

SB

140

SENATE COMMITTEE REPORT

DATE: 3/29/05

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered

SENATE BILL NO. 140

SB 140 BAN INTERNET SPYWARE

"An Act relating to spyware and unsolicited Internet advertising."

and recommends:

- be **replaced** with _____ CS _____ (_____)
- adopt **previous** _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:
 Same Title
 New Title

SCS House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

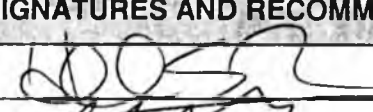
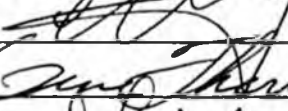
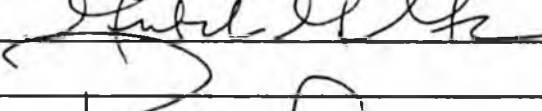
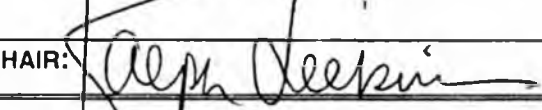
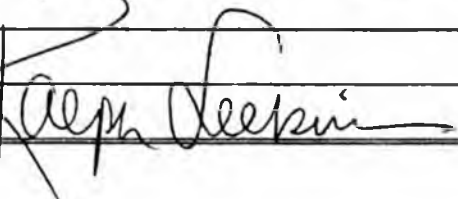
NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			X	
	X			
	X			
	X		X	
CHAIR: 	✓			

CS FOR SENATE BILL NO. 140()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): SENATOR THERRIAULT

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to spyware and unsolicited Internet advertising."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1. AS 45.45 is amended by adding new sections to read:**

4 **Article 10A. Deceptive Acts or Practices Relating to Spyware.**

5 **Sec. 45.45.792. Prohibited conduct relating to spyware. (a) It is unlawful**
6 **for a person who is not the owner or authorized user of a computer to engage in**
7 **deceptive acts or practices described in this subsection using spyware. Deceptive acts**
8 **or practices under this subsection are**

9 (1) causing a pop-up advertisement to be shown on the computer
10 screen of a user by means of a spyware program, knowing that the pop-up
11 advertisement is

12 (A) displayed in response to a user accessing a specific

13 (i) mark; or

14 (ii) Internet website address; and

15 (B) purchased or acquired by a person other than

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- (i) the mark owner;
- (ii) a licensee of the mark;
- (iii) an authorized agent of the owner of the mark;
- (iv) an authorized user of the mark; or
- (v) a person advertising the lawful sale, lease, or transfer of products bearing the mark through a secondary marketplace for the sale of goods or services; and

(2) purchasing advertising that violates (1) of this subsection if the purchaser of the advertising

- (A) receives notice of the violation from the mark owner; and
- (B) fails to stop the violation.

(b) It is not a violation of this section for a person to display a pop-up advertisement under (a)(1) of this section if the spyware program includes a function that

(1) requests information about the user's state of residence before displaying a pop-up advertisement to the user, and the user indicates a residence outside this state;

(2) implements a reasonably reliable automated system to determine the user's likely geographic location, according to current best practices in the field, and the system determines that it is unlikely that the user is located in this state; and

(3) does not prompt, ask, or otherwise encourage a user to indicate a residence outside this state.

(c) It is not a violation of (a)(2) of this section if a person purchases advertising that complies with the requirements of (b) of this section.

Sec. 45.45.794. Removal of potentially harmful software. Notwithstanding AS 45.45.792, a provider of computer software or an interactive computer service may, after notice to a customer, remove from or disable a program on the customer's computer that is used to

(1) violate AS 45.45.792; or

(2) collect information from the computer of the customer without the customer's knowledge.

1 **Sec. 45.45.798. Definitions.** In AS 45.45.792 - 45.45.798,

2 (1) "interactive computer service" means an information service,
3 system, or access software provider that provides or enables computer access by
4 multiple users to a computer server; "interactive computer service" includes an
5 Internet or online service provider or a service or system providing access to the
6 Internet, including a system operated by a library or educational institution;

7 (2) "Internet" means the combination of computer systems or networks
8 that make up the international network for interactive communications services,
9 including remote logins, file transfer, electronic mail, and newsgroups;

10 (3) "Internet or online service provider" means an interactive computer
11 service that provides software or other material that enables a person to transmit,
12 receive, display, forward, cache, search, subset, organize, reorganize, or translate
13 content; select or analyze content; or allow or disallow content;

14 (4) "mark" means a registered trademark, registered service mark, or
15 registered domain name in an Internet website address that is owned, licensed, or
16 lawfully used by a person doing business in this state;

17 (5) "pop-up advertisement" means material offering for sale or
18 advertising the availability or quality of a property, good, or service that is displayed
19 on a user's computer screen, without any request or consent of the user, separate from
20 an Internet website that a user intentionally accesses;

21 (6) "spyware"

22 (A) means software on the computer of a user who resides in
23 the state that

24 (i) collects information about an Internet website at the
25 time the Internet website is being viewed in the state, unless the
26 Internet website is the Internet website of the person who provides the
27 software; and

28 (ii) uses the information collected contemporaneously
29 to display a pop-up advertisement on the computer;

30 (B) does not mean

31 (i) an Internet website;

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(ii) a service operated by an Internet or online service provider accessed by a user;

(iii) software designed and installed primarily to prevent, diagnose, detect, or resolve technical difficulties or prevent fraudulent activities;

(iv) software designed and installed to protect the security of the user's computer from unauthorized access or alteration;

(v) software or data that reports information to an Internet website previously stored by the Internet website on the user's computer, including a cookie; in this sub-subparagraph, "cookie" means a text file that is placed on a computer to record information that can be read or recognized when the user of the computer later accesses a particular Internet website, online location, or online service by an interactive computer service, Internet website, or a third party acting on behalf of an interactive computer service or an Internet website;

(vi) software that provides the user with the capability to search the Internet;

(vii) software installed on the user's computer with the consent of the user the primary purpose of which is to prevent access to certain Internet content;

(7) "user" means the owner or authorized user of a computer.

* Sec. 2. AS 45.50.471(b) is amended by adding a new paragraph to read:

(51) violating AS 45.45.792 (deceptive acts or practices relating to spyware).

(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 1173 (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 prospective economic advantage, and intentional infliction of emotional distress. *Odom v. Fairbanks Mem. Hosp., Lutheran Health Sys.*, 999 P.2d 123 (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 45.50.535 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.
Editor's notes. — Section 7, ch. 96, SLA 1998

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

(§ 5 ch 96 SLA 1998; am § 1 ch 169 SLA 2004)

Revisor's notes. — Subsection (d) was enacted as AS 45.50.537 and relettered in 2004, at which time what was formerly subsection (d) was relettered as (e).

Cross 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 (f)].

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 P.3d 1229 (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 retail 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

Alaska State Legislature

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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.

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
 Requester _____ Component No. 2082

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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 Tibbles, 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/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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 Daughetee, Director Phone 465-3673
 Division: Administrative Services Division Date/Time 3/21/05 11:44 AM
 Approved by: K. Daughetee 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 RDU: Alaska State Troopers
advertising" Component: AST Detachments
 Sponsor: Senator Therriault
 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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

ALASKA STATE LEGISLATURE

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Senate
Senate District F

FOR IMMEDIATE RELEASE: March 10, 2005
Contact: Dave Stancliff, 465-4797

State Senator Targets Computer Invaders *Bill aims to reduce spyware*

JUNEAU—Senator Gene Therriault, R-North Pole, has introduced legislation aimed at reducing the unwanted invasion of spyware on Alaskans' computers. SB 140 was drafted after an extensive review of state and national efforts under way on the issue.

"The cost and frustration caused by those who invade our home and work computers is enormous," Therriault said. "My approach toward reducing unwanted spyware is to cover ground that Congress has thus far not covered."

Spyware is any technology that aids in gathering information about a person or organization without their knowledge. On the Internet, spyware is programming that is put in someone's computer to secretly gather information about the user and relay it to advertisers or other interested parties.

Therriault looked at a wide range of legislation proposed in other states and chose the Utah model as a starting point for legislative consideration. "My staff located Mr. Ben Edelman, a nationally recognized expert associated with the Harvard School of Law, who specializes in the nuances of spyware operation and law. We are working with Mr. Edelman and our legal services to tailor an existing Utah statute to fit our body of law," Therriault said.

SB 140 is a complicated undertaking in several respects. The legislation must have a delicate but well-aimed counter move against spyware tactics. The law must prevent abuses but not damage legitimate companies who operate in a forthright and open manner. It is a challenge Senator Therriault is willing to undertake. "This is not about eliminating just nuisances, it is about protecting the privacy and the legitimate use of computers in Alaska and getting a handle on the enormous cost these unwanted invasions are causing."

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CNET NEWS.COM <http://www.news.com/>

Judge: See ya later, Gator

By Stefanie Olsen

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

Exempt of Problem -
D

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

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.

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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. _____

Ben's
Credentials
(D)

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 Master's 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>.

Spyware 101



Curtis Clothier
Data Processing Manager
Legislative Affairs Agency
April 7, 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.

Congratulations!
YOU ARE THE 10,000th VISITOR TO THIS SITE
Click to Claim your Prize
Close Window

OKI

theZreview.co.uk

- ▶ Home
- ▶ News
- ▶ Coming Soon
- ▶ Movie Trailers
- ▶ Movie Reviews
- ▶ Box Office
- ▶ Release Dates
- ▶ DVD
- ▶ Movie Posters
- ▶ Features
- ▶ Community
- ▶ Resource
- ▶ Contact

Congratulations!
You have won our hourly "OK" button to claim it!

Congratulations!
YOU ARE THE 1,000th VISITOR TO THIS SITE
Click to Claim your Prize
Close Window

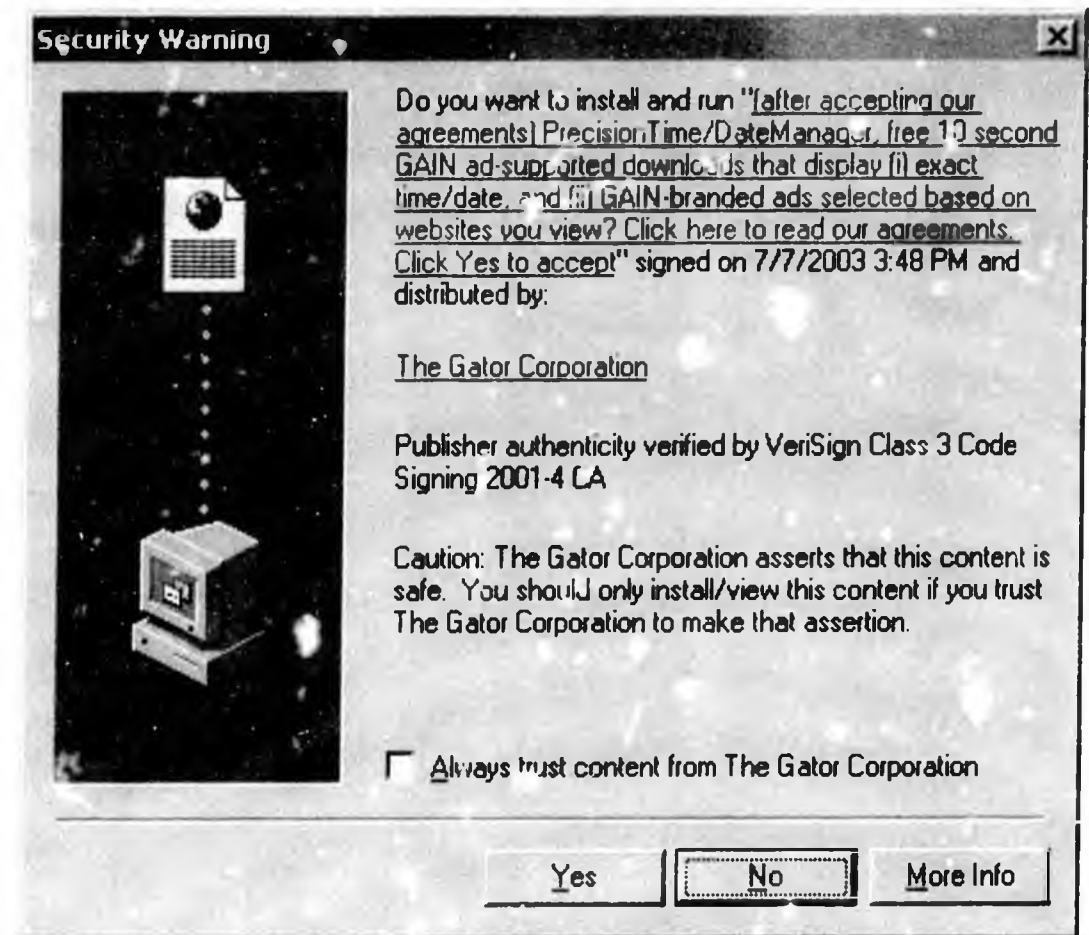
Riding Giants:
Riding Giant
Riding Giants Pr
Riding Giants
Riding Giants:
Riding Giants:
Riding Giants I
Riding Giants Quick
HI-F
Riding Giants Q
Trailer Lo-Res

Riding Giants Fan Sites:
Riding Giants

Submit your News, Information,
Pictures & Scoops on Riding Giants
Here: Gary@thezreview.co.uk

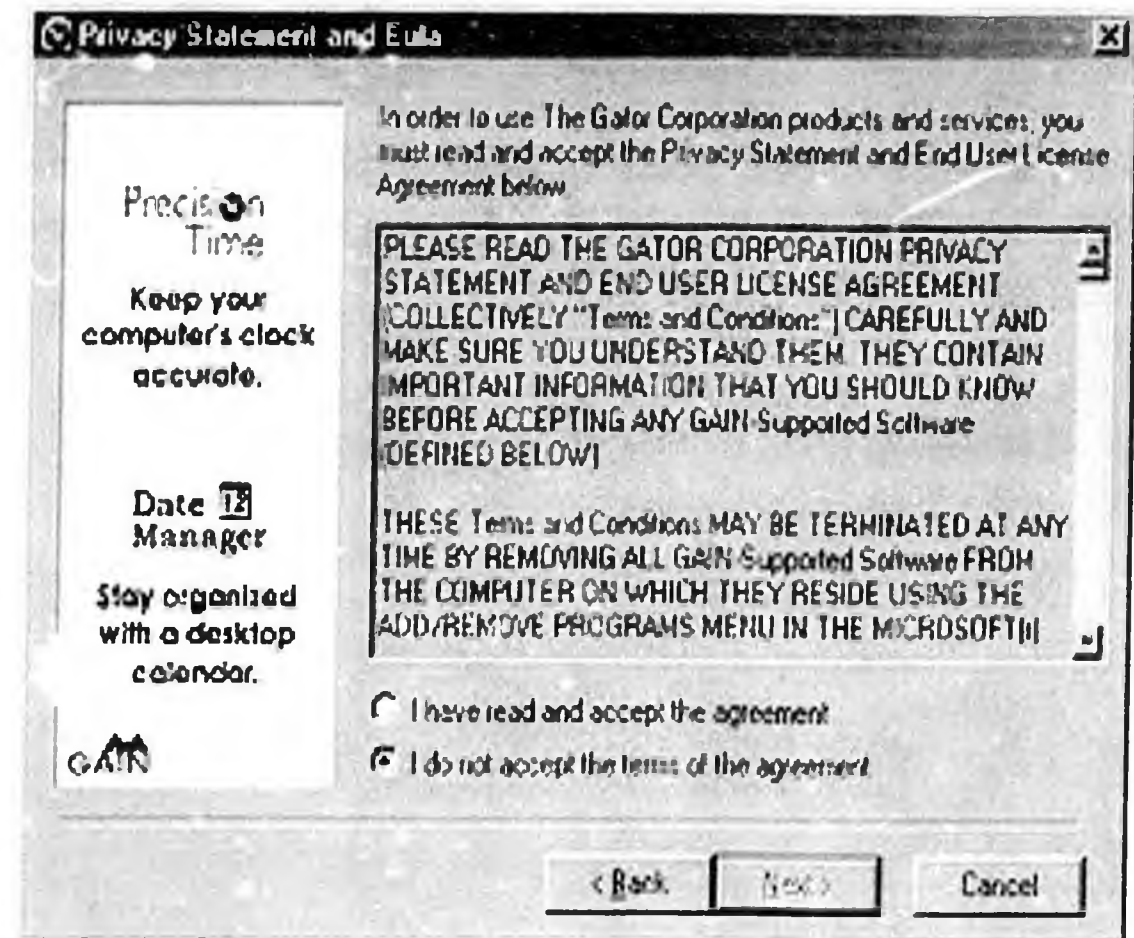
How does Spyware get installed?

- 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 3rd 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 Yesterday

March 21st 2005



■ *The Salt Lake Tribune*

- Utahans May Get Some Relief from Spyware,
http://www.sltrib.com/utah/ci_2615174

■ *The Annapolis Capitol*

- Maryland Lawmakers' bills would make spyware illegal, http://www.baltimorecapitol.com/whatsnew/03_21_05/03_21_05GOV

■ *Internetnews.com*

- Anti-Spyware Bill Introduced in U.S. Senate,
<http://www24.internetnews.com/business/article.php?id=431/01>

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

