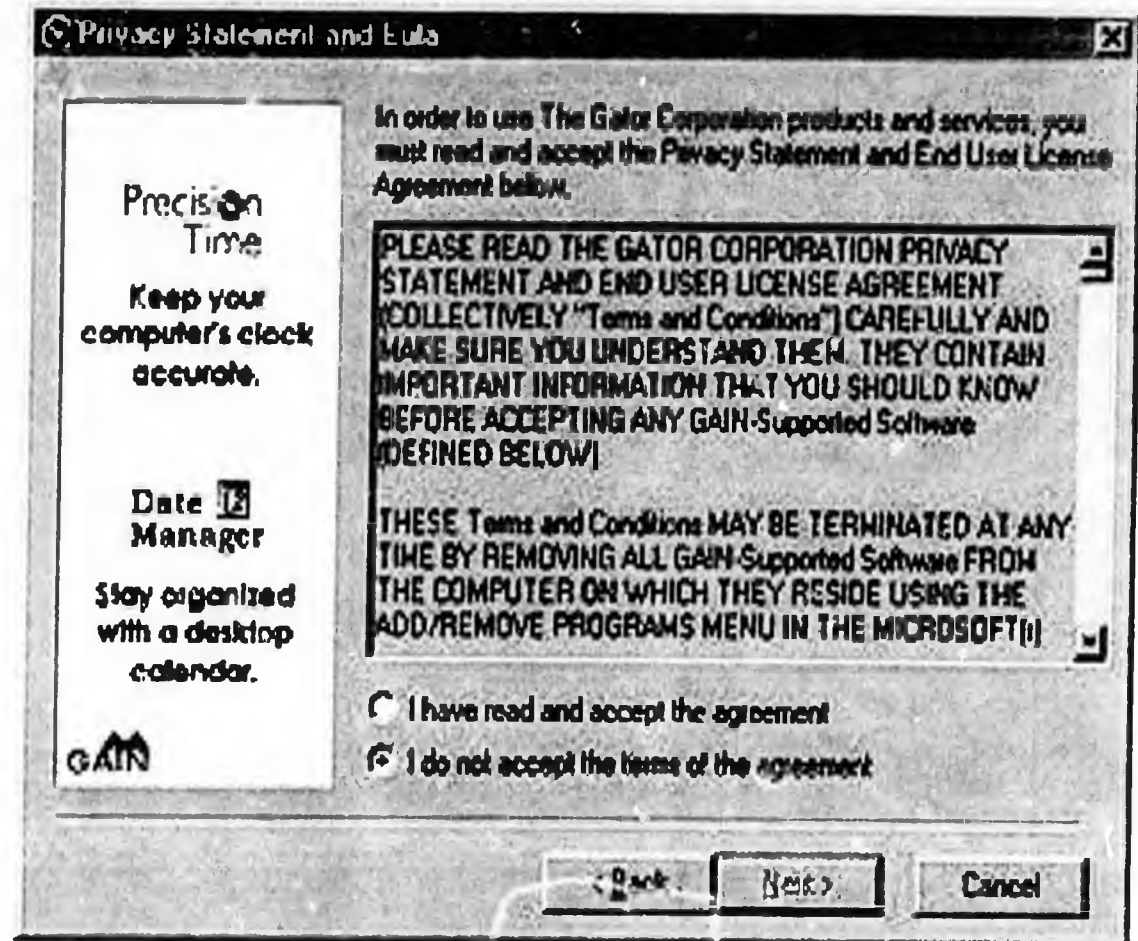
# How does Spyware get installed?

- Often by installing 'free' software, such as:
  - ScreenSavers
  - Weather Info
  - Toolbars
  - Music sharing



# How does Spyware get installed?

Lengthy 'End User Licensing Agreements' that are difficult to read.



# What does Spyware Do?

- Spyware changes your computer's settings and programs.
  - Slows or crashes computer.
- These changes are rarely documented and usually occur without your consent.
- Spyware can be (and often is) used to steal confidential information.

# Good Software versus Bad

- Not all software that collects information is bad:
  - Some computer and software vendors collect information on computer health.
  - Some software comes gives you an option for a 'paid' version of product, versus a 'free' version bundled with advertising.
- ***Knowledge and consent*** are key.

# How Do You Remove Spyware?

- Usually by running several 3<sup>rd</sup> party Spyware removal tools.



- Some Spyware programs can't be removed without cleaning the machine and starting over.

# At the Legislature (and other agencies)...

- Our defenses include:
  - Current versions of software,
  - Anti-virus systems,
  - Spam Filters,
  - Content filters,
  - Firewalls,
  - Spyware removal tools,
  - and a staff to provide support,



However,

- Data Processing staff work on 4-5 Spyware infected computers a week.
- Each call can take several hours each to fix.
- If the computer is in a 'remote' location, the repair may cost several days of downtime.
- Spyware prevention and removal now takes ***more staff time*** than virus and spam issues.

# Solutions? – No Silver Bullet

- Continued focus in 3 areas:
  - Continued **education** of computer users to make them aware of Spyware and act more responsibly.
  - Additional **technological** solutions to spot spyware and prevent it from installing.
  - Anti-spyware **legislation** providing recourse to users.

# In the News Last Month



## ■ *The Salt Lake Tribune*

- Utahans May Get Some Relief from Spyware,  
[http://www.sltrib.com/utah/ci\\_2615174](http://www.sltrib.com/utah/ci_2615174)

## ■ *The Annapolis Capitol*

- Maryland Lawmakers' bills would make spyware illegal, [http://www.hometownannapolis.com/cgi-bin/read/2005/03\\_21-11/GOV](http://www.hometownannapolis.com/cgi-bin/read/2005/03_21-11/GOV)

## ■ *Internetnews.com*

- Anti-Spyware Bill Introduced in U.S. Senate,  
[http://www.internetnews.com/bus-news/article.php\\_191731](http://www.internetnews.com/bus-news/article.php_191731)

# What about the future?



- No decline in Spyware.
- More identity theft.
- More involvement from organized crime.
  
- **Question:** Why the increases?
- **Answer:** Because there is money involved (Advertising, Marketing and Theft).

Questions



# Alaska State Legislature

SENATOR  
**GENE THERRIAULT**

Mailing Address:  
119 N. Cushman, Suite 101  
Fairbanks, Alaska 99701  
(907) 488-0857  
Fax: (907) 488-4271



**Senate**

While in session  
State Capitol  
Juneau, Alaska  
99801-1182  
(907) 465-4797  
Fax: (907) 465-3884  
SENATE DISTRICT F

## Memorandum

**To: Representative Lesil McGuire / Chair House Judiciary**

**From: Senator Gene Therriault**

A handwritten signature in black ink, appearing to read "Gene Therriault".

**Date: April 25, 2005**

**Re: SB 140/ Banning certain types of internet spyware.**

.....  
SB 140 has been moved from Labor and Commerce after one hearing to your committee.

SB 140 passed the Senate unanimously with broad bi-partisan support.

I respectfully request scheduling of this measure at your earliest convenience.

Thank you.

# Alaska State Legislature

SENATOR  
**GENE THERRIAULT**

Mailing Address  
119 N. Cushman, Suite 101  
Fairbanks, Alaska 99701  
(907) 488-0857  
Fax: (907) 488-4271



Senate

While in session  
State Capitol  
Juneau, Alaska  
99801-1162  
(907) 465-4797  
Fax (907) 465-3884  
SENATE DISTRICT F

## SB 140 Sponsor Statement

Spyware, which includes malware, trackware and adware, is the categorical name for any application that may track a user's online and/or offline PC activity and is capable of locally saving or transmitting those findings for third parties either with, or more often without, the computer user's knowledge or consent.

According to reports by the National Cyber Security Alliance, in 2003 nine out of 10 PCs connected to the Internet were infected with spyware. A joint spy audit report by Earthlink and Webroot in October, 2004, detected an average of 26 spyware traces on any given PC. Over a nine-month random computer audit, Earthlink and Webroot detected 82 million pieces of spyware and other potentially unwanted software programs.

Spyware can install tracking cookies that marketers use to monitor online activities to tailor pop-up ads directly to the user. More harmful programs can record keystrokes to get personal information such as Social Security Number, bank account numbers, login names, passwords and credit card numbers that can be used to commit identity theft.

In addition to frustrating users with pop-up ads that are misleading and anticompetitive, the cost of removing unwanted spyware from PCs in homes, businesses, schools, universities and governments is staggering.

Senate Bill 140 would make it unlawful for a person to engage in deceptive acts or practices using spyware, including causing a pop-up ad to be shown on a computer screen knowing, or with reckless disregard, that the ad is the consequence of a user accessing a certain website.

While prosecutions and enforcement may be challenging, SB 140 sends the message that Alaska takes computer invasion seriously and will not leave its citizens without recourse.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

WASHINGTONPOST NEWSWEEK  
INTERACTIVE COMPANY, LLC, et al.,

Plaintiffs,

v.

THE GATOR CORPORATION,

Defendant.

Civil Action No. \_\_\_\_\_

DECLARATION OF BENJAMIN G. EDELMAN

→ I, Benjamin G. Edelman, state and declare as follows:

1. I make this statement under penalty of perjury and from my own personal knowledge.
2. I hold an Bachelor of Arts degree in Economics from Harvard College and a Masters Degree in Statistics from the Graduate School of Arts and Sciences at Harvard University.
3. I am presently employed as a Technology Analyst at the Berkman Center for Internet & Society at Harvard Law School. I have been employed as a technical consultant at the Berkman Center since May, 1998. While employed by the Berkman Center I have published the following: (1) The Effect of Editorial Discretion Book Promotion on Sales at Amazon.com (2001-2002), available at <http://cyber.law.harvard.edu/people/edelman/pubs/Thesis-intro.pdf> (2) Software Environments for Online Deliberative Discourse (1999-2000), available at <http://cyber.law.harvard.edu/projects/deliberation/>; (3) Analysis of Domain Reregistrations Used For Distribution of Sexually-Explicit Content (2002), available at <http://cyber.law.harvard.edu/people/edelman/renewals/>; (4) Large-Scale Intentional Invalid WHOIS Data (2002), available at <http://cyber.law.harvard.edu/people/edelman/invalid-whois/>; (5) .NAME Registrations Not Conforming to .NAME Registration Restrictions, available at <http://cyber.law.harvard.edu/people/edelman/name-restrictions/>; (5) Alternative Perspectives on Registrar Market Share, available at <http://cyber.law.harvard.edu/people/edelman/registrar-choice/>; (6) Analysis of Registrations in Alternative Root TLDs (2001), available at <http://cyber.law.harvard.edu/people/edelman/dotbiz> and <http://cyber.law.harvard.edu/people/edelman/dotweb>; (7) and Documentation of Privacy and Security Shortcomings at Buy.com (2000), available at <http://cyber.law.harvard.edu/people/edelman/buy-privacy.html>.

4. I am proficient in Microsoft Visual Basic, Microsoft Visual Basic for Applications, including AccessBasic and WordBasic, Microsoft Visual Basic Scripting, including Active Server Pages, ADO and OLEDB, Mathworks MatLab, Stata, and Splus / R.

5. I was qualified as an expert and provided oral testimony in a lawsuit in United States District Court for the Eastern District of Pennsylvania captioned *Multnomah County Public Library v. United States of America*, No. CIV.A. 01-1322, 2002 WL 1126046 (E.D. Pa. 2002). My work in that case investigated and detailed the design of the Internet, the implementation of computer networks, and the capabilities of proposed methods of filtering access to certain types of Internet content.

6. The Internet is a global network of millions of interconnected computers. The World Wide Web is a portion of the Internet especially suited to displaying images and sound in addition to text. Much of the information on the World Wide Web is stored in the form of "web pages" which can be accessed through a computer connected to the Internet (via a commercial Internet service provider or "ISP") and equipped with a computer program called a "browser." Leading web browsers include Microsoft Internet Explorer and Netscape Navigator. "Websites" are locations on the World Wide Web containing collections of web pages. A web page is identified by its unique Uniform Resource Locator or "URL" (e.g. <http://www.usatoday.com>), and a URL ordinarily incorporates its site's "domain name" (e.g. [usatoday.com](http://www.usatoday.com)).

7. I have conducted research regarding the Gator Corp. on several previous occasions and am familiar with its operation.

8. Software written and distributed by Gator Corp. causes the display of pop-up advertisements upon a user's attempt to view certain websites. Gator causes the display of these pop-up advertisements without the permission of or payment to such websites.

9. Gator Corp. distributes a free software application called "Gator." Gator is essentially a "digital wallet." Gator provides users with a mechanism for storing personal information about themselves, passwords, user identification numbers and names, and other data that consumers routinely need to input on electronic forms when they shop for goods or services on the Internet. Gator assists users in filling out such forms without having to retype the previously stored information.

10. Gator Corp. bundles a software program that it calls "OfferCompanion" together with its Gator digital wallet software program, so that persons who download the Gator application onto their personal computers automatically have OfferCompanion downloaded and installed onto their personal computers. In addition, when a person downloads certain popular free software programs, such as KaZaa or AudioGalaxy, OfferCompanion is automatically downloaded and installed onto her personal computer. Because OfferCompanion is bundled with other software programs and downloaded automatically with those other software programs, even sophisticated computer users frequently do not know that OfferCompanion has been installed on their personal computers.

11. Once OfferCompanion is installed on a personal computer, OfferCompanion automatically launches and operates whenever a user invokes her computer's web browser. OfferCompanion communicates frequently with Gator Corp.'s computer servers, monitoring the user's activities on the World Wide Web and transmitting that information over the Internet to Gator Corp.

12. When a computer user visits certain websites Gator Corp.'s remote computer systems transmit to the user's computer one or more advertisements to be displayed directly over the content that the owner of the website intended to be displayed.

13. Gator Corp.'s pop-up advertisements typically appear at approximately the same time that the web page that the user has requested is downloading onto the user's computer and opening on the user's computer screen. As a result of Gator Corp.'s pop-up advertisements, users ordinarily do not see the requested web page in the manner that the website owner intended to display it. Instead, users see the Gator Corp. pop-up advertisement concealing some of the content the website owner intended to be displayed on the requested web page. In order for a user to see the requested web page displayed as intended by the website owner, the user must move her mouse to each pop-up advertisement and click the mouse to close each advertisement, thus delaying access to the site's content.

14. The design of the Gator Corp. software allows Gator to cause advertisements to be displayed on any website desired. The Gator software is capable of placing advertisements even on the websites of Gator's competitors, and it is equally capable of placing advertisements on websites that do not sell advertising or that refuse to permit certain types of advertising.

15. Gator Corp. does not prominently advise users who have downloaded OfferCompanion software that Gator Corp.'s pop-up advertisements will change the display of content on particular websites. Furthermore, the Gator Corp. pop-up advertisements fail to suggest that they are not authorized and supplied by the underlying website.

16. Because Gator Corp.'s advertisements appear on a user's screen simultaneously, or nearly simultaneously, with the downloading and opening of the requested web page of the targeted website, the Gator Corp. pop-up advertisements appear to be an integral and fully authorized part of the original underlying web page.

17. Users may find it difficult or confusing to remove Gator software from their computers. Even if a user invokes the ordinary Windows "uninstall" feature to remove the software program that provided OfferCompanion as a part of a bundle, OfferCompanion remains on the user's computer and continues to function in support of Gator Corp.'s pop-up advertising system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this \_\_\_\_\_ day of June, 2002.

---

Benjamin G. Edelman

# "Spyware": Research, Testing, Legislation, and Suits Benjamin Edelman

[ [Introduction](#) - [Research](#) - [Legislation](#) - [Pending Suits](#) - [Disclosures](#) ]

## Introduction

A number of firms currently design and offer so-called "spyware" software -- programs that monitor user activities, and transmit user information to remote servers and/or show targeted advertisements. As distinguished from the design model anticipated by [whatis.com's definition of adware](#) ("any software application in which advertising banners are displayed while the program is running"), these spyware programs run continuously and show advertisements specifically responding to the web sites that users visit. Companies making programs in this latter category include [Gator](#) (recently renamed [Claria](#)), [WhenU](#), and [180Solutions](#). Other spyware programs include keystroke recorders, screen capture programs, and numerous additional software systems that surreptitiously monitor and/or transmit users' activities.

Spyware programs have prompted a number of legal challenges, as described in the [pending suits](#) section, below. The problem of spyware has also attracted [attention from legislators](#), who have proposed laws to rein in the problem

I have followed these developments generally, I have written about the programs and their effects, and I have been retained as an expert in certain of these suits. This page indexes my research on my own and my work in selected cases.

- |   |
|---|
| <i>Featured Research</i>  |
| • <a href="#">180solutions &amp; Affiliate Commissions (NEW)</a>      |
| • <a href="#">WhenU Violates Own Privacy Policy (NEW)</a>             |
| • <a href="#">Advertisers Using WhenU (NEW)</a>                       |
| • <a href="#">WhenU Spams Google, Breaks "No Cloaking" Rules</a>      |
| • <a href="#">WhenU Copies 26+ Articles from 20+ News Sites</a>       |
| • <a href="#">WhenU.com, Inc., v. The State of Utah</a>               |
| • <a href="#">Documentation of Gator Advertisements and Targeting</a> |

## Research as to Spyware Operation, Advertisements and Targeting

[Return to top](#)

### Gator / Claria GAIN

- [Documentation of Gator Advertisements and Targeting \(May 2003\)](#)
  - o Research showing which advertisements Gator shows when users visit various domain names. Includes advertisement thumbnails and analysis of targeting conditions.
- [WashingtonPost.Newsweek Interactive Company, LLC, et al. v. the Gator Corporation - Edelman Expert Declarations \(June 2002 - February 2003\)](#)
- [Teleflora, Inc. v. Claria. - Edelman Expert Declaration \(May 2004\)](#)
- [Dell's Spyware Puzzle \(June 2004\)](#)
  - o Research showing Dell UK advertising on the Claria network, puzzling because Dell has previously criticized unwanted software on users' PCs.
- [Gator's EULA Gone Bad. \(November 2004\)](#)
  - o Analysis of substance and presentation of Claria's license agreement. The 5,900+ word, 63-page license is presented in a small scroll box with section headings merged into body text. Users who manage to read the license find surprising terms: Users must not run third-party tools (like Ad-Aware or Spybot) to remove Gator, and users must not investigate what personal information Gator tracks and sends.
- [Claria's License Agreement is Fifty Six Pages Long \(June 2004\)](#)
  - o Complete set of screenshots showing the Claria installation process and license agreement, when Claria is bundled with Kazaa. The 5,541-word Claria license requires fifty six on-screen pages, e.g. fifty six presses of the page-down key, discouraging users from meaningfully reviewing the license.

### WhenU Save / SaveNow

- WhenU Violates Own Privacy Policy (May 2004)
  - Research showing that WhenU transmits to its servers some of the specific URLs users visit, precisely contrary to WhenU's promises in WhenU's license agreements and in some WhenU software installers.
- Advertisers Using WhenU (June 2004)
  - Research reporting all current WhenU graphical advertisers. Major advertisers include Priceline, J.P. Morgan Chase, Verizon, Merck, and T-Mobile.
- WhenU Security Hole Allows Execution of Arbitrary Software (June 2004)
  - Research finding a flaw in the auto-update system used by certain WhenU software recently available on WhenU's ordinary public web site. Flaw allowed attackers to install any software on PCs of users with the affected WhenU software.
- WhenU Spams Google, Breaks Google "No Cloaking" Rules (May 2004)
  - Research showing web sites created by WhenU in violation of search engine rules, boosting rankings of content favorable to WhenU while pushing critics lower in rankings. Google and Yahoo! responded by removing www.whenu.com and other affected sites from their indexes.
- WhenU Copies 26+ News Articles from 20+ Publishers (May 2004)
  - Research showing that WhenU has copied at least 26 articles from at least 20 different publishers to its main www.whenu.com web server, as well as to at least eleven other official WhenU servers. The articles are provided in full, but without the advertisements that surround article text on the publishers' web sites, without any mention of authorization from the publishers, and without their ordinary copyright notices.
- WhenU's License Agreement is Forty Five Pages Long (April 2004)
  - Complete set of screenshots showing the WhenU installation process and license agreement, when WhenU is bundled with BearShare. Due to placement of the WhenU license is an exceptionally small on-screen window, viewing the entire license requires 45 presses of the page-down key, discouraging users from meaningfully reviewing the license.
- Documentation of WhenU Advertisements and Targeting (forthcoming)
  - Research showing which advertisements WhenU shows when users visit various domain names. Includes advertisement thumbnails and analysis of targeting conditions.
- Quicken Loans and Wells Fargo v. Whenu.com Inc. - Edelman Expert Declarations (July - September 2003)

*180Solutions n-CASE and Zango*

- Documentation of n-CASE Advertisements and Targeting (forthcoming)
- The Effect of 180solutions on Affiliate Commissions and Merchants (July 2004)
  - Research showing how 180 software intentionally causes merchants to pay affiliate commissions to 180, even when affiliate commissions are properly payable to other affiliates, or are properly withheld by merchants under the terms and conditions of their affiliate programs.
- 180solutions Installation Methods and License Agreement (July 2004)
  - Research itemizing 180's major installation methods, including drive-by downloads, distribution partners, and installation through security holes. Discussion also tracks failure to show a license agreement and failure to provide an uninstaller.
- Who Profits from Security Holes? (November 2004)
  - Video example of software installation through security holes, installing software from 180solutions and 15+ other companies.
- 180 Talks a Big talk, but Doesn't Deliver (January 2005)
  - Evaluates 180solutions current installation methods and other practices in light of endorsement by an anti-spyware consortium.

*DirectRevenue / ABetterInternet*

- Documentation of DirectRevenue Advertisements, Advertisers, and Targeting (forthcoming)

- [DirectRevenue Deletes Competitors from Users Disks \(December 2004\)](#)
  - Packet log excerpts showing the means by which DirectRevenue removes certain competitors' programs from users' hard disks.

#### Spyware Generally

- [Methods and Effects of Spyware \(PDF\) - Response to FTC Call for Comments on Spyware \(March 2004\)](#)
  - I explain how spyware works, including presenting specific personal information transmitted by both Gator and WhenU. (The WhenU transmissions are particularly notable because these transmissions seem to violate WhenU's own privacy policy.) Other sections of the document discuss installation methods of spyware (with special consideration of the technical methods used in drive-by downloads), frequency of advertisement display, and performance and security effects of spyware.
- [A Close Reading of Utah's Spyware Control Act - FAQ-style analysis of the bill, a prominent letter of opposition, and related media coverage. \(March 2004\)](#) See also [WhenU.com, Inc., v. The State of Utah](#), [WhenU's challenge to the Spyware Control Act](#).
- [Grokster and Claria Take Licenses to New Lows \(October 2004\)](#)
  - Shows installation of software even when users press "Cancel" to decline installation. Notes that license agreements stretch to the tens of thousands of words, and to hundreds of on-screen pages.
- [Who Profits from Security Holes? \(November 2004\)](#)
  - Video example of software installation through security holes, installing software from 180solutions and 15+ other companies.
- [Video: Ebates Installed through Security Holes \(December 2004\)](#)
  - Video showing software from Ebates installed through security holes, contrary to affiliate networks' policies.
- [Media Files that Spread Spyware \(January 2005\)](#)
  - Listing of programs installed after a misleading pop-up displayed by a Windows Media file.
- [Investors Supporting Spyware \(January 2005\)](#)
  - Listing of major investment firms helping support the operation of large US-based spyware companies.

### Legislation Regulating Spyware

[Return to top](#)

In the listings below, the  icon indicates links to my original research and analysis;  indicates local versions of content originating elsewhere; and other links point to content hosted elsewhere.

- Proposed US federal legislation
  - [Safeguard Against Privacy Invasions Act - Rep. Mary Bono - H.R. 29 \(formerly H.R.2929\)](#)
    - Status: Reintroduced, January 2005. (Previously passed by full House.)
    - Prohibits certain specific practices except with user authorization. Requires notice, consent, and uninstall capability for certain information collection and advertising programs. Leaves many key details to the Federal Trade Commission. Grants enforcement power only to the FTC. Preempts existing state laws about spyware.
    - [My full analysis and critique. See also my earlier \[initial analysis and critique\]\(#\).](#)
  - [Software Principles Yielding Better Levels of Consumer Knowledge - Sen. Conrad Burdick and Sen. Ron Wyden - S.2145](#)
    - Status: Introduced, February 2004. Hearing held, March 2004.
    - Requires notice (with representative examples of advertisements and estimated display frequency) and uninstall capability (presence in Add/Remove Programs listing). Enforcement by FTC and state attorney generals.
  - [Computer Software Privacy and Control Act - Rep Jay Inslee - H.R.4255](#)

- Status: Introduced, April 2004.
- Prohibits transmission of software that collects and transmits personal information about computer owner or operator, monitors and transmits web pages accessed, or modifies default computer settings as to home page or search, unless notice is provided and consent is obtained in advance. Advertising software permitted only with consent and uninstall. Violations enforced by FTC under FTC Act, via criminal penalties, and by states. Preempts existing state laws about spyware.
- Internet Spyware (I-SPY) Prevention Act - Rep. Bob Goodlatte - H.R.4661
  - Status: Passed by House, October 7, 2004.
  - Creates criminal penalties for accessing a protected computer without authorization, or exceeding authorization, by causing software to be copied onto a computer and 1) using that code for another Federal criminal offense, 2) intentionally obtaining or transmitting personal information with intent to defraud, injure, or cause damage, 3) intentionally impair computer security.
  - My initial analysis and critique.
- Proposed US state legislation
  - California
    - Computer Spyware, introduced by Senator Kevin Murray (with principal coauthors Assembly Members Correa and Leslie) - S.B.1436
      - According to the California Office of Privacy Protection, "This bill would prohibit a person from knowingly installing a providing spyware, as defined, on or to another user's computer located in California. It would authorize the recipient of such spyware to bring an action for actual damages and for liquidated damages of \$1000 per transmission, subject to reduction by a court for specified reasons, plus attorney's fees and costs to a prevailing plaintiff." (reference)
      - Prohibits numerous specific stated practices, such as removing or disabling security or antivirus software, when such practices are intentionally deceptive and when they are conducted willfully or with actual knowledge.
      - Status: Passed legislature. Signed into law by governor, September 28, 2004.
      - My analysis and critique.
    - Computer Adware and Spyware, introduced by Assembly Member Tim Leslie - A.B.2787
      - Prohibits "hijack[ing] ... a user's computer in this state." Other clauses and prohibitions (from earlier drafts of the bill) have been removed.
      - Consumers may sue to recover actual damages or liquidated damages of \$1,000 per violation. The Department of Consumer Affairs may issue administrative fines against violators.
      - Status: Passed committee.
  - Iowa - Senate File 2200, introduced by Sen. Keith A. Kreiman
    - According to Slashdot, this bill makes "the distribution of Spyware without notice an aggravated misdemeanor, punishable by confinement for no more than two years and a fine of at least \$500 but not more than \$5,000. The proposed bill also provides victims and county attorneys with the ability to file a civil cause of action for relief from conduct constituting the crime of unauthorized collection and disclosure of personal information by computer." (reference)
    - Suits may be brought by the county attorney or by other aggrieved persons.
    - Status: Introduced
  - Michigan: Senate 1315
    - Requires certain disclosures prior to installation of spyware. Defines spyware as software that monitors computer use or display advertisements in response to computer use, but excludes from spyware all programs "installed ... by the owner" of a computer. Criminal sanctions including fines and imprisonment.
    - Status: Introduced in Senate.
  - New Hampshire: Regulating the Use of Computer Spyware
    - Requires certain notice and consent before installation of certain software. Prohibits context-

- based triggering mechanisms that cover web sites with advertisements.
- Status: Introduced, House January 2005
- o New York: Senate S07141
  - According to the bill's summary, the bill creates a crime of unlawful dissemination of spyware, ordinarily a class A misdemeanor and a class E felony for repeat offenders. Unlawful dissemination of spyware takes place when a person "having no right to do so" installs software ("including but not limited to a keylogg[er]") to gather and transmit personal information or data without a user's knowledge or explicit authorization.
  - Slashdot Discussion
- o Utah: Spyware Control Act, introduced by Rep. Stephen H. Urquhart, signed by Governor Olene Walker on March 23
  - Spyware Control Act - reformatted, indented
  - A Close Reading of Utah's Spyware Control Act - FAQ-style analysis of the bill, a prominent letter of opposition, and related media coverage.
  - Letter of Opposition (PDF) from AOL, Amazon, the Association for Competitive Technology, AT&T, the American Electronics Association, the Business Software Alliance, c|net, the Computer & Communication Industry association, eBay, Google, the Information Technology Association of America, the Internet Commerce Coalition, Intraware, MCI, Microsoft, NetCoalition, Novell, Orbitz, the Software & Information Industry Association, Verizon, and Yahoo!
  - WhenU.com, Inc., v. The State of Utah - Case Document - Suit filed by a company subject to the Act, seeking that the act be declared void and invalid.
  - Bill status: Signed into law by Governor Olene Walker on March 23, 2004. Challenged by WhenU in WhenU v. The State of Utah. Preliminary injunction granted, enjoining enforcement of the bill, June 22, 2004.
- o Virginia:
  - HB 1729: Prohibited Software and Actions, introduced by John Cosgrove
    - Prohibits collection of personally identifiable information through intentionally deceptive means. Prohibits modifying certain Internet settings, misrepresenting that software has been disabled or is necessary, inducing a user to install software by misrepresenting necessity for security, privacy, or file viewing.
  - HB 1304: Invasive Technologies, introduced by L. Scott Lingamfelter
    - Beginning in 2006, would require public bodies to conduct a privacy impact analysis when authorizing or prohibiting the use of invasive technologies including spyware.
- o Other legislation
  - o Australia: Spyware Control Bill - Requires notice and consent prior to installation of certain software. Computerworld coverage.
    - Status: Slated to go before Parliament in September 2004.
  - o Netherlands: Plans for an anti-spyware bill reported in the media, e.g. this article in Digital Media Europe.

The National Conference of State Legislatures maintains 2004 Legislation Relating to Internet Spyware or Adware.

## Pending Suits against Designers of Spyware

[Return to top](#)

Claria

Claria's activities have prompted a number of legal challenges. This section attempts to chronicle key suits to the best of my ability, but this section is unlikely to be comprehensive; a thorough search of Google, LexisNexis, and/or Westlaw will likely yield additional cases and additional

information as to recent updates. Send suggested additions to [Ben Edelman](#).

- o Facing complaints from the [Internet Advertising Bureau](#) as to Gator's activities, then including banner ads that tended to cover web site operators' own banner ads, Gator in 2001 [sued](#) the IAB and subsequently [settled](#). Gator has subsequently sued Virtumundo (since settled) L.L. Bean, and PriceGrabber ([citation](#)).
- o In 2002, Gator was sued by a group of media companies including the New York Times and Washington Post in the US District Court for the Eastern District of Virginia. A preliminary injunction was issued, enjoining Gator's targeting of plaintiffs' web sites. The case settled before trial, and the terms of the settlement are confidential. I served as a technical expert for the plaintiffs. See [my declarations and selected other case documents](#).
- o In 2002, Weight Watchers [sued](#) competitor DiscreetDrugs.com, which had reportedly used Gator to cause its advertisements to appear when users requested the Weight Watchers web site. Also in 2002, Weight Watchers sued competitor DietWatch.com, which had also reportedly used Gator to cause its advertisements to cover the Weight Watchers site. A permanent injunction was issued by the US District Court, Southern District of New York, enjoining certain DietWatch activities and granting \$25,000 of damages.
- o Gator was subsequently sued by Extended Stay America ([District of South Carolina](#)), Hertz ([opinion as to Gator's requested stay of proceedings](#)) ([New Jersey District Court](#)), Lending Tree ([Western District of North Carolina](#)), Metrodate (representing a class of targeted web sites), Overstock.com, Quicken Loans, Six Continents Hotels ([Northern District of Georgia](#)), TigerDirect ([Southern District of Florida](#)), FS ([Northern District of Georgia](#)), and Wells Fargo, among others. A [footnote in the Hertz opinion](#) provides citations to the majority of these cases.
- o In 2003, Gator moved for consolidation of these cases as well as Gator's declaratory judgment actions against L.L. Bean, Virtumundo, Extended Stay America, PriceGrabber.com, and Tiger Direct. Gator asked that these cases be consolidated in the [US District Court for the Northern District of California](#). (See [Schedule of Matters for Judicial Panel on Multidistrict Litigation](#), PDF page 7.) Instead, these cases were consolidated to the [Northern District of Georgia](#), as detailed in the [Multidistrict Litigation Transfer Order](#) (PDF).
- o In 2004, the German division of Hertz obtained a preliminary injunction prohibiting Claria from using pop-up ads to cover Hertz's site. See [news coverage](#).
- o In 2004, Teleflora sued Claria. I serve as an expert for Teleflora, and I filed an initial declaration in this matter.
- o In 2004, L.L. Bean sued Nordstrom's, JC Penney, Atkins, and Gevalia, each of which used Claria to display pop-up ads that cover L.L. Bean's site. See [press release](#), [news coverage](#). Claria countersued L.L. Bean. Gevalia and Atkins [settled](#) with L.L. Bean. L.L. Bean complains: [Nordstrom's](#), [JC Penney](#), [Atkins](#), [Gevalia](#).
- o According to Claria's [SEC S-1 filing of April 8, 2004](#), Claria has settled suits brought by Extended Stay America, PriceGrabber.com, LendingTree, and UPS.
- o In June 2004, the Georgia Court hearing Gator's multidistrict litigation ordered that the Metrodate case (a class action of targeted web sites) be remanded to state court.
- o In July 2004, Claria was sued by Interlinx, LLC, as to Claria's targeting of budgetlife.com. The case was filed in the US District Court for the Eastern District of Michigan.
- o In August 2004, the clerk of the court hearing Gator's multidistrict litigation reported that the MDL proceedings were closed because all the MDL cases had been settled ([reportedly](#) save for Teleflora).

#### WhenU

WhenU has been sued by 1-800 Contacts, Overstock.com, Quicken Loans, U-Haul, Weight Watchers, and Wells Fargo. See [summary judgment order \(PDF\)](#) in U-Haul case (dismissing claims against WhenU) and [preliminary injunction order \(PDF\)](#) in 1-800 Contacts case (granting preliminary injunction enjoining WhenU from delivering certain pop-up advertisements).

1-800 Contacts has also sued (and obtained a preliminary injunction enjoining) Vision Direct, a

competitor which used WhenU to cause its advertisements to appear when users requested the 1-800 Contacts web site.

In 2004, WhenU sued the state of Utah seeking that Utah's Spyware Control Act be declared void and invalid

I serve as a technical expert in the Quicken Loans and Wells Fargo matter; I filed two declarations in this matter and provided oral testimony. I serve as a technical expert in the Utah matter; I filed a declaration in this matter and provided oral testimony.

#### *180solutions*

DMNews reports that Weight Watchers sued 180solutions and eDiets as to eDiets covering Weight Watchers' site using 180solutions software.

180solutions sued two distributors of its software for installing its software without users' consent, which 180 claims was contrary to the distributors' contract with 180. News coverage.

#### *Others*

In May 2004, Overstock.com sued SmartBargains, Inc. Press release.

In December 2004, Avenue Media sued DirectRevenue as to "systematic[] delet[ion]" of Avenue's software from users' hard disks. Discussion and case documents.

### **Related Suits**

[Return to top](#)

*New.net v. Lavasoft*. Claim by designer and distributor of controversial NewDotNet addressing software against designer of software that, upon a user's request, removes NewDotNet and other programs deemed adware. Alleges false advertising, unfair competition, trade libel, and tortious interference with prospective economic advantage. Complaint.

### **Disclosures**

[Return to top](#)

I serve or served as an expert in some of cases referenced above, and I continue to accept inquiries as to other matters in which I might be of assistance.

This research is a work in progress. Suggestions are welcomed and appreciated.

---

Last Updated: January 19, 2005 - [Sign up for notification of major updates and related work.](#)

## Legal remedies in SB 140

SB 140 establishes two new legal footings.

- 1) The AG under the Fair Trade Practices may take action upon violation of the new statute under criminal procedures.
- 2) A person or entity may use the new statute to establish a "course of action" in matter of a civil remedy. (As opposed to the more difficult path of establishing actual damage absent the statute.)

Remedies are available under AS 45.50 under actions in dealing with unfair trade practices.

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

(i) If a person receives an award of punitive damages under (a) of this section, the court shall require that 50 percent of the award be deposited into the general fund of the state under AS 09.17.020(j). This subsection does not grant the state the right to file or join a civil action to recover punitive damages. (§ 2 ch 246 SLA 1970; am § 1 ch 225 SLA 1976; am §§ 1 — 4 ch 31 SLA 1987; am §§ 3, 4, 6 ch 96 SLA 1998)

**Revisor's notes.** — In subsections (g) and (h), the word "section" was substituted for "chapter" in 1987 to correct a manifest error.

**Effect of amendments.** — The 1998 amendment, effective September 10, 1998, in subsection (a) inserted "for each unlawful act or practice three times

the" and substituted "\$500" for "\$200" in the first sentence, deleted the former second sentence, which read "The court may, in cases of wilful violation award up to three times the actual damages sustained," and added the last sentence; repealed subsection (g); and added subsection (i).

#### NOTES TO DECISIONS

**Opportunity to cure technical pleading deficiency.** — Although defendant is a New Jersey corporation with its principal place of business in Ohio and plaintiffs failed to set forth in their amended complaint the essential allegation that defendant was "doing business" in Alaska within the meaning of subsection (a) of this section, dismissing the claim on the basis of this technicality was inappropriate; leave to amend the complaint should have been granted in order to afford the plaintiffs the opportunity to cure their technical pleading deficiency. *Shooshanian v. Wagner*, 672 P.2d 455 (Alaska 1983).

**Timeliness of claims.** — The timeliness of a municipality's claim under the Unfair Trade Practices Act is governed by AS 09.10.120, not subsection (f) of this section. *City of Fairbanks v. Amoco Chem. Co.*, 952 P.2d 1177 (Alaska 1998).

**Failure to show monetary damages.** — In alleging that the competitor's ads had the capacity to deceive or confuse a buyer in connection with the advertisement of services, as prohibited by AS 45.50.471(b)(11), the complaint was sufficient to defeat a motion to dismiss for failure to state a claim, but a review of the factual support for these claims provided a strong basis for the superior court's finding that the action was frivolous and brought to harass

the defendants, where plaintiffs never produced credible evidence that the central theme of the ads was unfair or deceptive; they did not produce even one person who had read the ads and could testify to any confusion; and they produced no evidence that they had suffered any monetary damage, as required for a private action under subsection (a) of this section. *Garrison v. Dixon*, 19 P.3d 1229 (Alaska 2001).

**Abuse of discretion.** — The superior court improperly dismissed plaintiff anesthesiologist's claims resulting from the termination of his privileges at defendant hospital where his complaint alleged facts which, if proven, were sufficient to state a claim for unreasonable restraint of trade, group boycott, attempted monopolization, unfair trade practices, defamation, breach of oral contract, interference with a prospective economic advantage, and intentional infliction of emotional distress. *Odom v. Fairbanks Mem. Hosp., Lutheran Health Sys.*, 999 P.2d 1233 (Alaska 2000).

Applied in *Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co.*, 604 P.2d 1113 (Alaska 1980); *State v. First Nat'l Bank*, 660 P.2d 406 (Alaska 1982).

Cited in *O.K. Lumber Co. v. Providence Wash. Ins. Co.*, 759 P.2d 523 (Alaska 1988); *Pierce v. Catalina Yachts, Inc.*, 2 P.3d 618 (Alaska 2000).

**Collateral references.** — Consumer class action based on fraud or misrepresentations. 53 ALR3d 534.

Right to private action under state consumer protection act. 62 ALR3d 169.

Reasonableness of offer of settlement under state deceptive trade practice and consumer protection acts. 90 ALR3d 1350.

**Sec. 45.50.535. Private injunctive relief.** (a) Subject to (b) of this section and in addition to any right to bring an action under AS 45.50.531 or other law, any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under AS 45.50.471.

(b) A person may not bring an action under (a) of this section unless

(1) the person first provides written notice to the seller or lessor who engaged in the unlawful act or practice that the person will seek an injunction against the seller or lessor if the seller or lessor fails to promptly stop the unlawful act or practice; and

(2) the seller or lessor fails to promptly stop the unlawful act or practice after receiving the notice. (§ 5 ch 96 SLA 1998)

**Effective dates.** — Section 5, ch. 96, SLA 1998, which enacted this section took effect on September 10, 1998.

**Sec. 45.50.536. Mediation.** Notwithstanding the other provisions of AS 45.50.471 — 45.50.561, a civil action under AS 45.50.531 or 45.50.525 may be submitted to mediation under the Alaska Rules of Civil Procedure. The mediation must begin within 30 days after the court's order for mediation. During mediation, the court may, if it is determined appropriate by the court, enjoin the defendant from engaging in the act or practice that is the subject of the civil action. (§ 5 ch 96 SLA 1998)

**Effective dates.** — Section 5, ch. 96, SLA 1998, which enacted this section, took effect on September 10, 1998.

provides that the 1998 enactment of this section "applies only to causes of action that accrue on or after September 10, 1998."

**Editor's notes.** — Section 7, ch. 96, SLA 1998

**Sec. 45.50.537. Attorney fees, costs, and damages.** (a) In an action brought by a private person under AS 45.50.471 — 45.50.561, a prevailing plaintiff shall be awarded costs as provided by court rule and full reasonable attorney fees at the prevailing reasonable rate.

(b) Unless the action is found to be frivolous, in an action brought by a private person under AS 45.50.471 — 45.50.561, a prevailing defendant shall be awarded attorney fees and costs as provided by court rule. If the action is found to be frivolous, the attorney fees shall be awarded to the defendant shall be full reasonable attorney fees at the prevailing reasonable rate.

(c) Notwithstanding the other provisions of this section, in an action brought by a private person under AS 45.50.471 — 45.50.561, if the plaintiff is not the prevailing party and if the court finds that the action was brought by the plaintiff to obtain a competitive business advantage, the court shall award a prevailing defendant costs as provided by court rule, full reasonable attorney fees at the prevailing reasonable rate, and any damages suffered by the prevailing defendant as a result of the plaintiff's allegations.

(d) In an action brought by the attorney general under AS 45.50.471 — 45.50.561, if the attorney general prevails, the state shall be awarded its actual attorney fees and costs, including costs of investigation, to the extent those fees and costs are reasonable.

(e) In this section, "frivolous" means

(1) not reasonably based on evidence or on existing law or a reasonable extension, modification, or reversal of existing law; or

(2) brought to harass the defendant or to cause unnecessary delay or needless expense. (Section 6 SLA 1998; am § 1 ch 169 SLA 2004)

**Editor's notes.** — Subsection (d) was enacted as amended and relettered in 2004, at which time what was formerly subsection (d) was relettered as (e).

**Editor's references.** — Under § 3, ch. 169, SLA 2004, the provisions of (e) of this section apply only to causes of action that accrue on or after October 24, 2004.

**Effect of amendments.** — The 2004 amendment, effective October 24, 2004, added subsection (e) (now (d)).

**Effective dates.** — Section 5, ch. 96, SLA 1998,

which enacted this section, took effect on September 10, 1998.

**Editor's notes.** — Section 2, ch. 169, SLA 2004 provides that the 2004 enactment of subsection (e) has the effect of amending Rules 54(d), 79, and 82, Alaska Rules of Civil Procedure, by establishing rules for the award of actual attorney fees and costs in certain actions relating to unfair trade practices that are brought under AS 45.50.471 — 45.50.561, to the extent those fees and costs are reasonable.

#### NOTES TO DECISIONS

See *Garrison v. Dixon*, 19 P3d 1223 (Alaska)

**Sec. 45.50.541. Nonnegotiability of consumer paper.** (a) If a contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, the note, instrument, or evidence of indebtedness shall have printed on its face the words "consumer paper," and the note, instrument or evidence of indebtedness with the words "consumer paper" printed on it is not a



## Judge: See ya later, Gator

By Stefanie Olsen

[http://news.com.com/Judge+See+ya+later%2C+Gator/2100-1023\\_3-943515.html](http://news.com.com/Judge+See+ya+later%2C+Gator/2100-1023_3-943515.html)

Story last modified Fri Jul 12 13:35:00 PDT 2002

**A federal judge on Friday ordered software company Gator to temporarily stop displaying pop-up advertising over Web publishers' pages without their permission.**

The order was issued in a lawsuit filed against Gator in June by *The Washington Post*, *The New York Times*, Dow Jones and seven other publishers, which allege the company's ads violate their copyrights and steal revenue.

On Friday, Judge Claude Hilton granted the motion, according to the clerk's office at the federal court in Alexandria, Va., where the suit was filed.

The companies had sought a temporary injunction against Gator preventing it from delivering ads keyed to their sites pending the resolution of the suit, in which they are seeking a permanent injunction against the company and monetary damages for any advertising dollars made from their Web pages.

Terence Ross, attorney for the plaintiffs, said the judge quickly granted the motion, prohibiting Gator "from tampering with the 16 Web sites involved in the litigation during the pendency of the case.

"This really is a clear-cut case in my opinion; Gator is infringing our copyrights and trademarks. The judge came to that conclusion, and a jury will make the same decision in a trial."

By delivering unauthorized pop-up ads, Gator is altering the intended display of the publishers' works, a right that has been recognized by the Supreme Court, Ross has argued.

In early August the judge will set a court schedule, and the case will go to trial before the end of the year, Ross said.

In a statement issued Friday, Redwood City, Calif.-based Gator said that it would honor the judge's request but asked for an expedited trial.

"We are highly confident that once all the facts are presented in the upcoming trial, no court will issue a ruling eliminating a consumer's right to decide for themselves what is displayed on their own computer screens," Gator CEO Jeff McFadden said in the statement.

"Such a ruling would attack a consumer's right to use hundreds of popular software applications that automatically display separate windows while the consumer is surfing the

*Example of Problem -*  
*D*

Internet."

Gator develops software that manages passwords and fills out forms for about 10 million Web surfers who often download the application unwittingly through other popular file-sharing programs. Also bundled in Gator's software is a program called OfferCompanion, which monitors Web surfing behavior and delivers targeted pop-up ads to viewers. For example, a Web surfer may see an advertisement for Ford Motor--delivered by Gator--while visiting Toyota.com.

Gator has been selling such advertising for more than a year and has accumulated several top-tier advertisers, including Target.com. According to Ross, the plaintiffs were stirred to action after the company published marketing material in April essentially promising ad buyers placement on the Web sites of specific publications, including *The New York Times*.

According to the suit, Gator is "essentially a parasite on the Web that free rides on the hard work and the investments of plaintiffs and other Web site owners. In short, Gator sells advertising space on the plaintiffs' Web sites without (their) authorization and pockets the profits from such sales."

The decision does not bar Gator from delivering pop-up ads over other sites. But it could establish a precedent that prohibits third-party software operators from delivering ads that alter another Web page. It also highlights mounting tension over tactics used by Gator and others.

Earlier this year, WeightWatchers.com sued rival DietWatch.com for using Gator to deliver ads to visitors of its site. On June 11, a court granted WeightWatchers a permanent injunction barring DietWatch from serving ads on its site.

Last year, the Interactive Advertising Bureau (IAB) criticized Gator for selling banner ads that obscure those sold by online publishers. Gator sued the IAB, alleging "malicious disparagement" over its statements, but the two parties found common ground when Gator agreed to stop selling banner overlays.

Copyright ©1995-2005 CNET Networks, Inc. All rights reserved.

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 140  
 (S) Publish Date: 3/29/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title Ban Internet Spyware RDU Enterprise Technology Sr  
 Component Enterprise Technology Sr  
 Sponsor (S) L&C Component No. 2082  
 Requester \_\_\_\_\_

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill will not have a fiscal impact upon the agency.

Prepared by: Stan Herrera, Director Phone 465-5735  
 Division Enterprise Technology Services Date/Time 3/22/05 7:21 AM  
 Approved by: Michael Tibbies, Deputy Commissioner Date 3/22/2005  
 Agency Department of Administration

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: SB 140  
 (S) Publish Date: 3/29/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title: "An Act relating to spyware and unsolicited RDU: CIVIL  
 Internet advertising." \_\_\_\_\_ Component: Commercial & Fair Business  
 Sponsor: Senator Therriault  
 Requester: Senate Labor & Commerce Component No. \_\_\_\_\_

**Expenditures/Revenue** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill amends AS 45.45 (Trade and Commerce - Trade Practices) by adding new sections to prohibit the use of "spyware" that causes "pop-up" ads to appear on a computer when the user accesses a certain website. The Department of Law is currently charged with enforcing Alaska's Consumer Protection Act, AS 45.50.471 et seq., which includes enforcement of AS 45.50.479-.481 relating to electronic mail. We would likely enforce this provision of AS 45.45 in a similar manner, and we do not believe this bill will require additional funds for effective enforcement.

Prepared by: Kathryn Daughhete, Director Phone 465-3673  
 Division: Administrative Services Division Date/Time 3/21/05 11:44 AM  
 Approved by: K. Daughhete for Scott Nordstrand, Acting Attorney General Date 3/21/2005  
 Agency: Department of Law

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 3  
 Bill Version: SB 140  
 (S) Publish Date: 3/29/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
 Title "An Act relating to spyware and unsolicited Internet advertising." RDU Alaska State Troopers  
 Component AST Detachments  
 Sponsor Senator Theriault  
 Requester Senate Labor & Commerce Component No. 2325

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Passage of this bill will have no fiscal impact on the Alaska State Troopers.

The bill prohibits spyware pop-up advertisements on computers in our state and helps undermine the economic incentives for spyware providers to sneak onto a user's computer. Penalties for a violation of these provisions are civil.

Prepared by: Lieutenant Todd Sharp Phone 907-269-4532  
 Division: Alaska State Troopers Date/Time 3/18/05 3:24 PM  
 Approved by: Commissioner William Tandeske Date 3/18/2005  
 Agency: Department of Public Safety

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3887 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101


State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

April 27, 2005

**SUBJECT:** CSSB 140(JUD) and the Commerce Clause  
(Work Order No. 24-LS0592\Y)

**TO:** Senator Gene Therriault  
Attn: Dave Stancliff

**FROM:** Barbara R. Craver   
Legislative Counsel

You have asked whether CSSB 140(JUD), which relates to spyware and unsolicited Internet advertising, violates the federal Commerce Clause. It is my opinion that a challenge would not be successful based on general commerce clause analysis.<sup>1</sup> Regulation of spyware is a legitimate local concern and does not burden out-of-state businesses any more than local businesses, so it appears not to erect a barrier to interstate trade which is the focus of the federal commerce clause.

### Commerce Clause generally

The commerce clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article I, sec. 8, cl. 3, Constitution of the United States. "Although the Clause speaks in terms of powers bestowed upon Congress, the [U.S. Supreme Court] long has recognized that it also limits the power of the States to erect barriers against interstate trade." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35, 64 L.Ed.2d 702, 711 (1980). The limitation imposed by the commerce clause on state regulatory power is by no means absolute, and the states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected. Maine v. Taylor, 477 U.S. 131, 138, 91 L.Ed.2d 110, 120 (1986).

"In determining whether a State has overstepped its role in regulating interstate commerce, [the U.S. Supreme Court] has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burden they impose on interstate trade are 'clearly excessive in relation to the putative

---

<sup>1</sup> As you know, legal research cannot take priority over drafting of legislation, so I have not been able to fully research your request in regard to spyware or state Internet regulation in particular. Please contact me after the session if you would like a more in depth discussion of this issue.

Senator Gene Therriault

April 27, 2005

Page 2

local benefits,' Pike v. Bruce Church, Inc., [397 U.S. 137, 142, 25 L.Ed.2d 174, 178 (1970)], statutes in the second group are subject to more demanding scrutiny. The [U.S. Supreme Court] explained in Hughes v. Oklahoma, [441 U.S. 322, 336, 60 L.Ed.2d 250, 262 (1979)], that once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by nondiscriminatory means." Maine, 477 U.S. at 138, 91 L.Ed.2d at 120-121.

Protection of in-state industries from out-of-state competition is almost never a legitimate local purpose. State laws that amount to economic protectionism are virtually always invalid. Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L.Ed.2d 475, 481 (1978). However, I do not see this bill as a protectionist as it applies to in-state as well as out-of-state companies.

If I may be of further assistance, please advise.

BRC:med

05-314.med