



24-LS0739V  
Kurtz  
5/4/05

**HOUSE CS FOR SENATE BILL NO. 137( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-FOURTH LEGISLATURE - FIRST SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): SENATOR SEEKINS**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act providing that an institution providing accommodations exempt from the**  
2 **provisions of the Uniform Residential Landlord and Tenant Act may evict tenants**  
3 **without resorting to court proceedings under AS 09.45.060 - 09.45.160."**

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

5 **\* Section 1. AS 09.45.070 is amended by adding a new subsection to read:**

6 (c) Nothing in AS 09.45.060 - 09.45.160 shall be interpreted to require an  
7 institution providing a residence that is exempted by AS 34.03.330(b)(1) from the  
8 provisions of AS 34.03 to institute a court action to recover possession of that  
9 residence.

SIB157

Agency No. 04-02246 The Trial Court  
STATE OF ALASKA, FOURTH DISTRICT  
JUN 22 2004  
Clerk of the Trial Court  
By \_\_\_\_\_ Deputy

IN THE DISTRICT COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,

Plaintiff

**MISDEMEANOR  
COMPLAINT**

vs.

Francis Gerald Bragg

Defendant

CASE NO. 4FA-S04 - 2140 CR.

Criminal Trespass in the Second Degree

ID: 7126651 DOB: 12-15-1966

ATN: 106996374

AS 11.46.330(a)

CERTIFICATION

RES: UNKNOWN

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

THE COMPLAINANT STATES that on or about the 22nd day of June, 2004 at or near Fairbanks, in the Fourth Judicial District, State of Alaska, the above-named Defendant did unlawfully

(X) Commit the offense of Criminal Trespass in the Second Degree, when he/she entered or remained unlawfully;

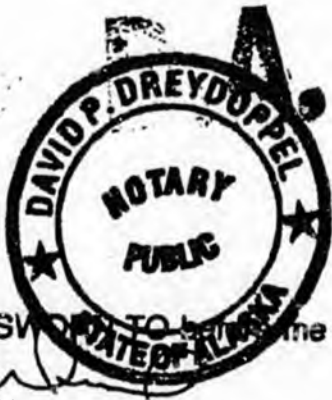
(X) in or upon premises; or  
\*AS 11.46.330(a)(1)\*

( ) in a propelled vehicle.  
\*AS 11.46.330(a)(2)\*

Francis BRAGG is trespassed from all UAF Residential Facilities, to include his former residence, 754 A Hess Village. BRAGG recieved numerous trespass warnings from various UAF Officials, who are granted the Authority to issue Trespasses. BRAGG was given one last warning on 6-22-2004, to leave the premisses/property of UAF Residential Facility 754 A Hess Village or he would be arrested for Criminal Trespassing. BRAGG refused to leave the property and he was arrested.

PC- A UAF staff person reported that a trespassed person (BRAGG) was in 754 A Hess Village.

All of which is a Class B Misdemeanor being contrary to and in violation of AS 11.46.330(a) and against the peace and dignity of the State of Alaska.



*[Handwritten Signature]*

SIGNATURE OF COMPLAINANT

I certify, under penalty of perjury, the foregoing is true.

SUBSCRIBED AND SWORN TO before me this 22 day of JUNE 2004

*[Handwritten Signature]*  
Notary Public for Alaska

9/12/2004  
My Commission Expires:

Screen for VRA Certification

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

<input checked="" type="checkbox"/> State of Alaska,	)
<input type="checkbox"/>	)
	)
Plaintiff,	)
	)
vs.	)
	)
Francis G. Bragg,	)
	)
Defendant.	)
DOB: 12-15-66	)
_____ )	
CASE NUMBER: 4FA-S04-2140 CR	)

ORDER OF DISMISSAL

Defendant's ID#: 7126651 ATN: 106996374 Date of Offense: 6-22-04  
Crime Charged: Criminal Trespass II  
Statute/Ordinance/Regulation: AS 11.46.330(a)

IT IS ORDERED that this case is dismissed pursuant to:  
 Rule 43(a) – Dismissal by Prosecuting Attorney  
 Rule 43(b) – Dismissal by Court  
 Rule 43(c) – Dismissal in Furtherance of Justice  
 Other: for the following reason(s):

IT IS FURTHER ORDERED that the defendant be released from custody, any bond executed on behalf of the defendant be exonerated, and any cash or other security posted as bail be refunded to the depositors.

Sept 9, 2004  
Date

Winston S. Burbank  
Winston S. Burbank  
District Court Judge

I certify that on 9-13-04  
a copy of this order was sent to: DA, PD, DPS,  
Clerk: SM FCC, NEWS

IN THE DISTRICT COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FRANCIS BRAGG, )  
 )  
 Defendant )

FILED in the Trial Court  
State of Alaska Fourth District  
AUG 30 2004  
By \_\_\_\_\_ Deputy

Case No.: No. 4FA-S04-2004 CR

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT

**Introduction**

The Defendant, Francis Bragg, hereinafter referred to as "Bragg", has filed a Motion to Dismiss the Complaint that has been filed against him in the above referenced matter. The Plaintiff, State of Alaska, hereinafter referred to as "State", has filed its opposition to Bragg's motion. An evidentiary hearing occurred before the Court on August 9, 2004. At the conclusion of the evidentiary hearing, the Court requested supplemental briefing from the parties. Pursuant to the briefing of the parties and the evidentiary hearing the Court is granting Bragg's motion to dismiss the State's complaint for criminal trespass for the reasons set forth below.

**Facts of the case**

A summary of the facts is that Bragg is a student at the University of Alaska Fairbanks, hereinafter referred to

"University". Bragg has signed two housing agreements with the University and that he and his family resides on the University premises. Bragg has been assigned an apartment to live in which is located within the complex known as Hess Village.

The University alleges that Bragg has breached and violated his housing agreement. These complaints are, but not limited to, the following:

- 1) A shouting match between Bragg and another resident, that took place in February 2004 regarding a survey that Bragg was distributing within the Hess Village, that at least one resident did not want to fill out;
- 2) Noise complaint from a neighbor within Hess Village;
- 3) Rough play with children on the Hess Village Basketball court (including picking up several of the boys and grabbing and swinging one of the boys by the arm);
- 4) A report of Bragg's children wandering through Hess Village unsupervised, while Bragg was asleep;
- 5) Another noise complaint from a neighbor;
- 6) Noise complaint regarding a party Bragg had for his daughter and her friends in the Hess Community Center (noise continued until 1:00 a.m.);
- 7) Noise complaint regarding Bragg yelling at his family inside and outside the apartment beginning at 7 o'clock in the morning;
- 8) Bragg sleeping in the 24-hour study area after he had been trespassed from housing;
- 9) Bragg on June 16, 2004 was verbally abusive to Director of Residence Life, Kevin Huddy, when Huddy responded to a neighbor's complaints about a party and loud music that continued into the early morning hours. Bragg became aggressive and stated the complaints were "bullshit" and that Huddy was an "asshole". The following day Bragg was summarily trespassed from the University housing areas.

On or about June 22, 2004 Bragg was arrested at his apartment for violating the criminal trespass notification that he had been given on June 17<sup>th</sup>.

#### Case analysis

In the present case Bragg has been charged with the crime of Criminal Trespass in the second degree. A person commits the crime of criminal trespass if the person enters or remains unlawfully upon the premises.<sup>1</sup>

Bragg entered into a lease agreement with the University on or about April 12, 2004. The lease agreement was for apartment 762C, located within the Hess Village complex. Bragg was occupying the aforementioned premises at all times which are pertinent to the above captioned case. In short, Bragg had the absolute right to occupy the premises pursuant to the lease agreement.

On June 17, 2004 Bragg was issued his notification of trespass, following his meeting with Mr. Huddy. The primary issue for the Court to consider is may the University charge Bragg with trespass for occupying premises that he was leasing from the University. Bragg had the legal right to be on his premises pursuant to the leasing contract that the University had executed with Bragg. Therefore, Bragg, having a legal right

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<sup>1</sup> AS 11.46.330(a)(1).

to occupy his apartment pursuant to his legally binding contract, how could he have unlawfully entered upon and unlawfully remained upon those premises?

The Court finds that by looking at Bragg's conduct in a light most favorable to the University, which conduct has been set forth above, that Bragg has probably breached his contract or rental agreement with the University. Therefore the University may terminate the agreement and by the terms of the agreement may have Bragg and his family evicted and removed from the premises. In the event that Bragg would not voluntarily remove himself from the premises the University could then file an action for Forcible Entry and Detainer (FED) and procure a Writ of Assistance to have Bragg forcibly removed from the premises.<sup>2</sup>

The University, rather than terminating the lease agreement and filing a FED, summarily trespasses Bragg for his conduct that has been summarized above, the day following his meeting with Mr. Huddy wherein Bragg called Mr. Huddy an "asshole". It is interesting to note that Bragg was only trespassed from his leased apartment. Bragg was not trespassed from Mr. Huddy's office or some other part of the University. It is also of interest that the summarized misconduct of Bragg is non-criminal

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<sup>2</sup> AS 09.45.060.

and is typical of the type of conduct that is normally present in Landlord/Tenant disputes. The Court finds that the issuance of the trespass notice to Bragg is essentially a de facto eviction, which improperly subjects Bragg to criminal ramifications.

The State and the University make the rather specious argument that the issuance of the trespass notice is similar to the issuance of a protective order pertaining to a situation involving domestic violence. The analogy that the University and the State are presenting is not valid. A protective order is issued only after the person has filed a petition with the Court and only after a judicial officer has found that the other party has committed an act of domestic violence and that a protective order is necessary to avoid future acts of domestic violence. Furthermore, the ex parte protective order is issued only for a limited period of time. In the present case a notice of criminal trespass was issued by Mr. Huddy the day following the confrontation between Bragg and Mr. Huddy, which conduct was non-criminal.

Bragg had a legal right to occupy the premises pursuant to his lease agreement with the University. The University has the right to terminate the lease agreement for good cause and to having Bragg evicted from the premises. Until the time that the contract has been terminated and Bragg has been evicted from the

premises he has the lawful right to be present within his apartment unit and may not be criminally trespassed for legally occupying his apartment dwelling unit.

#### Conclusion

In conclusion the Court finds that Bragg has a legal right to occupy his apartment pursuant to the lease agreement. Because Bragg has a legal right to occupy those premises, he may not be legally trespassed from those premises. Therefore, Bragg's motion is granted and the Complaint against Bragg charging him with Criminal Trespass in the second degree is hereby dismissed.

Dated at Fairbanks, Alaska this 26<sup>th</sup> day of August 2004.

I certify that on 8-30-04  
copies of this form were sent to DA, PD  
CLERK: SN

  
WINSTON S. BURBANK  
District Court Judge

137  
SP5T

Care

Amendment

Insert at p. 1 line 7,

replace "a residence" with

"a student residence at ~~the~~

educational institution"

# LEGAL SERVICES

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

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 5th St., Rm. 329

## MEMORANDUM

April 27, 2005

**SUBJECT:** Effect of SB 137 (Work Order No. 24-LS0739A)

**TO:** Senator Ralph Seekins  
Attn: Joe Michel

**FROM:** Kathryn L. Kurtz *KLK*  
Legislative Counsel

You requested a legal opinion as to the effect of the above noted bill.

Certain rental arrangements are already exempt under state law from the provisions of the Uniform Residential Landlord and Tenant Act (AS 34.03), including those specified in AS 34.03.330(b)(1):

(b) Unless created to avoid the application of this chapter, the following arrangements are not governed by this chapter:

(1) residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar services; . . .

This bill provides that nothing in the state statutes governing forcible entry and detainer (AS 09.45.060 - 09.45.160) may be interpreted to require landlords in those rental arrangements specified above to institute court proceedings to recover possession of the residence.

KLK:med  
05-313.med

Sec. 14.40.240. Power of president to suspend and expel students.

The power to suspend and expel a student for misconduct or other cause and to reinstate the student is vested solely in the president of the University of Alaska. The president may delegate the exercise of the power to the chancellor or another official on each campus of the university or to the administrative head or director of a community college or other campus or extended unit of the university.

Sec. ~~34.03.330~~. Application and exclusions.

(a) This chapter applies to and determines rights, obligations and remedies under a rental agreement, wherever made, for a dwelling unit in this state.

(b) Unless created to avoid the application of this chapter, the following arrangements are not governed by this chapter:

(1) residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar services;

(2) occupancy under a contract of sale of a dwelling unit or the property of which it is a part if the occupant is the purchaser or a person who succeeds to the interest of a purchaser;

(3) occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

(4) transient occupancy in a hotel, motel, lodgings, or other transient facility;

(5) occupancy by an employee of a landlord whose right to occupancy is conditioned upon employment substantially for services, maintenance, or repair to the premises;

(6) occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;

(7) occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes;

(8) occupancy under a rental agreement covering premises used as part of a transitional or supportive housing program that is sponsored or operated by a public corporation or by a nonprofit corporation and that provides shelter and related support services intended to improve the occupant's opportunity to obtain permanent housing.

Sec. ~~09.45.060~~. Prohibition of use of force for entry on realty.

A person may not enter upon any land, tenement, or other real property except in cases where entry is given by law. In those cases the entry may not be made with force but only in a peaceable manner.

Sec. 09.45.07 ). Action for forcible entry or detention.

(a) When a forcible entry is made upon a premises, or when an entry is made in a peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover the possession.

(b) *[Repealed, Sec. 1 ch 73 SLA 1966].*

Sec. 09.45.080. Undertaking on appeal. *[Repealed, Sec. 4 ch 10 SLA 1974].*

Repealed or Renumbered

Sec. 09.45.090. Unlawful holding by force.

(a) For property to which the provisions of AS 34.03 (Uniform Residential Landlord and Tenant Act) apply, unlawful holding by force includes each of the following:

(1) when, for failure or refusal to pay rent due on the lease or agreement under which the tenant or person holds, and after service, under AS 09.45.100 (b), of the written notice required by AS 34.03.220(b) by the landlord for recovery of possession of the premises if the rent is not paid, the tenant or person in possession fails or refuses to vacate or pay the rent within seven days;

(2) when,

(A) after a violation of a condition or covenant set out in AS 34.03.120(a), other than a breach of AS 34.03.120 (a)(5) due to the deliberate infliction of

substantial damage to the premises, or after a breach or violation of a condition or covenant in a lease or rental agreement and following service of written notice to quit, the tenant fails or refuses to remedy the breach or to deliver up the possession of the premises within the number of days provided for termination under AS 34.03.220 (a)(2);

(B) after a violation of AS 34.03.120 (a)(5) by deliberate infliction of substantial damage to the premises, following service of written notice to quit, the tenant fails or refuses to deliver up the possession of the premises by the date set out in the written notice to quit under AS 34.03.220 (a)(1);

(C) after a violation of AS 34.03.220 (e) following discontinuance of a public utility service, following service of written notice to quit, the tenant fails or refuses to deliver up the possession of the premises by the date set out in the written notice to quit under AS 34.03.220(e);

(D) the landlord requires the tenant to vacate the premises for a reason set out in AS 34.03.310 (c)(2) or (c)(4) - (7), following service of written notice to quit, the tenant fails or refuses to deliver up the possession of the premises within the longer of 30 days or the period of notice for the landlord's recovery of possession of the premises set out in the rental agreement;

(E) in a mobile home park, there is to be a change in the use of land for which termination of tenancy is authorized by AS 34.03.225(a)(4), following service of written notice to quit, the mobile home dweller or tenant fails or refuses to vacate within the number of days provided for termination under AS 34.03.225 (a)(4);

(F) after termination of a periodic tenancy as prescribed by AS 34.03.290(a) or (b), following service of written notice to quit, the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or after the date of its expiration;

(G) after the tenant has violated AS 34.03.120 (b) or the tenant has used the dwelling unit or allowed the dwelling unit to be used for an illegal purpose in violation of AS 34.03.310 (c)(3) other than a breach of AS 34.03.120 (b), following service of written notice to quit, the tenant fails or refuses to deliver up the possession of the premises within five days; or

(H) following service of written notice to quit, a person in possession continues in possession of the premises without a valid rental agreement, as that term is defined in AS 34.03.360, and without the consent of the landlord; or

(3) when, without a notice to quit, a tenant or person in possession continues in possession of the premises after the tenancy has been terminated by issuance of an order of abatement under AS 09.50.210 (a).

(b) For property to which the provisions of AS 34.03 (Uniform Residential Landlord and Tenant Act) do not apply, unlawful holding by force includes each of the following:

(1) when, for failure or refusal to pay rent due on the lease or agreement under which the tenant or person in possession holds, after service, under AS 09.45.100 (c), of demand made in writing by the landlord for the possession of the premises if the rent is not paid, the tenant or person in possession fails or refuses to vacate or pay the rent due within seven days;

(2) when, following service of a written notice to quit,

(A) after the tenant or person in possession has breached or violated a condition or covenant of the lease or rental agreement other than breach of a covenant or condition set out in (B) of this paragraph, the tenant or person in possession of a premises fails or refuses to deliver up the possession of the premises within 10 days;

(B) after the tenant or person in possession has deliberately inflicted substantial damage to the premises, the tenant or person in possession of a premises fails or refuses to deliver up the possession of the premises on the date required by the landlord; the date specified may not be less than 24 hours after demand for possession of the premises by the landlord;

(C) after the tenant or person in possession has violated AS 34.05.100(a) or has used the premises for or allowed the premises to be used for an illegal purpose, the tenant or person in possession fails or refuses to deliver up the possession of the premises within five days;

(D) for premises the lease or occupation of which is primarily for the purpose of farming or agriculture, after the tenant or person in possession has violated AS 34.05.025, other than a violation that is a breach under (B) or (C) of this paragraph, the tenant fails or refuses to deliver up possession of the premises within 30 days;

(E) a tenancy based upon an estate at will terminates, and the tenant or person in possession continues in possession of the premises; or

(F) a person in possession continues in possession of the premises

(i) at the expiration of the time limited in the lease or agreement under which that person holds; or

(ii) without a written lease or agreement and without the consent of the landlord; or

(3) when, without a notice to quit, a tenant or person in possession continues in the possession of the premises after the tenancy has been terminated by issuance of an order of abatement under AS 09.50.210 (a).

(c) When a landlord who is required to provide written notice to a tenant or person in possession under (a) or (b) of this section, provides notice by mail, notwithstanding any other provision of law, three days must be added to the period set out in (a) or (b) of this section to determine the date on and after which the tenant or person in possession unlawfully holds by force.

Sec. 09.45.100. Notice to quit.

(a) Except where service of written notice is made under AS 09.45.090(a)(1) or (b)(1), or except when notice to quit is not required by AS 09.45.090 (a)(3) or (b)(3), a person entitled to the premises who seeks to recover possession of the premises may not commence and maintain an action to recover possession of premises under AS 09.45.060 ~~09.45.160~~ unless the person first gives a notice to quit to the person in possession.

(b) To recover possession of premises after a tenant or person in possession has failed or refused to pay rent due, service of the written notice required by AS 34.03.220 (b) or of a demand in writing for possession of the premises

(1) constitutes notice to quit, and service of a separate notice to quit is not required; and

(2) satisfies the requirements of (c) of this section and AS 34.03.310(c).

(c) A notice to quit shall be in writing and shall be served upon the tenant or person in possession by being

(1) delivered to the tenant or person;

(2) left at the premises in case of absence from the premises; or

(3) sent by registered or certified mail.

Sec. 09.45.105. Content of notice to quit.

Notice to quit served upon the tenant or person in possession must

(1) state

(A) the nature of the breach or violation of the lease or rental agreement or other reason for termination of the tenancy of the tenant or person in possession;

(B) in circumstances in which the breach or violation described in (A) of this paragraph may be corrected by the tenant or person in possession to avoid the termination of the tenancy, the nature of the remedial action to be taken, and the date and time by which the corrective actions must be completed in order to avoid termination of the tenancy;

(C) the date and time when the tenancy of the tenant or person in possession under the lease or rental agreement will terminate;

(2) direct the tenant or person in possession to quit the premises not later than the date and time of the termination of the tenancy; and

(3) give notice to the tenant or person in possession that, if the tenancy terminates and the tenant or person in possession continues to occupy the premises, the landlord may commence a civil action to remove the tenant or person and recover possession.

Sec. 09.45.110. Time when action to recover possession may be brought.

An action for the recovery of the possession of the premises may be commenced on or after the date the tenant or person in possession unlawfully holds possession of the dwelling unit or rental premises by force, as determined under AS 09.45.090.

Sec. 09.45.120. Summons and continuance.

Summons in actions for forcible entry and detainer shall be served not less than two days before the date of trial. A continuance may not be granted for a longer period than two days unless the defendant applying for the continuance gives an undertaking to the adverse party, with sureties approved by the court conditioned to the payment of the rent that may accrue if judgment is rendered against the defendant.

Sec. 09.45.130. Action against persons paying rent in advance.

The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against the tenant or person for the possession of the premises until the expiration of the period for which that tenant or person may have paid rent for the premises in advance. To authorize an action against a tenant or person in possession who has paid rent in advance, a notice must be given at least 10 days before the date the rent is due again in case of a month-to-month tenancy or at least three days before in the case of a week-to-week tenancy.

Sec. 09.45.135. Action against tenant occupying premises abated as nuisance.

In an action under AS 09.45.060 ← 09.45.160 against a tenant or person in possession of premises for which an order of abatement has been entered under AS 09.50.210 (a), a certified copy of the order of abatement is prima facie evidence of unlawful holding of the premises by force by a person who remains on the premises.

Sec. 09.45.140. Agricultural tenant.

When the leasing or occupation is for the purpose of farming or agriculture, the tenant or person in possession shall, after the termination of the lease or occupancy, have free access to the premises to cultivate and harvest or gather

any crop or produce of the soil planted or sown by the tenant or person before the service of the notice to quit.

Sec. 09.45.150. Inquiry into merits of title.

In an action to recover the possession on the land, tenement, or other real property where the entry is forcible or when the possession is unlawfully held by force, there shall be no inquiry into the merits of the title. Three years' quiet possession of the premises immediately preceding the commencement of the action by the party in possession or those under whom the party holds may be pleaded in bar thereof unless the estate of the party in the premises is ended.

Sec. 09.45.158. Action by nonprofit housing corporation.

A nonprofit housing corporation may designate an officer or employee of the corporation who is not an attorney to commence and maintain an action under AS 09.45.060 ~~09.45.160~~ on behalf of the corporation against a tenant or person in possession. When, under this section, a nonprofit corporation appears by an officer or employee of the corporation who is not an attorney, the written proceedings shall be in the name of the person representing the corporation and that person is the sole representative of the corporation as between the corporation and the adverse party.

Sec. 09.45.160. Actions for possession of realty.

In an action to recover the possession of real property as provided in AS 09.45.630, notice to quit, when necessary, may be given as prescribed in AS 09.45.060 ~~09.45.160~~, and nothing in AS 09.45.060 ~~09.45.160~~ shall be construed so as to prevent such an action being maintained for the recovery of the possession.

Sec. 11.46.350. Definition (trespassing)

(a) As used in AS 11.46.300 - 11.46.350, unless the context requires otherwise, "enter or remain unlawfully" means to

(1) enter or remain in or upon premises or in a propelled vehicle when the premises or propelled vehicle, at the time of the entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so;

(2) fail to leave premises or a propelled vehicle that is open to the public after being lawfully directed to do so personally by the person in charge; or

(3) enter or remain upon premises or in a propelled vehicle in violation of a provision in an order issued or filed under AS 18.66.100 - 18.66.180 or issued under former AS 25.35.010 (b) or 25.35.020.

(b) For purposes of this section, a person who, without intent to commit a crime on the land, enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, is privileged to do so unless

(1) notice against trespass is personally communicated to that person by the owner of the land or some other authorized person; or

(2) notice against trespass is given by posting in a reasonably conspicuous manner under the circumstances.

(c) A notice against trespass is given if the notice

(1) is printed legibly in English;

(2) is at least 144 square inches in size;

(3) contains the name and address of the person under whose authority the property is posted and the name and address of the person who is authorized to grant permission to enter the property;

(4) is placed at each roadway and at each way of access onto the property that is known to the landowner;

(5) in the case of an island, is placed along the perimeter at each cardinal point of the island; and

(6) states any specific prohibition that the posting is directed against, such as "no trespassing," "no hunting," "no fishing," "no digging," or similar prohibitions.

**UNIFORM RESIDENTIAL  
LANDLORD AND TENANT ACT**

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

and by it

**APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES**

at its

**ANNUAL CONFERENCE  
MEETING IN ITS EIGHTY-FIRST YEAR  
AT SAN FRANCISCO, CALIFORNIA  
AUGUST 4 – 11, 1972**

**WITH AMENDMENTS APPROVED, AUGUST 1974**

*WITH COMMENTS*

Approved by the American Bar Association at its  
Midyear Meeting in Houston, Texas, February, 1974

PART II  
SCOPE AND JURISDICTION

§ 1.201. [Territorial Application] This Act applies to, regulates, and determines rights, obligations, and remedies under a rental agreement, wherever made, for a dwelling unit located within this state.

§ 1.202. [Exclusions from Application of Act] Unless created to avoid the application of this Act, the following arrangements are not governed by this Act:

(1) residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service;

(2) occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest;

(3) occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

(4) transient occupancy in a hotel, or motel [or lodgings [subject to cite state transient lodgings or room occupancy excise tax act]];

(5) occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises;

(6) occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;

(7) occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

**Comment**

This Act regulates landlord-tenant relations in residential properties. It is not intended to apply where residence is incidental to another primary purpose such as residence in a prison, a hospital or nursing home, a dormitory owned and operated by a college or school, or residence by a landlord's employee such as a custodian, janitor, guard or caretaker rendering service in or about the demised

premises. This Act is intended to apply to government or public agencies acting as landlords (Section 1.301 (8)).

This Act does not apply to occupancy by a purchaser under a contract of sale. This Act applies to occupancy by the holder of an option to purchase, as distinguished from a contract of sale.

This Act applies to roomers and boarders but is not intended to apply to transient occupancy. In many jurisdictions transient hotel operations are subject to special taxes and regulations and, where available, determinations under such authority constitute appropriate criteria.

All of the exclusions enumerated apply only to genuine, bona fide arrangements not created to avoid the application of the Act and are subject to the test of good faith (see Section 1.302).

[Subsection (3) ] A fraternal or social organization is deemed to also cover "athletic club".

#### **[§ 1.203. [Jurisdiction and Service of Process]**

(a) The [ ] court of this state may exercise jurisdiction over any landlord with respect to any conduct in this state governed by this Act or with respect to any claim arising from a transaction subject to this Act. In addition to any other method provided by rule or by statute, personal jurisdiction over a landlord may be acquired in a civil action or proceeding instituted in the court by the service of process in the manner provided by this section.

(b) If a landlord is not a resident of this state or is a corporation not authorized to do business in this state and engages in any conduct in this state governed by this Act, or engages in a transaction subject to this Act, he may designate an agent upon whom service of process may be made in this state. The agent shall be a resident of this state or a corporation authorized to do business in this state. The designation shall be in writing and filed with the [Secretary of State]. If no designation is made and filed or if process cannot be served in this state upon the designated agent, process may be served upon the [Secretary of State], but service upon him is not effective unless the plaintiff or petitioner forthwith mails a copy of the process and pleading by registered or certified mail to the defendant or respondent at his last reasonably ascertainable address. An affidavit of compliance with this section shall be filed with the clerk of the court on or before the return day of the process, if any, or within any further time the court allows.]

# Residence Hall Application/Agreement



This agreement is for fall 2004 and spring 2005 semesters.

If this is a new agreement, return this form with \$260 (\$225 damage/reservation deposit + \$35 non-refundable application fee) to:  
 UAF Admissions • P.O. Box 757480, Fairbanks, AK 99775-7480

www.uaf.edu/reslife • tel 907-474-7247 • fax 907-474-6423 • e-mail housing@uaf.edu

Tell us about yourself! Please print.

Phone ( ) \_\_\_\_\_

Name \_\_\_\_\_ Student ID (usually SS#) \_\_\_\_\_

          Last                      First                      Middle

Cell phone ( ) \_\_\_\_\_

Present Mailing Address \_\_\_\_\_ Other phone ( ) \_\_\_\_\_

\_\_\_\_\_ E-mail address \_\_\_\_\_

Permanent Mailing Address \_\_\_\_\_  Please e-mail all materials

Hall preference \_\_\_\_\_ Major: \_\_\_\_\_  I have previously lived on campus.

(Your hall preference will be considered, but cannot be guaranteed)  
 (1) This agreement begins: Year \_\_\_\_\_  Fall  Spring

(2) Birth date \_\_\_\_/\_\_\_\_/\_\_\_\_ Gender:  Male  Female

(3) Name of preferred roommate\*: \_\_\_\_\_

**Special considerations:**

\* Roommate requests are granted when space is available, when the requests are mutual, and when both applications are received on or about the same date.

**Are you interested in any of these living options?**

Double  Single\*  Double-Single\*\*

What is your age? \_\_\_\_\_

\* a room built for one and occupied by one

\*\* a room built for two but occupied by one

Interest in these types of accommodations does not guarantee placement.

**Expected university class standing:**

Freshman  Junior  Graduate  
 Sophomore  Senior

**Please mark all that apply to you (please be honest):**

Non-Smoker  Tidy  Early Riser  Quiet  
 Smoker  Less Tidy  Night Owl  Less Quiet

Traditional first-time freshmen (younger than 20 years of age with less than 20 post high school credits) must live in designated EDGE halls and enroll in orientation.

**UAF RESIDENCE HALL CALENDAR**

Aug. 29 ..... Halls open, 8 a.m.  
 Sept. 2 ..... Classes begin  
 Dec. 19 ..... Halls close, noon  
 Jan. 18 ..... Halls open, 8 a.m.  
 Jan. 20 ..... Classes begin  
 May 13 ..... Halls close, noon

The University of Alaska Fairbanks provides equal housing opportunity and assigns units without discrimination on the basis of race, religion, color, sex, physical or mental disability or national origin. The Department of Residence Life has facilities accessible for mobility-impaired students. All correspondence must be in writing from student and shall be mailed to the University at the above postal address. The student understands that Alaska Statute 34.03 et seq., the Alaska Uniform Residential Landlord Tenant Act does not apply in this Agreement. NOTE: Application for and confirmation of admission to the University of Alaska Fairbanks and application for Residence Hall accommodations are separate transactions, acted upon separately by the University. Return of this Application/Agreement does not guarantee that accommodations will be available in the residence halls. Any questions you have about the terms and conditions of this Agreement should be directed toward the Department of Residence Life prior to signing it. The University shall be entitled to all remedies provided by law in this Agreement.

**Please read both sides of this agreement carefully before signing.**

I ACCEPT the terms and conditions of this agreement. I understand that by signing this agreement, I am personally (jointly and separately) responsible for compliance with all of the terms of this agreement. Cancellations of housing accommodations after Aug. 1 will result in the forfeiture of my entire damage/reservation deposit plus any other associated housing charges. Room reservations are guaranteed until 9:00 a.m. on the first day of classes. I UNDERSTAND that signing this agreement for fall 2004 obligates me to stay on campus for both fall 2004 and spring 2005 semesters. I UNDERSTAND that by signing this document I am incurring a debt that must be paid (be sure to read the back side of this form to understand your obligation).

Student Signature \_\_\_\_\_ Date \_\_\_\_\_

**New Agreements:** Complete the following if you wish to charge your credit card \$260 (\$225 damage deposit plus \$35 non-refundable application fee):  Visa  MasterCard  Discover

Number \_\_\_\_\_ Expiration Date \_\_\_\_\_

**FOR RESIDENCE LIFE USE ONLY**

RECEIVED BY	DATE	RECEIPT #
CREDITS	HALL	ROOM #
COMMENTS	<input type="checkbox"/> DOUBLE <input type="checkbox"/> DOUBLE SINGLE <input type="checkbox"/> SINGLE	

## Residence Hall Agreement

**TERMS OF OCCUPANCY** Student is responsible for all of the terms of this Agreement and as a member of the Residence Hall Association agrees to comply with all University rules, regulations, policies, procedures and community living standards including those printed in the Class Registration Schedule, the Residence Life Handbook, the University Catalog and any other University publication or electronic access site. All such rules and regulations are by this reference incorporated into this Agreement. The period of occupancy for this agreement and the academic year will begin on the first day of the fall semester as specified by the University and will end on the day after the last regularly scheduled final examination for the spring semester. Occupancy will not begin until the official opening day unless pre-approved arrangements are confirmed by the Department of Residence Life. Additional housing charges may be assessed to the student. As a campus resident, you are required to purchase a board plan for both the fall and spring semesters. Excluded from this provision are graduate students and those students living in the Cutler Apartment Complex and Wickes Hall. All board plans can be purchased with, and activated by, UAF Dining Services, Room 106 Eielson, or at the Lola Tilly Commons. For more information about the available board plan options, costs, program parameters, as well as the Agreement for Services, please visit [www.uaf.edu/fonds/](http://www.uaf.edu/fonds/) or call (907) 474-6661.

**NOTE:** Occupancy dates are subject to changes in the academic calendar. Students wishing to remain in campus housing between semesters must apply, be accepted, and pay a fee. Each approved student will be consolidated into an open residence hall(s). Failure to complete registration (course selection and payment of fees) constitutes a breach of this Agreement. Persons breaching their Agreement will be assessed room costs as defined in the "REFUNDS/COSTS" section of this Agreement and be required to move out. At the opening of each semester and at times of unanticipated over-enrollment, the student may be assigned to overflow housing space. Overflow assignments will be charged at the standard rate.

**ACADEMIC YEAR AGREEMENT:** The term of this agreement is for the entire academic year or for the remainder of the academic year, if entered into after the beginning of the academic year. The academic year consists of fall and spring semester and does not include summer sessions which are acted upon separately by the University. Any student who continues to be enrolled at the University of Alaska Fairbanks shall honor the terms of this Agreement for both the fall and spring semesters and shall be charged the full amount of the fall and spring housing fees. Students graduating in December or not enrolling for spring semester must provide notice of cancellation by Dec. 1 and must complete proper check-out (see "TERMINATION/FORFEITS" section).

This Agreement is not a lease. It creates no exclusive right on the part of the Student to occupy any portion of University property. The University may assign or reassign the Student to specific housing when, in the University's sole discretion, it deems such action necessary. The Student may not assign any rights or obligations created by this agreement. Eligibility: All students of UAF are eligible for campus housing but are not guaranteed housing until approved by the Department of Residence Life. To better manage occupancy, Residence Life may establish occupancy priorities and eligibility/credit hour requirements at any time deemed necessary.

**UNIVERSITY AUTHORITY:** The University reserves the right to:

a) Change room assignments (consolidate) when vacancies occur and single occupants are residing in multiple capacity rooms or when less than four students are living in one Cutler apartment (the remaining residents) must accept another roommate and/or move to another room/apartment. Students already on the double/single waiting list may keep the room and assume the additional cost if space is available.

b) Re-assign students from a room, floor, hall, or residence system if necessary for health, safety, financial, or disciplinary purposes or when premises are unsuitable for occupancy.

c) Enter any unit in order to inspect the same, make essential, preventative, routine, or agreed upon repairs, decorations, alterations or improvements, supply necessary or agreed upon services, or exhibit the premises to laborers or contractors, or as is otherwise necessary in the operation and/or protection of the premises or persons therein.

d) Enter any premises in the event of an apparent or actual emergency, if there is reason to believe that a University policy is being violated or when other community members' rights are being violated and entry cannot be gained by normal means.

e) Close a residence and re-assign residents to available space in other residences or within a residence when sufficient vacancies occur and/or the need arises.

f) Refuse or terminate housing to any student who is delinquent in the payment of resident fees, who has demonstrated an unwillingness to abide by Board of Regents policy, University Regulations and Residence Life rules and procedures, who may impact the community and/or students personal safety, or who exhibits behavior which is incompatible with maintaining of order and propriety of the Residence life community.

If the Student chooses to vacate their assigned unit during the term of this Agreement, but remains enrolled at the University, or the Student fails to occupy their reserved space by the first day of classes, the Student will forfeit their deposit and will agree to pay for occupancy as outlined in the "REFUNDS/COSTS" section. After Aug. 1, students who have submitted applications are expected to live on campus and pay appropriate housing fees for their reserved space. **NOTE:** Notification of student status to other departments within the University does not cancel this Agreement. Damage/reservation deposits (currently \$225) will be held by the University and carried forward to subsequent academic years until the termination of this Agreement. At the time of termination, the deposit may be used to cover cancellation/termination charges plus costs for any loss or damage caused during occupancy and not otherwise paid or provided for by the Student. The same may be applied to pay for other obligations owed by the Student to the University. Any portion of such deposit applied as provided herein will be mailed to the Student within 30 working days after proper check-out. Deposits will be forfeited for the following reasons: 1) failure to complete proper check-in by 9:00 am on the first day of classes; 2) termination of occupancy during the first sixty (60) days after the official fall opening; 3) canceling room reservations after Aug. 1; 4) failure to properly check out of a room or apartment. **NOTE:** All provisions of this Agreement apply to students with a confirmed room reservation for Spring semester except that the date of record will be changed from Aug. 1 to Dec. 1.

**REFUNDS/COSTS:** All room costs are subject to change if rates increase after student application, students with accepted agreements will be given the opportunity to withdraw their application without penalty (less application fee).

Students terminating their Agreements will be charged room rent based on the following schedule:

### FALL:

Prior to Aug. 1: Refund deposit, 0% of the semester charge  
Aug. 1-Sept. 9: Forfeit deposit, 10% of the semester charge  
Sept. 10-Sept. 23: Forfeit deposit, 25% of the semester charge  
Sept. 24-Oct. 14: Forfeit deposit, 50% of the semester charge  
Oct. 15-Nov. 4: Forfeit deposit, 75% of the semester charge  
After Nov. 4: Forfeit deposit, no refund or credit

### SPRING:

Prior to Dec. 1 (if new agreement in spring):  
Refund deposit, 0% of the semester charge  
Prior to Dec. 1 (continuation of fall agreement):  
Forfeit deposit, 0% of the semester charge  
Dec. 1-Jan. 26: Forfeit deposit, 10% of the semester charge  
Jan. 27-Feb. 7: Forfeit deposit, 25% of the semester charge  
Feb. 8-Mar. 2: Forfeit deposit, 50% of the semester charge  
Mar. 3-Mar. 23: Forfeit deposit, 75% of the semester charge  
After Mar. 23: Forfeit deposit, no refund or credit

**CHECK OUT:** A student's occupancy in University housing is terminated by the University by official check-out (personally signing out) with a Residence Life Staff member. Students failing to complete an official check-out forfeit their deposit and will be assessed all appropriate cleaning, damage and check out fees (or housing charges). The Student must provide written notice of cancellation as outlined in "TERMINATION/FORFEITS" section below. On or before the date of hall closing or termination, student must remove himself/herself and all personal property from the premises. The Premises, including equipment, furniture and fixtures shall be clean and in as good order and condition as when received, reasonable wear and tear expected. Upon termination of the Agreement, the University shall have, and is hereby granted, full and free right to remove property of the Student or others from the Premises without being guilty of trespass, eviction or forcible entry and detainer, and without relinquishing any of the University's legal rights. Any and all property which may be removed from the Premises by the University pursuant to the authority of this Agreement or of law, to which the Student or others may be entitled, shall be handled or removed by the University at the risk, cost and expense of the Student.

**WAIVER AND SEVERABILITY:** No term or condition of this Agreement can be waived by the University except as authorized in writing by the Director of Residence Life or designee. Requests must be made in writing. Should any clause or portion of this Agreement be

held invalid, the other portions of this Agreement shall remain in full force and effect.

**UNIVERSITY RULES AND PROCEDURES:** These are printed below for your convenience, but are not to take the place of the Residence Life Handbook which should be referred to for more specific information on Residence Life rules and procedures:

a) A room/apartment is to be occupied only by the Student(s) for whom it is reserved. Rooms/apartments may not be sublet or used by non-residents for any purpose.

b) Prohibited items in residential rooms/apartments include corrosive, combustible, hazardous or other dangerous substances, firearms, ammunition, other weapons, and cooking and food storage appliances unless approved by the Department of Residence Life.

c) All weapons must be stored at the UAF Police Department and cannot be kept in rooms or apartments. The University reserves the right to remove all prohibited items. Prohibited activities include, but are not limited to: possession or use of illegal drugs or substances, possession or use of alcoholic beverages by persons under Alaska's legal age, public display of offensive materials, relocation of University furniture from one room to another, keeping of pets, and cooking and smoking in unauthorized areas.

d) Residents are responsible for damages beyond normal wear to localities and equipment. Each Student will be charged for damage, or other loss incurred, to their room, the building, furniture, and equipment that is a result of carelessness or misconduct. Damage within the student room, apartment, or the common areas located throughout the building (unless individual responsibility is determined), will be attributed to all occupants of that room, apartment or all resident students served by the common areas. Student agrees to remove all stored personal property from University facilities upon termination of this Agreement. If the Student fails to remove said property, Student hereby authorizes the University to make disposition of such property in any manner in which the University sees fit, without further recourse from the Student.

f) Student shall not make any material alterations in the space without express written permission from the Department of Residence Life, shall not damage nor permit the damage of any part of the space, shall not do or permit the doing of anything that shall constitute a fire or health hazard, and shall not permit the accumulation of waste and refuse within the space. Violation of these term and conditions may be considered sufficient reason for monetary fines and disciplinary action, including, but not limited to, dismissal from the University residence halls (and possibly the University).

g) Students may occupy their rooms during Thanksgiving and "spring break" with no additional charge; however, Students who wish to remain on campus during the period between semesters must arrange for accommodations separately and pay an additional charge. No board program meals are provided during vacation periods.

h) Student hereby agrees to obey all applicable University, local, state, and federal laws and regulations which are now in effect or which may become effective during the term of this agreement.

**INDEMNITY/LIABILITY:** The University accepts no liability for:

a) Damage or injury to persons or property or loss of property of Student unless the same is caused by the gross negligence or willful misconduct of the University.

b) The loss, damage, or destruction to all personal belongings in the custody of, belonging to, or stored by the Student, regardless of cause. This includes losses that occur in the Student's room, storage room, and public area, in other areas of the hall or campus. The University strongly recommends that students secure insurance for personal property with a private insurance company. The University does not insure the student's private property.

**TERMINATION/FORFEITS:** Agreement may be terminated by the Student as follows:

a) Prior to Aug. 1: The Student may cancel this Agreement at anytime prior to Aug. 1 without penalty (less \$35 application fee) by filing a written notice to Residence Life.

b) Graduation, Total Withdrawal or Marriage: The Student may cancel this Agreement for Spring semester without forfeiture of the deposit for reasons of graduation, total enrollment withdrawal or for marriage by filing a written notice and appropriate documentation in Residence Life by Dec. 1.

c) Hardship: The Student may request cancellation of this Agreement for hardship by filing a written request to Residence Life. Hardship requests will be reviewed by the Business Manager of Residence Life for approval or denial. If approved, you will be notified in writing. If denied, you will be notified in writing and held to the terms of this agreement for the remainder of the academic year.

January 2004

MAIL IN BUSINESS REPLY ENVELOPE

## Conviction Disclosure Form

You are required to sign and return this form even if you answer NO to these questions.

Changes to Residence Life Application mandated by UA Board of Regents to be implemented for applications as of Sept. 12, 2004

Do you presently have felony charges pending against you or have you ever been convicted of a felony?

Yes\*  No

Do you presently have charges pending against you, or have you ever been convicted of a misdemeanor or felony sex offense crime, or an attempt to commit such a crime, as defined by Title 11 of Alaska Statutes?

The Alaska Statutes are viewable online at [www.legis.state.ak.us/folhome.htm](http://www.legis.state.ak.us/folhome.htm).

Yes\*  No

\* If you answered yes to either of these questions, please explain on the back

Name \_\_\_\_\_

Student ID number \_\_\_\_\_

Social security number \_\_\_\_\_



**UAF**  
The

MAIL IN BUSINESS REPLY ENVELOPE

**Conviction disclosure explanation sheet**

*If you answered yes to either of the questions on the front, please provide information about the crime you have been convicted of, date of conviction, court convicted in and sentence received. If you need more space, please attach a separate sheet. The explanation sheet must have your signature and authorize the UAF Department of Residence Life to conduct a detailed criminal background check.*

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*I authorize the UAF Department of Residence Life to conduct a detailed criminal background check of my past*

Student Signature \_\_\_\_\_ Date \_\_\_\_\_

**Removing Students from Student Housing:** The university has experienced unnecessary and unjustifiable expense, disruption, and delay associated with efforts to remove disruptive students from university housing. This issue arises out of judicial application of forcible entry and detainer law, which law more properly applies to non-educational rental and lease contracts, to student housing contracts. In short, the application of this law requires the university to obtain a court order before removing a student from housing, whether or not the student has been expelled. The university has so far wasted \$22,000 of public funds, not to mention a probably greater expenditure of internal time, litigating with student housing residents who have succeeded in convincing the court that they cannot be removed from student housing without a court order. But the real cost will come if the law is not changed to remedy this issue.

A number of factors distinguish student housing situations from the usual landlord tenant arrangement.

- ✓ Students need to study. Other students who repeatedly play loud music, or allow their children (in the case of family student housing) to run unsupervised, can seriously interfere with a threshold requirement of a successful university, i.e. to maintain an effective learning environment.
- ✓ Students who live on campus do not have many good options for alternative housing. They are essentially a captive audience, and should not have to bear the insults to their study atmosphere that in other circumstances they could avoid by moving elsewhere.
- ✓ By statute, the President of the university or designee can "expel" students: "The power to suspend and expel a student for misconduct or other cause and to reinstate the student is vested solely in the president of the University of Alaska." AS 14.40.240. But, courts have taken the rather arbitrary view that a student housing contract overrides this power, by placing the power to evict a student from student housing solely with the courts. And, in some cases, the university chooses to remove students from housing, but would prefer that they be allowed to continue as students. But, as the law currently reads, the university may be forced to expel students just to get them to leave student housing.
- ✓ Distinct from the usual landlord/tenant relationship, the university's provision of student housing is only part, but an integral part, of a larger relationship with the student. Under the approach followed by the courts, a student could be expelled from school, but insist on remaining in student housing until a court order is obtained removing the student.
- ✓ Distinct from the usual landlord/tenant relationship, the university has two additional reasons to accept people into its student housing that a private/commercial entity would not: First, as a public entity, the university has less latitude in rejecting people who might be difficult residents. Second, society benefits when it takes in socially challenged residents in an effort help them become more productive citizens. The university should not be saddled with the expense and delay of going to court to remove from housing students who have proven themselves too disruptive.

One way to address this issue would be to amend AS 14.40.240 to define the power to suspend or expel a student to include the power to terminate a student housing contract and remove the occupants from housing without going through court proceedings under AS 09.45, as follows:

**AS 14.40.240. Power of president to suspend and expel students.** The power to suspend and expel a student for misconduct or other cause and to reinstate the student is vested solely in the president of the University of Alaska. The president may delegate the exercise of the power to the chancellor or other official on each campus of the university or to the administrative head or director of the community college or other campus or extended unit of the university. For the purposes of this section, the power to suspend or expel a student includes the power to restrict a student from entering or remaining on or in all or a portion of university premises, to terminate a student housing contract, or, notwithstanding AS 09.45, to forcibly remove a student from university provided housing, if the student refuses to leave peacefully.

Another approach that would work well in combination with the first would be to amend the statute upon which the courts' rulings are based. The legal history of student housing includes exclusion from operation of the Uniform Landlord Tenant Act. ULTA was designed to alleviate injustices inflicted on residential renters by unscrupulous private landlords. Because public service institutional entities such as hospitals, schools, nursing homes, church housing, and counseling operations were not among the offenders, and because the realities of operating such services are not compatible with the heightened protections designed for residential renters, these public service institutions were exempted from the ULTA. See AS 34.30.330(b) exempting from ULTA "residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar services." But, according to the courts, this exemption does not apply to exempt these entities from having to obtain a court order to remove patrons from their premises.

The issue as it applies to the university is one that could apply equally to these other public service entities. For instance, a hospital should not be required to obtain a court order to remove a patient who no longer needs its services, or who is disrupting operations. And a church should not be required to seek a court order to remove a convent resident who takes to preaching a different faith. Thus, it would be reasonable to also propose an exemption to the forcible entry and detainer statute that eliminates any requirement of seeking a court order to recover possession of such institutional property from users.

**Sec. 09.45.060 Prohibition of use of force for entry on realty.**

(a) A person may not enter upon any land, tenement, or other real property except in cases where entry is given by law. In those cases the entry may not be made with force out only in a peaceable manner.

(b) Nothing in this section or chapter shall be read to require court action to recover possession of institutional property that is excepted from the provisions of the Uniform Residential Landlord and Tenant Act by AS 34.03.330(b)(1).

**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

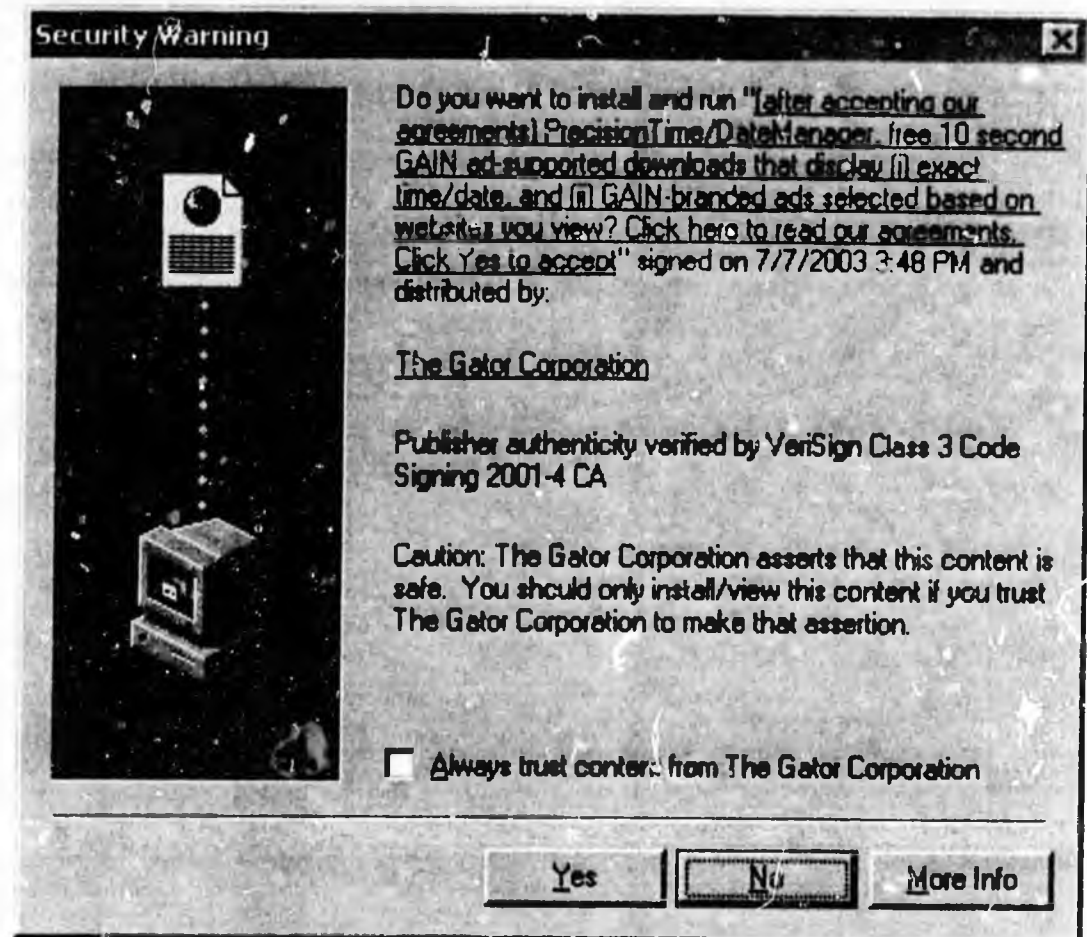


- Lots of pop-up ads, sometimes when you aren't surfing the web.
- Homepage or other settings are changed.
- New toolbars appear.
- New icons appear on your desktop.
- Computer slows down or crashes a lot.



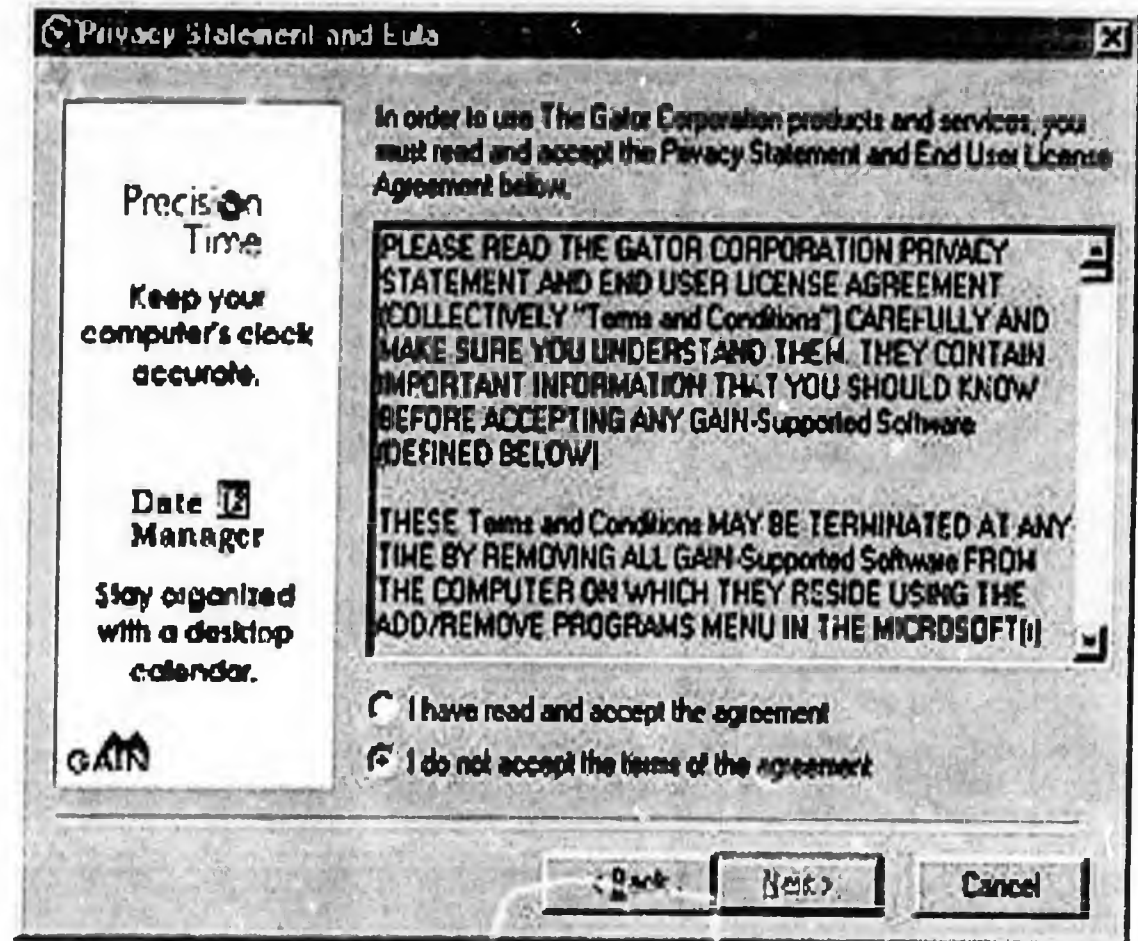
# How does Spyware get installed?

- 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", with a date "4/25/05" written next to it.

**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.

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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

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### *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

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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

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*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**

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*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**

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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.

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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.

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(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

In *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 -*

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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# 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>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<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  
 Division Enterprise Technology Services  
 Approved by: Michael Tibbies, Deputy Commissioner  
 Agency Department of Administration

Phone 465-5735  
 Date/Time 3/22/05 7:21 AM  
 Date 3/22/2005

# 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 \_\_\_\_\_ Component No. \_\_\_\_\_  
Requester: Senate Labor & Commerce \_\_\_\_\_

**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>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<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>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<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 *BRC*  
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

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<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