

# Spyware

This Act:

- Prohibits certain uses of pop-up advertisements;
- Prohibits the purchase of pop-up advertisements that violate the Act under certain circumstances; and
- Provides for the permissive removal of certain software.

Submitted as:

Utah

H.B. 104 (enrolled version)

Status: Enacted into law in 2005.

## Suggested State Legislation

- 1           Section 1. [*Short Title.*] The Act may be cited as the “Spyware Control Act.”  
2
- 3           Section 2. [*Definitions.*] As used in this Act:  
4           (A) “Cookie” means a text file:  
5                 (1) that is placed on a computer by:  
6                         (a) an interactive computer service;  
7                         (b) an Internet website; or  
8                         (c) a third party acting on behalf of:  
9                                 (i) an interactive computer service; or  
10                                (ii) an Internet website; and  
11                 (2) the function of which is to record information that can be read or recognized  
12 when the user of the computer later accesses a particular:  
13                         (a) Internet website;  
14                         (b) online location; or  
15                         (c) online service.  
16           (B) “Division” means the state [Division of Consumer Protection] in the state  
17 [Department of Commerce].  
18           (C) “Interactive computer service” means any information service, system, or access  
19 software provider that provides or enables computer access by multiple users to a computer  
20 server, including:  
21                 (1) an Internet or online service provider; or  
22                 (2) a service or system providing access to the Internet, including a system  
23 operated by a library or educational institution.  
24           (D) “Internet” is as defined in the Internet Tax Freedom Act, Pub. L. No. 105-277.  
25           (E) “Internet or online service provider” means an interactive computer service that  
26 provides software or other material that enables a person to:  
27                 (1) transmit, receive, display, forward, cache, search, subset, organize, reorganize,  
28 or translate content;  
29                 (2) select or analyze content; or  
30                 (3) allow or disallow content.  
31           (F) “Mark” means a registered trademark, registered service mark, or registered domain  
32 name in an Internet website address that is owned, licensed, or lawfully used by a person doing  
33 business in this state.

34 (G) (1) "Spyware" means software on the computer of a user who resides in this state  
35 that:

36 (a) collects information about an Internet website at the time the Internet  
37 website is being viewed in this state, unless the Internet website is the Internet website of the  
38 person who provides the software; and

39 (b) uses the information described in subsection (G)(1)(a)  
40 contemporaneously to display pop-up advertising on the computer.

41 (2) "Spyware" does not include:

42 (a) an Internet website;

43 (b) a service operated by an Internet or online service provider accessed  
44 by a user;

45 (c) software designed and installed primarily to:

46 (i) prevent, diagnose, or resolve technical difficulties;

47 (ii) detect or prevent fraudulent activities; or

48 (iii) protect the security of the user's computer from unauthorized  
49 access or alteration;

50 (d) software or data that reports information to an Internet website  
51 previously stored by the Internet website on the user's computer, including cookies;

52 (e) software that provides the user with the capability to search the  
53 Internet; or

54 (f) software installed with the consent of a user whose primary purpose is  
55 to prevent access to certain Internet content.

56 (H) "Pop-up advertising" means material:

57 (1) offering for sale or advertising the availability or quality of a commercial  
58 property, good, or service; and

59 (2) that is displayed:

60 (a) separate from an Internet website;

61 (b) as a result of a user accessing an Internet website;

62 (c) in a manner that covers paid advertising or other content on an Internet  
63 website in a way that interferes with the user's ability to view the advertising or other content  
64 that the user attempted to originally access; and

65 (d) without the authority of the operator of the Internet website.

66 (I) "User" means the owner or authorized user of a computer.

67

68 Section 3. [*Prohibited Conduct.*]

69 (A) A person may not display a pop-up advertisement by means of spyware if the pop-  
70 up advertisement:

71 (1) is displayed in response to a specific mark; or

72 (2) is displayed in response to a specific Internet website address;

73 (3) constitutes infringement of a registered trademark under federal or state law;

74 and

75 (4) is purchased or acquired by a person other than:

76 (a) the mark owner;

77 (b) a licensee of the mark;

78 (c) an authorized agent of the owner of the mark;

79 (d) an authorized user of the mark;

80 (e) a person advertising the lawful sale, lease, or transfer of products  
81 bearing the mark through a secondary marketplace for the sale of goods or services; or

82 (f) a person engaged in a fair or otherwise permissible use of a  
83 trademark or service mark under applicable trademark law.

84 (B) (1) A person using spyware to display a pop-up advertisement under Subsection  
85 (A) is not guilty of violating this Act if:

86 (a) the person requests information about the user's state of residence  
87 before sending the spyware or displaying a pop-up advertisement to the user after [May 2, 2005];  
88 and

89 (b) the user indicates a residence outside this state.

90 (C) A person purchasing or acquiring advertising is not guilty of violating this Act if  
91 the person reasonably determines that the person delivering a pop-up advertisement by use of  
92 spyware under Subsection (A) has complied with Subsection (B)(1).

93 (D) A person requesting information about a user's state of residence under Subsection  
94 (B)(1) may not prompt, ask, or otherwise encourage a user to indicate a residence outside this  
95 state.

96 (E) No action may be brought under this Act, for the use of a mark or Internet website  
97 address that constitutes a fair or otherwise permissible use of the mark or Internet website  
98 address under federal or state law.

99  
100 Section 4. [*Permissive Removal of Potentially Harmful Software.*]

101 (A) If a provider of computer software or an interactive computer service provides prior  
102 notice to a user with whom the provider has an established business relationship, that provider is  
103 not liable under the law of this state, or a political subdivision of this state, for identifying,  
104 removing, or disabling, preventing installation of a program on the user's computer that is used  
105 to, or that the provider reasonably or in good faith believes will likely be used to:

106 (1) violate a provision of this Act; or

107 (2) to engage in surreptitious collection of information concerning the user's use  
108 of the computer without the consent of the owner of the computer, except that no notice is  
109 required for:

110 (a) preventing the installation of a program; or

111 (b) in the case of an enterprise network, removing, disabling, or  
112 preventing the installation of a program on the computer of an employee.

113  
114 Section 5. [*Private Action.*]

115 (A) An action for a violation of this Act may be brought by

116 (1) the [attorney general]; or

117 (2) a mark owner who:

118 (a) does business in this state; and

119 (b) is directly and adversely affected by a violation of this Act.

120 (B) In an action under Subsection (A), a person may:

121 (1) obtain an injunction against committing any further violation of this chapter;

122 and

123 (2) subject to Subsection (3), recover the greater of:

124 (a) actual damages; or

125 (b) up to [\$500] for each occurrence resulting in the display of an  
126 advertisement prohibited by this Act.

127 (C) In an action under Subsection (A), a court may:

128 (1) increase the damages up to [three times] the damages allowed by Subsection  
129 (B)(2)(b) if the court finds that the defendant willfully or knowingly violated this Act; and

130 (2) award costs and reasonable attorney fees to a prevailing party.

131 (D) For purposes of this section, a separate violation occurs for each individual  
132 occurrence that results in the display of an advertisement described in this Act .

133 (E) An action may be brought against a person who purchases or acquires advertising  
134 described in this Act if:

135 (1) the person against whom the action is brought receives actual notice from a  
136 mark owner of an alleged violation;

137 (2) the notice required contains a detailed explanation of the alleged violation;  
138 and

139 (3) the person against whom the action is brought fails to take reasonable steps to  
140 stop the violation.

141 (F) (1) At the time of commencement of an action for a violation of this Act, the  
142 person filing the action shall serve a copy of any summons and complaint upon any person  
143 against whom an action is brought.

144 (2) A person against whom an action may be brought under this Act may  
145 intervene in an action for a violation in accordance with [insert citation] or Rule 24(c) of the  
146 Federal Rules of Civil Procedure.

147

148 Section 6. [*Limitations on Actions.*]

149 (A) A person may not bring an action for a violation of this Act against a person other  
150 than:

151 (1) a person who displays a pop-up advertisement by means of spyware in  
152 violation of this Act; or

153 (2) a person who purchases or acquires an advertisement in violation of this Act.

154 (B) A person may not bring a class action under this Act.

155 (C) This Act does not preclude any person accused of violating this Act from asserting  
156 any fair use or other defense that is available to people alleged to have engaged in trademark  
157 infringement.

158

159 Section 7. [*Severability.*] [Insert severability clause.]

160

161 Section 8. [*Repealer.*] [Insert repealer clause.]

162

163 Section 9. [*Effective Date.*] [Insert effective date.]