

2003

Jesse L. Riddle v. Celebrity Cruises, Inc. and John Does 1-10 : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Denver C. Snuffer, Jr.; Nelson, Snuffer, Dahle & Poulsen; Jesse R. Riddle; Riddle & Associates; Attorneys for Plaintiff-Appellant.

Randy L. Dryer; Michael P. Petrogeorge; Parsons, Behle & Latimer; Attorneys for Defendant-Appellee.

Recommended Citation

Brief of Appellee, *Riddle v. Celebrity Cruises*, No. 20030954 (Utah Court of Appeals, 2003).
https://digitalcommons.law.byu.edu/byu_ca2/4657

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JESSE L. RIDDLE,

Plaintiff and Appellant,

vs.

CELEBRITY CRUISES, INC. and JOHN
DOES one through ten whose true names are
unknown,

Defendants and Appellees.

Appeal No. 20030954-CA
District Court No. 020406212

Priority No. 15

APPELLEE'S OPENING BRIEF ON APPEAL

Appeal from the Decision and Order of The Honorable Judge Denise P. Lindberg,
Third District Court in and for Salt Lake County, Sandy Division

Denver C. Snuffer, Jr. (3032)
NELSON, SNUFFER, DAHLE &
POULSEN, P.C.
10885 South State
Sandy, Utah 84070
Telephone: (801) 576-1400

Jesse L. Riddle (6640)
RIDDLE & ASSOCIATES
11778 Election Drive, Suite 240
Draper, Utah 84020

*Attorneys for Plaintiff-Appellant Jesse
Riddle*

Randy L. Dryer (0924)
Michael P. Petrogeorge (8870)
PARSONS BEHLE & LATIMER, P.C.
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendant-Appellee
Celebrity Cruises, Inc.*

FILED
UTAH APPELLATE COURTS
JUN 18 2004

IN THE UTAH COURT OF APPEALS

JESSE L. RIDDLE,

Plaintiff and Appellant,

vs.

CELEBRITY CRUISES, INC. and JOHN
DOES one through ten whose true names are
unknown,

Defendants and Appellees.

Appeal No. 20030954-CA
District Court No. 020406212

Priority No. 15

APPELLEE'S OPENING BRIEF ON APPEAL

Appeal from the Decision and Order of The Honorable Judge Denise P. Lindberg,
Third District Court in and for Salt Lake County, Sandy Division

Denver C. Snuffer, Jr. (3032)
NELSON, SNUFFER, DAHLE &
POULSEN, P.C.
10885 South State
Sandy, Utah 84070
Telephone: (801) 576-1400

Jesse L. Riddle (6640)
RIDDLE & ASSOCIATES
11778 Election Drive, Suite 240
Draper, Utah 84020

*Attorneys for Plaintiff-Appellant Jesse
Riddle*

Randy L. Dryer (0924)
Michael P. Petrogeorge (8870)
PARSONS BEHLE & LATIMER, P.C.
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendant-Appellee
Celebrity Cruises, Inc.*

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. The plaintiff-appellant is Jesse L. Riddle (referred to herein as “Plaintiff”).
2. The defendant-appellee is Celebrity Cruises, Inc. (referred to herein as “Defendant”).
3. The Complaint below also named as defendants “John Does one through ten whose true names are unknown.”

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
APPLICABLE STATUTES, RULES AND REGULATIONS	2
STATEMENT OF THE CASE	2
I. NATURE OF THE CASE.....	2
II. PROCEDURAL HISTORY	3
III. STATEMENT OF RELEVANT FACTS.....	6
SUMMARY OF ARGUMENTS	6
ARGUMENT.....	8
I. THE DISTRICT COURT CORRECTLY INTERPRETED THE APPLICABLE STATUTORY PROVISIONS AND CONCLUDED THAT “POP-UPS” AND OTHER FORMS OF ONLINE ADVERTISING DO NOT CONSTITUTE “UNSOLICITED COMMERCIAL EMAILS” UNDER THE ACT, AND THUS PROPERLY GRANTED DEFENDANT’S MOTION FOR SUMMARY JUDGMENT	8
A. The Plain Language of the Act Precludes Application of its Provisions to “Pop-Ups” or Other Forms of Online Advertising	10
B. The Legislative History Further Supports This Interpretation.....	14
C. A Contrary Interpretation of the Statute Would Lead to an Absurd Result.....	17
II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFF’S MOTION FOR RELIEF UNDER RULE 56(F)	19
CONCLUSION	20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

U-Haul Intern., Inc. v. When-U.com, Inc., 279 F. Supp. 2d 723 (E.D. Va. 2003)..... 15

STATE CASES

Board of Ed. of Jordan Sch. Dist. v. Sandy City Corp., 2004 UT --, --- P. 3d. ---,
No. 20020020, 2004 WL. 943432 (Utah May 4, 2004) 1, 9

Business Aviation of S.D., Inc. v. Medivest, Inc., 882 P.2d 662 (Utah 1994) 9

Campbell, Maack & Sessions v. Debry, 2001 UT App. 397, 38 P.3d 984..... 2, 19

Crossland Sav. v. Hatch, 877 P.2d 1241, 1243 (Utah 1994)).....2

Dick Simon Trucking, Inc. v. Utah St. Tax. Commission, 2004 UT 11,
84 P.3d 1197 9

Grynberg v. Quested Pipeline Co., 2003 UT 8, 70 P.3d 1 2

Perrine v. Kennecott Mining Corp., 911 P.2d 1291 (Utah 1996) 9

Sandy City v. Salt Lake County, 794 P.2d 482 (Utah Ct. App. 1990), *rev'd in part*
on other grounds 827 P.2d 212 (Utah 1992)..... 19

State v. Heckel, 24 P.3d 404 (Wash. 2001) 15

State v. Hunt, 906 P.2d 311 (Utah 1995)..... 12

Wilcox v. CSX Corp., 2003 UT 21, 70 P.3d 85 (quotations and citations omitted) 9

STATE STATUTES

Spyware Control Act, Utah Code Ann. §§ 13-36-40 *et. seq* 12, 13, 19

Unsolicited Commercial and Sexually Explicit Email Act, Utah Code Ann. §§13-
36-101 *et. seq*..... 1, 2, 10, 12-14, 17

Utah Rule of Civil Procedure 56(c) 9

Utah Rule of Civil Procedure 56(f).....2, 19

STATEMENT OF JURISDICTION

Pursuant to Utah Code Ann. §78-2a-3(2)(j) (2004), and the Order from the Utah Supreme Court dated January 27, 2004, the Utah Court of Appeals has jurisdiction over this appeal from the district court's Decision and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Relief Under Rule 56(f).

ISSUES PRESENTED FOR REVIEW

Defendant offers the following statement of issues in lieu of that contained on pages 1-2 of the Appellant's Opening Brief on Appeal ("Plaintiff's Brief"). This formulation of the issues more accurately captures the arguments presented to the trial court and the bases for the trial court's decision below:

ISSUE NO. 1: Did the district court correctly interpret the provisions of Utah's Unsolicited Commercial and Sexually Explicit Email Act, Utah Code Ann. §§13-36-101 *et seq.* (2003) (repealed effective May 3, 2004), to conclude that "pop-ups" and other forms of online advertising do not constitute "unsolicited commercial emails" under that statute, and that Plaintiff therefore had no cause of action against Defendant?

Questions of statutory interpretation are questions of law which are reviewed "for correctness, giving no deference to the district court's interpretation." *Board of Ed. of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT --, ¶ 1, --- P. 3d. ---, No. 20020020, 2004 WL 943432 at * 1 (Utah May 4, 2004).

ISSUE NO. 2: Did the district court abuse its discretion in denying Plaintiff's Motion for Relief Under Rule 56(f) where neither Plaintiff nor his attorneys filed a supporting affidavit setting forth the discovery he sought to obtain, the reasons why such

discovery was necessary, or the reasons why he could not adequately respond to Defendant's Motion for Summary Judgment without such discovery?

A district court's ruling on a motion for continuance under Rule 56(f) of the Utah Rules of Civil Procedure is reviewed "for abuse of discretion." *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 56, 70 P.3d 1, 14. Under this standard, this district court's decision shall not be reversed unless it "exceeds the limits of reasonability." See *Campbell, Maack & Sessions v. Debry*, 2001 UT App. 397, ¶ 6, 38 P.3d 984, 988 (quoting *Crossland Sav. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994)).

APPLICABLE STATUTES, RULES AND REGULATIONS

The following statutes and rules are particularly relevant to the issues raised on appeal:

1. Unsolicited Commercial and Sexually Explicit Email Act, Utah Code Ann. §§13-36-101 *et. seq.* (2003) (repealed effective May 3, 2004); and
2. Rule 56(f) of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Through the current appeal, Plaintiff asks this Court to broadly interpret Utah's Unsolicited Commercial and Sexually Explicit Email Act, Utah Code Ann. §§13-36-101 *et seq.* (2003) (repealed effective May 3, 2004) (the "Act"), to conclude that the Legislature intended the Act to regulate "pop-ups" and other forms of online advertising. Plaintiff advocates this position despite the fact that the Act itself speaks solely in terms of "emails," does not reference "pop-ups" or any other forms of online advertising

anywhere in its provisions, and imposes statutory requirements that cannot be practically applied outside the context of traditional email messages. Defendant maintains that the district court properly rejected Plaintiff's proposed interpretation, correctly interpreted the Act to apply only to traditional email messages, and properly granted Defendant's Motion for Summary Judgment dismissing Plaintiff's claims against it under the Act.

Although Plaintiff is correct that these are issues of first impression, such reference overstates the actual importance of this case. The Act was repealed by the Utah Legislature effective May 3, 2004. Thus, any decision in this case will have minimal application and will not significantly impact Utah law.

II. PROCEDURAL HISTORY

1. Plaintiff filed his Complaint in the Third District Court in and for Salt Lake County, Sandy Division, on or about June 5, 2002, alleging that Defendant sent or caused to be sent to Plaintiff an "unsolicited commercial email" in violation of the Act. *See* Record at 1-6.

2. Defendant filed an answer on or about February 24, 2003, denying Plaintiff's claims. *See* Record at 7-14.

3. On or about June 24, 2003, Defendant filed a Motion for Summary Judgment, asserting, among other things, that the Act did not apply to "pop-up" ads and that Plaintiff therefore had no cause of action. *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, Record at 26-60. In support of this motion, Defendant submitted the Affidavit of Anthe Karademos ("Karademos Affidavit"). *See* Record at 15-22. The motion was fully briefed by the

parties and a notice to submit for decision was filed on or about July 16, 2003. *See* Record at 126-27.

4. On or about July 8, 2003, Plaintiff filed a Motion for Relief Under Rule 56(f), asserting that Defendant's Motion for Summary Judgment should be denied or continued because Plaintiff had not been given an adequate opportunity to conduct discovery. *See* Memorandum in Support of Plaintiff's Motion for Relief Under Rule 56(f), Record at 69-72. However, neither Plaintiff nor his attorneys filed the required affidavit setting forth the types of discovery sought, how such discovery might impact Defendant's Motion for Summary Judgment, or why Plaintiff could not adequately respond to Defendant's motion without such discovery. The memorandum in support of the motion likewise failed to provide this required information. *See id.*

5. On or about October 17, 2003, the Honorable Judge Denise P. Lindberg issued a Decision and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Relief Under Rule 56(f) ("Order"), *see* Record at 128-133:

a. With respect to Defendant's Motion for Summary Judgment, the district court specifically concluded that the Act did not apply to "pop-up" or other online advertisements, and that Plaintiff therefore had no cause of action against Defendant under the Act. The district court expressly relied on its Amended Decision and Order in *Miller v. Next Phase Media*, Civ. 020409662 (July 15, 2003) ("*Miller* Order"), whereby it

had previously concluded that “pop-up” advertisements were not regulated by the Act.¹ The Court further relied on subsequent legislative history as revealed by the statements of the Act’s legislative sponsor, Senator (then-Representative) Patricia Arent, surrounding proposed amendments to the Act during the 2003 Legislative Session. *See* Order at 4, ¶¶ 14-16, Record at 131.

b. With respect to Plaintiff’s Motion for Relief Under Rule 56(f), the district court found that Plaintiff “fails . . . to support his contentions that additional discovery is necessary in this case . . . , has not explained why he cannot respond to Defendant’s Motion for Summary Judgment based on the facts already in his possession,” and has not “explained how any additional discovery would be material to his opposition.” *See id.* at 5, ¶ 19, Record at 132.

¹ In that prior decision, the district court relied entirely on the plain language of the Act, concluding as follows:

Because popups, such as the one at issue here, are not sent to email addresses, but rather are browser windows that appear when an individual accesses a website . . . , the Court concludes they fall outside the prong of the Act allegedly violated in this case. The Court assumes that the Legislature acted knowingly and deliberately when it limited the reach of the Act to [unsolicited commercial emails] sent to defined destinations known as “email addresses.” Nothing in the Act’s language indicates that the Legislature intended to bring within the Act’s requirements all popup advertisements, as claimed by Miller.

Miller Order at 6, ¶ 19, a copy of which is attached hereto as Addendum 1. Although Plaintiff’s counsel also represented the plaintiff in *Miller*, they did not appeal the district court’s decision or otherwise challenge its statutory interpretation. The current case is nothing more than a tag-along to *Miller* (and the 1200 other cases Plaintiff’s counsel filed under the Act prior to its repeal in May 2004). It raises no new issues, and there is no good reason for Plaintiff’s counsel to pursue an appeal in this case.

c. The district court expressly stated that it was not relying on the Karademos Affidavit in granting Defendant's Motion for Summary Judgment. *See id.* at 4, ¶ 13, Record at 131.

III. STATEMENT OF RELEVANT FACTS

The only fact that is in any way material to this appeal is that the online advertisement allegedly received by Plaintiff was not received via email, but as a "pop-up" or "pop-under" while Plaintiff was "surfing" the Internet on his computer.²

SUMMARY OF ARGUMENTS

The District Court Properly Granted Defendant's Motion for Summary Judgment.

The district court properly granted Defendant's Motion for Summary Judgment because it applied the controlling rules of statutory construction and correctly concluded that "pop-ups" and other forms of online advertising do not constitute "unsolicited commercial emails" under the Act, and that plaintiff therefore had no cause of action against Defendant. The district court's interpretation of the Act is supported by both the plain language of the Act and the legislative history, and is the only interpretation that makes any practical sense.

² Plaintiff has conceded, both in his opening brief and in the proceedings below, that the advertisement he received was a "pop-up." *See, e.g.*, Plaintiff's Brief at 4, ¶ 1. Insofar as Plaintiff asserts that online advertisements "'appear on [his] computer screen even after [he has] exited the Internet,'" *see id.* at 7, ¶ 21 (quoting Affidavit of Jesse Riddle, Record at p. 92), it is possible that the advertisement may have in fact been a "pop-under," i.e., an online advertisement "that displays in a new browser window behind the current browser window," www.marketingterms.com/dictionary/pop-under-ad/, and which is not typically visible to the user until the user closes or minimizes the active browser window. Regardless of whether the advertisement was a "pop-up" or a "pop-under," however, the statutory analysis remains the same.

Although the technical definition of “email” in the Act could be construed, in isolation, to cover any and all electronic transmissions over the Internet, any telephone network or any public or private computer network, this definition must be considered in light of the other provisions of the statute. By regulating only those communications sent to an “email address” or through an “email service provider,” the Legislature indicated its intent to limit application of the Act only to traditional email messages, and to exclude from its regulatory scheme “pop-ups” and other forms of online advertising.

Even assuming that there is an irreconcilable conflict between the Act’s broad definition of “email” and its actual regulatory provisions, the legislative history undoubtedly supports the interpretation advocated by Defendant and adopted by the district court. The Act’s sponsor made it clear when introducing the original legislation during the 2002 Legislative Session that the Act was intended to regulate “SPAMing,” a practice commonly understood to apply only to traditional email messages. She clarified her intent further in proposing amendments to the Act during the 2003 Legislative Session, expressly stating that the Act was not intended to apply to “pop-ups” or other forms of online advertising. Not surprisingly, Plaintiff completely ignores this compelling legislative history, failing to address it in either the proceedings below or in his opening brief on appeal.

Finally, acceptance of Plaintiff’s interpretation would render the entire regulatory scheme impracticable. To begin with, the Act requires that the characters “ADV” (denoting advertisement) appear in the “subject line of an email.” Unlike traditional email messages, which have a “to,” “from,” and “subject” line, “pop-up” and “pop-

under” advertisements do not contain a “subject line,” and it would be absurd to require “pop-ups,” which are clearly advertisements, to contain the “ADV” designation. Likewise, the Act requires the sender of the email to provide the recipient with a convenient, no-cost mechanism to prevent future emails. While this requirement is practical and makes sense for traditional email messages, where the sender presumably has access to and can delete the recipient’s email address from the distribution mailing list for future mailings, it makes no sense with respect to “pop-ups” or other forms of online advertising which are not sent to any one particular computer or user, but are transmitted in conjunction with a host website to any user who calls up the triggering site.

The District Court Properly Denied Plaintiff’s Motion for Relief Under Rule 56(f).

The district court properly exercised its discretion in denying Plaintiff’s Motion for Relief Under Rule 56(f) because, among other things, the motion was not accompanied by the required affidavit setting forth the reasons why additional discovery was needed, or why Plaintiff could not adequately respond to Defendant’s Motion for Summary Judgment without access to such further discovery.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INTERPRETED THE APPLICABLE STATUTORY PROVISIONS AND CONCLUDED THAT “POP-UPS” AND OTHER FORMS OF ONLINE ADVERTISING DO NOT CONSTITUTE “UNSOLICITED COMMERCIAL EMAILS” UNDER THE ACT, AND THUS PROPERLY GRANTED DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.

Summary Judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). Issues of statutory construction are pure questions of law which can be resolved on summary judgment. *See Dick Simon Trucking, Inc. v. Utah St. Tax. Comm’n*, 2004 UT 11, ¶ 3, 84 P.3d 1197, 1198 (the “interpretation of a statutory provision is a question of law”).

The goal of statutory construction is to “give effect to the Legislature’s intent in light of the purpose the statute was meant to achieve.” *Board of Ed. of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT --, ¶ 8, --- P.3d. ---, No. 20020020, 2004 WL 943432 at * 2 (Utah May 4, 2004). In ascertaining such legislative intent the court must “look first to the statute’s plain language,” reading the statute *as a whole*. *Id.*; *see also Perrine v. Kennecott Mining Corp.*, 911 P.2d 1291, 1292 (Utah 1996) (internal quotations omitted) (“[S]tatutory enactments are to be construed so as to render all parts thereof relevant and meaningful.”); *Business Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994) (internal quotations omitted) (“[T]erms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion.”). Where the plain language of the statute is ambiguous, or would lead to an absurd result, the court must turn to the legislative history and other relevant policy considerations to ascertain the true legislative intent. *See Wilcox v. CSX Corp.*, 2003 UT 21, ¶ 8, 70 P.3d 85, 90 (quotations and citations omitted) (“We first interpret the statute according to its plain language; nevertheless, if we find the provision ambiguous . . . we then seek guidance from the legislative history and relevant policy considerations.”); *Board of Ed.*, 2004 WL 943432 at * 2, ¶ 9 (internal quotations and citations omitted) (“It is axiomatic that a statute should

be given a reasonable and sensible construction and that the Legislature did not intend an absurd or unreasonable result.”).

The district court properly applied these rules of statutory construction and correctly concluded that the Act was intended to apply only to traditional email messages and did not regulate “pop-ups” or other forms of online advertising. As set forth below, this interpretation of the statute is supported by both the plain language of the Act and the legislative history, and is the only interpretation that makes any practical sense. Having made this conclusion, the district court properly determined that Plaintiff had no cause of action against Defendant under the Act, and granted Defendant’s Motion for Summary Judgment on this ground.

A. The Plain Language of the Act Precludes Application of its Provisions to “Pop-Ups” or Other Forms of Online Advertising.

The Act defines “email” as “an electronic message, file, data, or other information that is transmitted: (a) between two or more computers, computer networks, or electronic terminals; or (b) within a computer network.” Utah Code Ann. §13-36-102(3) (2003) (repealed 2004). Read in isolation, this definition of email could, admittedly, cover any and all electronic transmissions over the Internet, any telephone network or any public or private computer network. This definition cannot be read alone, however, and must be considered in light of the other provisions of the Act.

Fundamental to this overall analysis is a full understanding of the critical difference between a traditional email message and the type of “pop-up” or “pop-under” advertisement Plaintiff apparently received in this case. A traditional email message is

essentially an electronic letter. Like a paper letter, which is sent from the sender to the recipient at the recipient's unique mailing address, using the medium of the postal service, a traditional email message is sent electronically from the sender's computer to the recipient using the recipient's unique email address, via the medium of an email service provider. Whether commercial in nature or not the message is targeted, being transmitted to a particular person at a particular address.

In contrast, a "pop-up" or "pop-under" advertisement is akin to a newspaper advertisement or television commercial. Just as a newspaper advertisement or television commercial is transmitted along with and as part of the primary media—i.e., the newspaper articles or television programs, and received by the reader or viewer as a result of his or her decision to subscribe to the newspaper or tune into the particular program, the "pop-up" or "pop-under" advertisement is transmitted along with and as part of the primary media—i.e., the host website, and received by the Internet user as a result of his or her decision to call up the host website.³ These forms of communications

³ There are actually two categories of online advertising. The first type of is contained within the code of a host website itself, and may appear anytime an Internet user voluntarily calls up the host website. Typically, the owner of the host website contracts with third-party advertisers to display their advertisements as part of the website's content. The advertisements are not targeted to any one computer user, and are not sent to any specific email addresses. The Karademos Affidavit indicates that Defendant relied upon this type of advertising, and that the "pop-up" or "pop-under" advertisement apparently received by Plaintiff fell within this first category of online advertising. *See* Record at 16, ¶ 3 (stating that Defendant had contracted with the New York Times to have its advertisements appear on the New York Times website).

The second type of online advertising is transmitted through third-party software that is downloaded on a end-user's computer. This software tracks the websites that are commonly viewed by the end-user, and sends advertisements offering products or

are anonymous and less targeted, and are sent out into the public domain to be viewed by anyone who calls up the host website. They are never sent to email addresses.

The heart of the Act's regulation is set forth in Section 13-36-103(1), and is clearly intended to apply only to traditional email messages. This provision specifically prohibits the transmission of any "unsolicited commercial email" either (i) through the intermediary of an "email service provider" located in Utah, or (ii) to an "email address" held by a resident of Utah, unless the email message contains certain required information or meets certain characteristics.⁴ Construing the Act to include "pop-ups" or "pop-unders" as "emails" would render these statutory references to "email service provider" and "email address" meaningless and superfluous, in contravention of commonly accepted rules of statutory construction. *See State v. Hunt*, 906 P.2d 311, 312 (Utah 1995) (quotations omitted) ("Any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.").

services similar to those offered on the websites called up by the user. Typically, the owner of the software program contracts with the third party advertisers to send the advertisements to those software users meeting the specified criteria. Although these advertisements are targeted to particular users meeting specified criteria and delivered along with like websites (much like toy commercials are targeted to a particular audience and bundled with children's programming), they are not sent directly to any particular user or to any email addresses. This second type of online advertising is specifically regulated by the recently enacted Spyware Control Act, Utah Code Ann. §§ 13-36-40 *et. seq.* ("Spyware Act").

⁴ An "email service provider" is defined as an "intermediary in the transmission of email from the sender to the recipient" or one who "provides to end users of email services the ability to send and receive emails." U.C.A. §13-36-102(5) (2003) (repealed effective May 3, 2004). An "email address" is defined as a "destination, commonly expressed through a string of characters, to which email may be sent or delivered." *Id.* §13-36-102(4).

In its opening brief, Plaintiff asserts that the district court's own interpretation of the statute renders the terms of Section 36-13-103(1) redundant. Specifically, the Plaintiff notes that the Legislature drew a distinction between transmissions through Utah based "email service providers" and transmissions to Utah held "email addresses," and assert that this distinction would be meaningless if only traditional emails were subject to regulation. The Plaintiff's theory appears to be that because all traditional email messages are sent to "email addresses" through "email service providers" the Legislature, by making the distinction, must have intended to regulate other electronic messages, including "pop-ups," that were not actually sent to "email addresses." This argument is flawed for at least two reasons.

First, "pop-up" and "pop-under" advertisements are not actually transmitted through "email services providers," but through "Internet service providers." An Internet service provider, or "ISP," is "a company which provides other companies or individuals with access to, or presence on, the Internet." www.dictionary.reference.com. Although an ISP frequently offers email service or access to its Internet customers, this is not always the case. Had the Legislature intended "emails" to include "pop-ups" or "pop-unders" it would have included "emails" transmitted through "Internet service providers" in the types of activity regulated by Section 13-36-103(1).⁵

Second, and most importantly, Plaintiff's argument entirely misconstrues the actual distinction being made by the Act. In drafting Section 36-13-103(1) the

⁵ The Legislature's use of the term "Internet service provider" in the recently enacted Spyware Act demonstrates its ability to distinguish between ISPs and email service providers.

Legislature was apparently cognizant of the fact that while the Internet is a world wide source of communication, it has authority to regulate and restrict only Internet activity occurring within this state. To maximize the regulatory effect of the statute, the Legislature applied the Act's provisions to two different types of activity. First, it applied the Act's regulations to any emails that were being transmitted through an "email service provider" located within the state, regardless of where the sender or recipient resides. By way of example, the statute applied to any email sent to or received by a resident of Nevada, regardless of where the message actually originated, so long as the sender or recipient obtained email service from an email service provider located within in the State of Utah. Second, it applied the Act's regulations to any emails being transmitted to any email address belonging to a resident of the State of Utah, regardless of where the sender or the email service provider is located. By way of example, this prong of the regulation would apply to any email received by a resident of Utah, even if the sender and/or the email service provider were located in Nevada. In sum, because the Act regulates two different types of activity, both applicable to traditional email messages, neither prong of the regulation is rendered redundant by excluding "pop-ups" or other forms of online advertising from its scope.

B. The Legislative History Further Supports This Interpretation.

Assuming that any conflict between the Act's broad definition of "email" and the actual regulatory provisions set forth in Section 13-36-103(1) creates an ambiguity in the plain language of the Act, the legislative history undoubtedly supports the interpretation advocated by Defendant and adopted by the district court.

Then-Representative (now Senator) Patricia Arent (“Arent”) made it clear when introducing the original legislation that “[t]his bill concerns *unsolicited commercial email*, also known as *SPAM*.” Comments of Representative Arent, January 5, 2002, House Floor Debates Regarding House Bill 80, 3:11-12 (hereinafter “Arent House Statement”) (emphasis added).⁶ Arent continued that the Act’s intended purpose was to place “some reasonable limitations on SPAMers” and to provide a remedy for consumers, email service providers and businesses that bear the cost of receiving SPAM. Arent House Statement at 4:12-6:3; *see also* Comments of Senator David H. Steele, January 25, 2002, House Floor Debates Regarding House Bill 80, 18:13-19 (hereinafter “Steele House Statement”).⁷ The repeated reference to “SPAM” during the Floor Debates, and the absolute lack of reference to online advertising such as “pop-ups” or “pop-unders” reflects the true intent of the Legislature since the word SPAM specifically refers only to traditional email messages. *See, e.g. U-Haul Intern., Inc. v. When-U.com, Inc.*, 279 F. Supp. 2d 723, 725 (E.D. Va. 2003) (distinguishing “pop-up advertising” from “her ugly brother unsolicited bulk email, ‘spam’”); *see also State v. Heckel*, 24 P.3d 404, 406 n. 1 (Wash. 2001) (quotations omitted) (“The term ‘spam’ refers broadly to unsolicited bulk e-mail (or ‘junk mail’), which ‘can be either commercial (such as an advertisement) or noncommercial (such as a joke or chain letter).”); www.dictionary.com (defining

⁶ A true and correct copy of the Arent House Statement is attached hereto as Addendum 2.

⁷ A true and correct copy of the Steele House Statement is attached hereto as Addendum 3.

“SPAM” as “[u]nsolicited e-mail, often of a commercial nature, sent indiscriminately to multiple mailing lists, individuals, or newsgroups; junk e-mail”).

Such legislative intent is further supported by amendments to the Act proposed during the 2003 Legislative Session. The proposed amendments (submitted by Arent and found in Senate Bill 59) clarified that the Act was not intended to regulate “pop-up” advertisements.⁸ In supporting the amendments, Arent expressly stated, both in the Senate Floor Debates and before the Senate Judiciary Committee, that “[t]he Act was never intended to regulate Web page content such as banner and pop-up advertisements.” Comments of Senator Arent, Senate Floor Debate Regarding Senate Bill 59 (“Arent Senate Statement”), at 3:24-4:1, Record at 49-50; Remarks of Senator Arent before the Senate Judiciary, Law Enforcement and Criminal Justice Committee Regarding Senate Bill 59 at 2:15-21, Record at 56. Arent continued that “pop-up” ads were always intended to be excluded from the Act’s reach because they “are not really understood by the average people to be email,” and “are not sent to actual email addresses.” Arent Senate Statement at 4:2-4, Record at 40. Finally, Arent recognized that “[i]f the Act were construed to regulate banner and [“pop-up” advertisements] it might have some serious constitutional concerns.” *Id.* at 4:4-6, Record at 50.

The statements of Arent, both in introducing and attempting to amend the Act, make it indisputably clear that the Legislature never intended the Act to apply to the type of “pop-up” or “pop-under” advertisement Plaintiff received in this case. Not

⁸ Senate Bill 59 easily passed the Senate but never passed the House due to delays caused by the introduction of eleventh hour amendments. These late amendments were unrelated to the proposed clarifications regarding “pop-ups.”

surprisingly, Plaintiff entirely ignores this compelling legislative history. Both in the proceedings below and in his opening brief he failed to provide any explanation for why Arent's statements do not reflect the true legislative intent, and provided no contrary legislative history to support his proposed interpretation of the Act to include online advertising.

C. A Contrary Interpretation of the Statute Would Lead to an Absurd Result.

Acceptance of Plaintiff's interpretation would render the Act's entire regulatory scheme impracticable. By way of example, section 13-36-103(1)(b) requires that the characters "ADV" (denoting advertisement) appear in the "subject line of an email." Traditional email messages have a "to," "from" and "subject" line. This information is displayed in the inbox of the user's email software program, allowing the user to open or discard emails based solely on this summary information. The presence of the "ADV" designation in the email subject line, and thus in the user's inbox, allows the recipient to quickly and easily delete the message, without even opening or reading it. The intent of this provision is to save the recipient time and eliminate some of the inconvenience caused by the SPAM.

In contrast, "pop-up" and "pop-under" advertisements do not contain a subject line, and are not received or collected through the same type of software. Once the "pop-up" or "pop-under" appears on the screen, the computer user is required to close the applicable browser window if he or she wishes to delete or remove the advertisement. Inclusion of the "ADV" designation (on the non-existent "subject line" or elsewhere)

would not make it any easier for the user to identify the “pop-up” or “pop-under” as an advertisement (something which is already relatively easy to do), or allow the user to more easily delete or remove the advertisement from his or her computer screen. Thus, application of this requirement to “pop-ups” or “pop-unders” would serve no useful purpose.

Likewise, Section 13-36-103(1)(c) requires the sender of the email to provide the recipient with a convenient, no-cost mechanism to prevent future emails. While this requirement is practical and makes sense for traditional email messages, where the sender presumably has access to and can delete the recipient’s email address from the distribution list for future mailings, it makes no sense with respect to “pop-ups” or other forms of online advertising which are sent, anonymously, along with a host website once that website is called up by the user. Unlike traditional email messages, these advertisements are not sent directly to any particular user or email address, and there is no distribution list from which to remove the user.

Both of these examples demonstrate why it would be absurd to classify “pop-ups” and other forms of online advertising as “emails” for purposes of the Act. It is clear from a reading of the Act as a whole, and a review of the relevant legislative history, that the Legislature was targeting a specific problem—i.e., the mass distribution of traditional email messages through the practice known as SPAMing. Although “pop-ups” and other forms of online advertising pose problems of their own, and can sometimes be a nuisance to the recipient, this evil was simply not the evil the Legislature sought to address through the Act. If Plaintiff believes that this evil needs to be addressed his remedy is to lobby

the Legislature to enact a statute that specifically addresses the distinct issues raised by this unique form of online marketing.⁹ He should not be allowed to distort the provisions of the now repealed Act to accomplish this goal.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 56(F).

The district court properly exercised its discretion in denying Plaintiff's Motion for Relief Under Rule 56(f) because, among other things, the motion was not accompanied by the required affidavit setting forth the reasons why additional discovery was needed, or why Plaintiff could not adequately respond to Defendant's Motion for Summary Judgment without access to such discovery.¹⁰ *See Sandy City v. Salt Lake County*, 794 P.2d 482, 488 (Utah Ct. App. 1990), *rev'd in part on other grounds*, 827 P.2d 212 (Utah 1992) (movants under Rule 56(f) must comply with the Rules of Civil Procedure and must (i) "file an affidavit to preserve his or her contention that summary judgment should be delayed pending further discovery" and (ii) "explain how the requested continuance will and his or her opposition to summary judgment"); *see also Campbell, Maack & Sessions v. Debry*, 2001 UT App. 397, ¶ 14, 38 P.3d 984, 990. It is not an abuse of discretion to deny such motions where the moving party is "dilatory" in

⁹ The Legislature has already started to address some of these issues through the recently enacted Spyware Act.

¹⁰ Nor did Plaintiff provide such information in his memorandum in support thereof. *See* Record at 69-72.

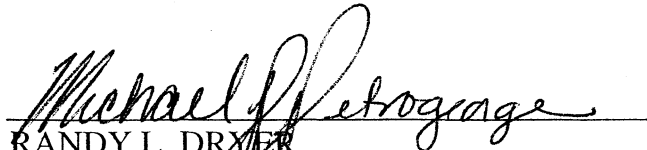
failing to provide the requisite basis therefore. *See, e.g., Campbell*, 2001 UT App. at ¶¶ 11 & 14, 38 P.3d 984, 989-90.¹¹

CONCLUSION

The district court applied proper standards of statutory construction to correctly conclude that the Act was intended to regulate only traditional email messages and did not apply to “pop-ups” or other forms of online advertising, and thus properly granted Defendant’s Motion for Summary Judgment. The district court also properly exercised its discretion in denying Plaintiff’s Motion for Relief Under Rule 56(f) insofar as Plaintiff failed to submit the required affidavit or otherwise demonstrate why additional discovery was needed or how such discovery would impact resolution of the Defendant’s Motion for Summary Judgment. As such, the district court’s Decision and Order Granting Defendant’s Motion for Summary Judgment and Denying Plaintiff’s Motion for Relief Under Rule 56(f) should be affirmed in its entirety.

¹¹ Any technical error in denying Plaintiff’s motion was harmless. The district court expressly stated that it was not relying on the “Karademos Affidavit in deciding the issues of this case,” and proceeded to analyze and resolve Defendant’s Motion for Summary Judgment on purely legal grounds. *See* Order at 4, ¶¶ 13-16, Record at 131. The district court looked specifically at the plain language of the Act, as well as the legislative history surrounding the statute (which was not contained in the Karademos Affidavit and was equally available to Plaintiff and Defendant) to determine that the Legislature did not intend it to apply to “pop-ups” or other forms of online advertising. *See id.* at ¶¶ 14-16, Record at 13. No discovery was necessary on this issue and whatever discovery Plaintiff might have done; it would not have had any actual impact on the district court’s resolution of the purely legal statutory interpretation issues in this case.

DATED this 18th day of June, 2004.


RANDY L. DRYER
MICHAEL P. PETROGEORGE
PARSONS BEHLE & LATIMER
Attorneys for Celebrity Cruises, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2004, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **APPELLEE'S** **OPENING BRIEF ON APPEAL**, to:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State
Sandy, Utah 84070

Jesse L. Riddle
RIDDLE & ASSOCIATES
11778 South Election Drive, Suite 240
Draper, Utah 84020



APPELLEE'S ADDENDUM

1. Amended Decision and Order, *Miller v. Next Phase Media, Inc.*, Case No. 020409662 (July 15, 2003).
2. Comments of Representative Arent, January 5, 2002, House Floor Debates Regarding House Bill 80.
3. Comments of Senator David H. Steele, January 25, 2002, House Floor Debates Regarding House Bill 80.

APPELLEE'S ADDENDUM NO. 1

**IN THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SANDY DEPARTMENT**

WADE MILLER,

Plaintiff,

vs.

GRANTING

NEXT PHASE MEDIA, INC. and JOHN DOES)

one through ten whose true names are unknown,)

Defendants.)

)

)

)

)

AMENDED

)

DECISION AND ORDER

)

DEFENDANT'S MOTION TO

)

DISMISS

)

Case No. 020409662

)

Judge Denise Posse Lindberg

¶1 On August 31, 2002 Plaintiff Wade Miller ("Miller") filed a complaint alleging that Defendant had violated Utah's Unsolicited Commercial and Sexually Explicit Email Act, Utah Code Ann. § 13-36-101 to -105 (2002) (the "UCSEEA" or "Act"). Before a responsive pleading was filed by Defendant Next Phase Media, Inc. ("Next Phase" or "Defendant"), Miller filed an amended complaint on February 27, 2003.¹ On March 31, 2003 Next Phase filed the present "Motion to Dismiss the Amended Complaint," under Utah R. Civ. P. 12(b)(6), along with a supporting memorandum of law. On April 14, 2003 Miller filed his memorandum in opposition to Defendant's motion ("Opposition"), along with a supporting affidavit. Defendant has filed a Reply, and a Notice to Submit.²

¹ Except where explicitly noted otherwise, all substantive references to the "complaint" in the body of this decision refer to Miller's *amended* complaint.

² Defendant requested oral argument for the first time in connection with its Notice to Submit. Unless there is good cause for denying a hearing request, the Court will normally grant a hearing if it is requested by "either party at the time of filing the principal memorandum in support of or in opposition to a motion." Utah R. Jud. Adm. §4-501(3)(B) (2002)(emphasis added). In this case, no request was made at the

¶2 In reaching its decision the Court has considered the pleadings and supporting documentation attached thereto (including Miller's affidavit and a printed copy of the allegedly offending message), as well as applicable law. Having fully considered the matter, the Court GRANTS Next Phase's Motion to Dismiss, which the Court treats as a motion for summary judgment.

STATEMENT OF FACTS

¶3 Miller is a resident of the State of Utah. The complaint does not explicitly state that he is a resident of Salt Lake County, but Defendant has not challenged venue in this Court. Miller's complaint asserts two causes of action: First, Miller alleges that Next Phase violated the UCSEEA by sending him an "unsolicited commercial email" [hereinafter "UCE"] that does not conform with the Act's requirements. Second, Miller alleges that Defendant's actions also establish a common law claim for trespass to chattels.

¶4 Attached to Miller's original complaint is a document that he claims is a UCE within the meaning of the Act (the "Attachment"). The Attachment is a printout of a series of five (5) computer screens [hereinafter "pages"]. None of the pages carries the usual email header (*i.e.*, "To," "From" and "Subject" entries). The Attachment does not include the information required by the Act.

¶5 Printed as a footer at the bottom left-hand corner of the Attachment's first page is the inscription: "http://www.icastle.com/." The date "8/8/2002" is printed on the lower right hand corner of the page. Pages 2 and 3 of the Attachment do not carry any headers or footers. Pages 4 and 5 do carry footer entries, but they differ from the one on the first screen. Inscribed on the lower left hand corner of page 4 is :
"http://www.imotors.com/ads/popups/icastle/tagtop.gif"; on the right hand corner of the same page is the date "8/8/2002." Printed on the lower left hand corner of page 5 is:
"http://www.imotors.com/ads/popups/icastle/textcopy.gif," with the same "8/8/2002" date on the lower right hand corner.

time the principal memoranda were filed. Accordingly, the request for oral argument is untimely, and the Court denies the request.

¶6 Miller's Affidavit does not refute Defendant's claim that the Attachment is the printout of a "popup browser window." Defendant Next Phase Media, Inc.'s Memorandum in Support of Motion to Dismiss Amended Complaint, at 2 [hereinafter "Memorandum"]; Miller Aff. Indeed, his Opposition memorandum essentially concedes the point.³ Opposition, at 3.

¶7 Miller's affidavit states: "I have not visited iCastle.com's website," Miller Aff. at 2, ¶9, and "I have not visited Next Phase Media Group, Inc's [sic] website." *Id.* at ¶10. The Affidavit is silent with respect to visiting the "iMotors.com" website.

LAW

³ Indeed, on the first page of the Attachment to the original complaint there is an original *handwritten* entry stating: "Pop-up on Aug 8 @ Wade Miller." The same handwritten entry (this time an obvious photocopy) appears on the Attachment to the amended complaint.

¶8 Among other things, the UCSEEA requires that “[e]ach person who sends or causes to be sent an unsolicited commercial email . . . to an email address held by a resident of the state shall” take certain actions to identify the sender, and the advertising nature of the message sent. Specifically, the Act imposes certain requirements on unsolicited commercial email messages⁴ and authorizes a civil cause of action for violation of the Act’s requirements. §13-36-105.

¶9 Under Utah R. Civ. P. 12(b)(6) the Court may dismiss a complaint for failure to state a claim upon which relief may be granted. The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). For purposes of this Motion, Plaintiff’s bare-bones factual allegations must be accepted as true, and, in deciding the matter, all inferences must be drawn in favor of Plaintiff. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990). A motion to dismiss will be granted only if there is no state of facts that would entitle Plaintiff to relief. *See Educators Mut. Ins. Ass’n v. Allied Property & Cas. Ins. Co.*, 890 P.2d 1029, 1030 (Utah 1995); *see generally Conley v. Gibson*, 355 U.S. 41, 45 (1957). Moreover, “[i]f, on a motion asserting the defense numbered (6) . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . .” Utah R. Civ. P. 12(b).

¶10 “Summary judgment shall be rendered if the pleadings, . . . admissions on file, [and] affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c); *see also Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991). The Court must draw all inferences in favor of the nonmoving party. Utah R. Civ. P. 56(c).

¶11 In this case Miller has filed an affidavit in opposition to Defendant’s motion. Defendant has failed to file a counter-affidavit. “A party may not rely upon allegations in the pleadings to counter affidavits made upon personal knowledge stating facts contrary to those alleged in the pleadings.” *Freed Fin. Co. v. Stoker Motor Co.*, 537 P.2d 1039, 1040 (Utah 1975). However, “[a]n affidavit that merely reflects . . . unsubstantiated conclusions and that fails to state evidentiary facts is insufficient to create an issue of fact.” *Walker v. Rocky Mt. Recreation Corp.*, 508 P.2d 538, 542 (Utah 1973); *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985).

ANALYSIS

¶12 Subject matter jurisdiction has been provided by the Act. The Court’s exercise of personal jurisdiction over Defendant is not contested.

⁴ For example, the Act requires that senders include certain truthful information in its email, prohibits the use of certain misleading practices, and requires the sender to provide a mechanism allowing recipients to “unsubscribe” with respect to future email messages. Utah Code §13-36-103.

I
Liability under the UCSEEA

¶13 Under the Act, “[e]ach person who sends or causes to be sent an unsolicited commercial email . . . through the intermediary of an email service provider located in the state or to an email address held by a resident of the state” is liable for civil penalties if the sender does not follow certain statutory requirements.⁵ Utah Code Ann. §13-36-103 (Supp. 2002). Among other things, the Act requires senders of UCEs to include certain truthful information in each UCE, to announce the advertising nature of the UCE by including “ADV:” in the subject line, and to include a mechanism allowing recipients to “unsubscribe” with respect to future messages. §13-36-103(1)(b). Additionally, the Act expressly prohibits the use of certain misleading practices designed to mask the true sender of the UCE. §13-36-103(2)(b). The Act authorizes a civil cause of action and specifies certain statutory damages. §13-36-105.

¶14 At issue in this case is whether, as a matter of law, the Attachment submitted by Miller is a UCE regulated by the Act. Defendant contends that a “popup browser window,” by definition, is not a UCE. Accordingly, Defendant argues that Miller cannot state a claim for relief under the Act.

¶15 As noted *supra* ¶6, Miller does not dispute Defendant’s characterization of the Attachment as a “popup browser window,” but rather argues that “[p]op-up advertisements . . . is [sic] of the type of ‘email’ covered by the statute.” Opposition, at 3. Relying on the Act’s broad definition of “email,” Miller argues that “[i]t seems obvious that the legislature[] . . . intended to cover all unsolicited electronic messages, in whatever electronic form they are sent.” *Id.*, at 4.

¶16 Admittedly, the Act’s definition of “email” is broad enough to cover any kind of electronic transmission. §13-36-102(3). The problem with Miller’s argument is that the operative requirements of the Act apply *only* to UCEs⁶ sent “through the intermediary of [a

⁵The Act does not define the terms “send” or “sender,” so under standard rules of construction the Court looks to the usual and ordinary meaning of the words. According to Webster’s New World Dictionary (2d Coll. ed.), relevant definitions include “to dispatch, convey or transmit; to arrange for the going of; to cause or force to move.” The common thread of these definitions is that the “sender” is the one who exercises initiative to communicate or transmit the message.

⁶ Although the Act, by its terms, also imposes its operative requirements on unsolicited sexually explicit email (whether or not it is commercial in nature), *see* § 13-36-103(2); *see also* 13-36-102(7)(a), for purposes of the present Motion the Court limits its discussion to UCEs.

Utah-based] email service provider” or “to an email address held by a [Utah] resident,” *not* to all “emails” as defined by the Act. *See* §13-36-103(1).

¶17 The Act defines an “[e]mail address” as a “destination, commonly expressed as a string of characters, *to which email may be sent or delivered.*” §13-36-102(4) (emphasis added). Notably, Miller’s affidavit does *not* assert that the Attachment at issue in this case was sent to his email address. Rather, the affidavit is artfully drafted to state “Wade @recovery-usa.com is my email address and I received the attached solicitation.” Miller affidavit, at 2, ¶3. Miller is making two assertions in the quoted statement: (1) what his email address is; and (2) that he received the Attachment. It is obvious that Miller would have the Court draw the inference that the Attachment was “sent” to him at his “email address.” Artful drafting, however, does not substitute for actual facts.

¶18 Miller also alleges that the advertisement was “unsolicited” and “commercial” in nature. Amended Complaint at ¶6. Defendant maintains that the advertisement was “solicited,” arguing that “Plaintiff *voluntarily* visited Defendant’s website and solicited its content.” Memorandum at 2 (Emphasis in original). At this stage of the proceedings the Court accepts Miller’s factual allegations as true because Defendant has not specifically controverted the allegations by way of affidavit.

¶19 In this case Miller has neither claimed nor provided evidence that Defendant sent the email “through the intermediary of an email service provider located in the state.” Utah Code Ann. §13-36-103(1) (Supp. 2002). Further, Miller does not directly claim that the popup advertisement of which he complains was sent to his email address, although that appears to be the prong of the Act under which he has brought this claim. *See supra* ¶17; *see also* Miller Aff. at 2, ¶3. Because popups, such as the one at issue here, are not sent to email addresses, but rather are browser windows that appear when an individual accesses a website such as iMotors.com, the Court concludes they fall outside the prong of the Act allegedly violated in this case. The Court assumes that the Legislature acted knowingly and deliberately when it limited the reach of the Act to UCEs sent to defined destinations known as “email addresses.” Nothing in the Act’s language indicates that the Legislature intended to bring within the Act’s requirements all popup advertisements, as claimed by Miller. On these facts, the Court concludes that Miller has failed to allege all the elements necessary to state a claim for relief under the Act.

II

Trespass upon Personal Property or Chattels

¶20 Miller’s alternative cause of action is trespass to property or chattels. Generally, trespass to chattels has fallen into disuse. *Walker v. Union Pacific Railroad*, 844 P.2d 335, 343 n.9 (Utah Ct. App. 1992). Nevertheless, “[t]he explosion of access to the Internet has created new ways of communicating, and accordingly, new problems. Courts have applied the common-law tort of trespass in the context of electronic communications.” Marjorie A.

Shields, Applicability of

Common-Law Trespass Actions to Electronic Communications, 107 ALR 5th 549 (2003).

¶21 A trespass to chattel may be committed by intentionally "(a) dispossessing another of the

chattel, or (b) using or intermeddling with a chattel in the possession of another."

RESTATEMENT (SECOND) OF TORTS § 217(b) [hereinafter "Restatement"]. Comment "e" of Restatement § 217 defines "intermeddling" as "an intentional[] . . . physical contact with the chattel. The actor may commit a trespass by an act which brings him into an intended physical contact with a chattel in the possession of another. . . ."

¶22 Section 218 of the Restatement lists four ways in which an actor may be subject to liability to the possessor of the chattel. They include (a) if the actor dispossesses the other of the chattel; (b) if the chattel is impaired as to its condition, quality, or value; (c) if the possessor is deprived of the use of the chattel for a substantial time; or (d) if bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest. Restatement § 218. While dispossession alone, without further damages, is actionable, other forms of interference require some additional harm to the personal property or the possessor's interest in it. *Id.*, par. (a), (b)-(d) & comment "d."

¶23 As explained in comment "e" to Restatement §218:

The interest of a possessor of a chattel in its inviolability, . . . is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c).

¶24 Comment "h" to §218 elaborates further:

an unprivileged use or other intermeddling with a chattel which results in actual impairment of its physical condition, quality or value to the possessor makes the actor liable for the loss thus caused. In the great majority of cases, the actor's intermeddling with the chattel impairs the value of it to the possessor, as distinguished from the mere affront to his dignity as possessor, only by some impairment of the physical condition of the chattel. There may, however, be situations in which the value to the owner of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition. . . . In such a case, the intermeddling is actionable even

though the physical condition of the chattel is not impaired.

¶25 The Restatement comments are generally consistent with Utah law as reflected in our Court of Appeals' statement in *Walker* that this tort, when applied, "requires that there be some damage to the chattel in question." *Walker v. Union Pacific Railroad*, *supra*, 844 P.2d at 343. To the extent that comment "h" to Restatement §218 suggests otherwise, this Court is bound by precedent to conclude that for Miller to survive a Rule 12(b)(6) challenge based on a claim of trespass to chattel, he must allege actual damage to the physical condition of the chattel.

¶26 A number of federal courts have approved the use of trespass to chattels as a theory of spammers' liability to Internet Service Providers (ISP)'s, based on evidence that the vast quantities of mail sent by spammers overburden ISPs ability to service their customers and impair the functioning of ISP computer systems. *See, e.g., CompuServe, Inc., v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550-51 (E.D.Va. 1998); *America Online, Inc., v. LCGM, Inc.* 46 F. Supp. 2d 444, 451-52 (E.D.Va. 1998), *EBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000). *Cf. Thrifty-Tel, Inc., v. Bezenek*, 46 Cal.App.4th 1559, 1566 (1996). The court in *EBay, Inc. v. Bidder's Edge, Inc.*, explained that "[i]n order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to the plaintiff." 100 F. Supp. 2d at 1069-70. After reviewing these cases, the California Supreme Court recently summarized them as follows: "In each of these spamming cases, the plaintiff showed . . . some interference with the efficient functioning of its computer system." *Intel Corporation v. Hamidi*, 2003 Cal. LEXIS 4205 (June 30, 2003), at 21. Finding liability under a trespass to chattel's claim under those circumstances is consistent with Utah law's insistence that there be actual damage to the property in question. *See Walker v. Union Pacific Railroad*, *supra*, 844 P.2d at 343 n.9.

¶27 The most recent appellate court guidance on the issue of unauthorized electronic contact with computer systems as potential trespasses to chattels is found in *Intel Corporation v. Hamidi*, 2003 Cal. LEXIS 4205 (June 30, 2003). In *Hamidi*, Intel maintained an email system connected to the Internet; Intel allowed its employees to make reasonable non-business use of the email system. Hamidi, a former Intel employee, sent six emails over a two-year period to current employees, criticizing Intel's employment practices. Intel sued Hamidi under a trespass to chattels theory. Lower courts had ruled in favor of Intel, but the California Supreme Court reversed, concluding that:

the tort [of trespass to chattels] does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. Such an electronic communication does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected

interest in, the personal property itself.
Id. at 4.

¶28 In reaching its decision the California court rejected Intel’s argument that “while its computers were not damaged by receiving Hamidi’s messages, its interest in the ‘physical condition, quality or value’ . . . of the computers was harmed.” *Id.* at 20.⁷ The *Hamidi* court determined that Intel had failed to demonstrate that Hamidi’s messages had “any appreciable effect on the operation of [Intel’s] computer system.” *Id.* at 27.

¶29 Similarly, here, Miller has not directly plead that Defendant’s actions intentionally and without authorization interfered with his possessory interest in the computer system, nor has he directly claimed any physical damage to his computer. Indeed, as was the case in *Hamidi*, Miller concedes that his computer was “not physically damaged by defendants’ conduct.” Opposition, at 9. Rather, Miller claims, without evidentiary support, that he was “damaged” because the alleged UCE utilized disk space and consumed processing power of his computer equipment, thus diminishing the computer’s value. *Id.* However, Miller fails to provide any facts showing how the temporary storage of a single popup advertisement, and the temporary use of a trivial amount of processing power to display it, diminished the value of his computer. In rejecting a similar claim by Intel, the *Hamidi* court concluded that the fact “[t]hat Hamidi’s messages temporarily used some portion of the . . . computers’ processors or storage is . . . not enough; Intel must, but does not, demonstrate some measurable loss from the use of its computer system.” *Hamidi, supra*, at 30 & note 5.

¶30 Finally, Miller offers no facts to support his conclusory statement that removing the alleged UCEs will “require[] effort, time and expense.” *Id.* Without more, this allegation is insufficient to establish cognizable “damage” to Plaintiff.

¶31 Defendant clearly did not dispossess or deprive Miller of possession of the chattel, *i.e.*, Plaintiff’s computer equipment. Thus, the actions by Defendant, at most, would constitute “intermeddling” with the chattel. The Court is persuaded that Miller’s conclusory statements fail sufficiently to allege facts that show damage to the physical

⁷ Although Miller’s trespass to chattels claim in this case is not as broad as that asserted by Intel in the *Hamidi* case, that court’s discussion regarding one of Intel’s theories may also be applicable here:

‘Damage’ [resulting from] the distraction of reading or listening to an unsolicited communication—is not within the scope of the injury against which the trespass-to-chattel tort protects, and indeed trivializes it. After all, ‘the property interest protected by the old action of trespass was that of possession; and this has continued to affect the character of the action’ . . . Reading an e-mail transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment. . . .’ While unwelcome communications, electronic or otherwise, can cause a variety of injuries . . . protected by other branches of tort law; in order to address them, we need not create a fiction of injury to the communication system.

Id., at 34-36 (citations omitted).

condition of his chattel or to support the diminution of value claim. Accordingly, Miller's claim under a "trespass to chattel" theory fails to state a claim for which relief can be granted.

ORDER

¶32 Defendant's Motion to Dismiss for failure to state a claim is GRANTED.

So ordered this 15th day of July, 2003, by the Court:

DENISE POSSE LINDBERG,
Third District Court Judge

APPELLEE'S ADDENDUM NO. 2

COPY OF TRANSCRIPT

UTAH STATE HOUSE OF REPRESENTATIVE FLOOR DEBATES

REGARDING:

HOUSE BILL 80

HOUSE BILL 143

DATES:

JANUARY 5, 2002
FEBRUARY 26, 2002
MARCH 4, 2002
MARCH 6, 2002



Thacker + Co.

Court Reporters

Utah's Leader in Litigation Support

Salt Lake City

Washington, DC

New York

Los Angeles

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

www.thackerco.com

House Floor Debate

January 5, 2002

PROCEEDINGS

MS. ERICKSON: First Substitute House Bill 80, Unsolicited Commercial Email, Patrice Arent.

PRESIDENT MANSELL: Representative Arent.

REPRESENTATIVE ARENT: Thank you, Mr. Speaker. I'd like to move the amends under my name, Amendment No. 4 in your book dated January 23, six p.m.

PRESIDENT MANSELL: Okay, we have that, proceed.

REPRESENTATIVE ARENT: These are technical amendments that were brought to me from our counsel based on input he has received from techies from throughout the state. And they don't change the intent or any policy in this bill at all.

PRESIDENT MANSELL: Further discussion to Amendment No. 4. I see no light, Representative Arent, for summation on the amendment.

MS. ERICKSON: We have summation.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

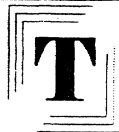
1 PRESIDENT MANSELL: (Inaudible.) The
2 motion to amend is found on the pink sheet,
3 Amendment No. 4 under Representative Arent's name.
4 Those in favor of the motion to amend say aye.

5 FROM THE CONGREGATION: Aye.

6 PRESIDENT MANSELL: Opposed say no.
7 Motion passes. Representative Arent, the bill is
8 amended.

9 REPRESENTATIVE ARENT: Thank you, Mr
10 Speaker.

11 This bill concerns unsolicited
12 commercial email, also known as SPAM. We've all
13 received it. It's costly, it's annoying, and it's
14 a waste of time. According to American Online,
15 it's their number one customer complaint, is SPAM.
16 Statistics show it's increased six fold in the
17 last two years. And as opposed to regular junk
18 mail that you receive, with regular junk mail the
19 sender has paid the money to have it printed and
20 sent. But here with junk email, the recipients
21 pay the cost. They pay the cost if they want to
22 print it, they pay the cost in higher internet
23 connection fees. Because the internet service
24 providers receive so much of this, they have
25 increased their capacity. And of course, we pay



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 in time.

2 It costs the same for a sender of the
3 email to send 10 messages or 10 million messages.
4 The cost to businesses are dramatic. I've talked
5 to many businesses who say it is just difficult
6 for them. They have perhaps 200 or 300
7 terminals. They all receive SPAM. It takes a
8 lot of employee time to get rid of it. According
9 to a recent study, the average employee spends 10
10 minutes a day, and that's going up, just reviewing
11 and deleting SPAM.

12 HB80, the first substitute, places some
13 reasonable limitations on SPAMers. These ideas
14 are not my original ideas. They come from the 19
15 other states that have already passed these laws.
16 First of all, it requires in the subject line the
17 first three letters have to be adv for
18 advertisement, so you know what you're getting.
19 Also there needs to be a no-cost opt out
20 provision that works. At the bottom of the email
21 they have to have something in there, or someplace
22 in the email, that you can click and really get
23 off the list. And the choice is yours, whether
24 you want to do that or not. And there are pros
25 and cons there. Also if they have a toll free



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 number, they should include that. They don't have
2 to go out and get one. The sender would have to
3 correctly identify themselves and the origin of
4 the email.

5 The bill provides broad exceptions for
6 personal relationships, for existing relationships
7 with business and for somebody accidentally pressing
8 the money--the button that could SPAM you. In
9 other words, if I accidentally press a button and
10 forward my SPAM to everybody in the legislature, I
11 would not be liable. There are civil remedies
12 for noncompliance. Individuals can sue,
13 businesses can sue, internet service providers can
14 sue.

15 Now I will tell you that some of you
16 asked about federal laws. And frankly, I wish it
17 had been dealt with on a federal level. And
18 there were some pretty good bills out there. But
19 on September 11 they closed down and they aren't
20 moving. And so we need to do something to
21 protect Utah consumers. This bill would allow a
22 Utah consumer to sue a SPAMer who sent a SPAM
23 from Florida, Montana, or anyplace else. This
24 bill has received tremendous support. I've given
25 you just a couple of the many letters I've



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 received from business, from internet service
2 providers, from individuals, from the Division of
3 Consumer Protection. There is another amendment,
4 a friendly amendment awaiting, so I'll end now and
5 be happy to answer any questions. Thank you very
6 much.

7 PRESIDENT MANSELL: Thank you.
8 Representative Ure.

9 REPRESENTATIVE URE: I wish to propose
10 an amendment please, Mr. Speaker.

11 PRESIDENT MANSELL: Proceed.

12 REPRESENTATIVE URE: You will find an
13 amendment under my name dated January 24 at 1:19
14 p.m. What I'm doing in this amendment is putting
15 a criminal intent on the SPAMing bill also.
16 Right now under the present code, yes we can all
17 sue, but it has to be under a civil court. And
18 we would all have to originate the lawsuit
19 ourself. The question's going to asked is if
20 Utah, we have this criminal penalty in the State
21 of Utah, and yet the SPAM is coming out of
22 Florida, what do we do about it then? What I'm
23 hoping to do through this, is through a
24 correlation of many states passing criminal intent
25 language on SPAM, that we'll have a relationship



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 with say, Florida, New York or wherever it might
2 be that we might be able to negotiate some of
3 these arrangements back and forth.

4 That's why I'm wanting to put this
5 criminal penalty into it right now. Yes, a Class
6 C is not much of a penalty on it, but it's a
7 starting point for where we can start to allow
8 the citizens to realize that we in this state are
9 actually trying to protect them of the SPAMing
10 coming through their internet.

11 And so with that I would ask for your
12 support or ask for any questions.

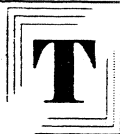
13 PRESIDENT MANSELL: Representative
14 Arent, the motion to amend?

15 REPRESENTATIVE ARENT: I support the
16 amendment.

17 PRESIDENT MANSELL: Further discussion
18 of the motion to amend. Seeing no lights,
19 Representative Ure, for summation.

20 REPRESENTATIVE URE: I believe I've
21 done it. Thank you.

22 PRESIDENT MANSELL: Summation is
23 waived. The motion to amend is found on the pink
24 sheet. It's amendment No. 6 under Representative
25 Ure's name. Those in favor of the motion to



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 amend say aye.

2 FROM THE CONGREGATION: Aye.

3 PRESIDENT MANSELL: Opposed say no.

4 The motion passes. We're back to the bill.

5 Representative Arent, seeing no further lights,
6 back to you for summation.

7 REPRESENTATIVE ARENT: I'll waive
8 summation. Thank you, Mr Speaker.

9 PRESIDENT MANSELL: Summation is
10 waived. Voting is open on First Substitute House
11 Bill 80 as amended.

12 Seeing all present having voted.
13 Voting will be closed. First Substitute House
14 Bill 80 having received 64 yes votes and 2 no
15 votes, passes. This body will refer to the
16 Senate for further consideration (inaudible).

17 House Floor Debate

18 March 4, 2002

19 PROCEEDINGS

20 PRESIDENT MANSELL: We do have two
21 bills on the concurrence calendar that we can take
22 this morning first thing. I'm going to go to
23 Representative Arent first. We'll deal with Third
24 Substitute House Bill 80 first. Representative
25 Arent.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 REPRESENTATIVE ARENT: Thank you, Mr.
2 Speaker. I move we concur in the amendments to
3 House Bill, Third Substitute House Bill 80. Let
4 me explain those briefly.

5 First of all, it's a substitute so that
6 we can incorporate all of the amendments in one
7 bill so it would be easier to read. The two
8 substantive changes of the criminal sanctions are
9 no longer in the bill, and the toll free number
10 which will still be an option for companies is no
11 longer required. These are all agreed to and I
12 urge you to support this motion.

13 PRESIDENT MANSELL: The motion is that
14 we concur with the Senate amendments. Further
15 discussion to the motion to concur? Seeing none,
16 Representative Arent, back to you for summation.

17 REPRESENTATIVE ARENT: Waive summation.

18 PRESIDENT MANSELL: Summation's waived.
19 Those in favor of the motion to concur with the
20 Senate amendment say aye.

21 FROM THE CONGREGATION: Aye.

22 PRESIDENT MANSELL: Opposed say no.
23 The motion passes. The House will concur with
24 the Senate amendments. Voting is open on Third
25 Substitute House Bill 80 as amended by the Senate.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 Seeing all present having voted, voting
2 will be closed. Third Substitute House Bill 80,
3 having received 70 yes votes and 0 no votes,
4 passes this body and will be referred to the
5 Senate for the signature of the president.

6 House Floor Debate

7 February 26, 2002

8 PROCEEDINGS

9 House Bill 143

10 MS. ERICKSON: --sanctions on sexually
11 explicit email, Bradley Winn. This was heard in
12 law enforcement with a vote of 10 yes, 0 no, 2
13 absent.

14 PRESIDENT PRO TEM: Representative
15 Curtis?

16 REPRESENTATIVE CURTIS: Thank you, Mr.
17 Speaker. Move to circle House Bill 143--

18 PRESIDENT PRO TEM: The motion is that
19 we circle House Bill 143. Discussion to the
20 motion? Seeing none, all in favor say aye.

21 FROM THE CONGREGATION: Aye.

22 PRESIDENT PRO TEM: Opposed say no.
23 Motion passes. The bill will be circled.
24 Representative Winn? Just a second. Okay,
25 proceed, go ahead.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 REPRESENTATIVE WINN: I move to
2 uncircle House Bill 143.

3 PRESIDENT PRO TEM: The motion is that
4 we uncircle House Bill 143. Would you state the
5 title, please?

6 REPRESENTATIVE WINN: Restrictions on
7 Sexually Explicit Email.

8 PRESIDENT PRO TEM: Restrictions on
9 Sexually Explicit Email. Discussion to the
10 motion? Seeing none, all in favor say aye.

11 FROM THE CONGREGATION: Aye.

12 PRESIDENT PRO TEM: Opposed say no.
13 Motion passes. The bill will be uncircled.
14 Representative Winn.

15 REPRESENTATIVE WINN: Thank you. I
16 apologize for not being ready when that came up.

17 This is being more popularly known as
18 the porn SPAM bill. What it does, and I'll be
19 very quick. It's very similar to the SPAMing
20 bill that we passed earlier which says you have
21 to put adv for advertising in the subject line.
22 This says that if it's an unsolicited email that
23 you get that includes obscene material, not fit
24 for minors, that there would be several
25 restrictions on that.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 One would be that in the subject line
2 you would have to put the word adult in the first
3 nine characters of the subject line. Another
4 would be that you have to give me as a parent a
5 way to get off of your email list so that I don't
6 get those in the future. There's a way for me to
7 opt out. It does also provide for penalties,
8 civic as well as criminal, the civic penalties are
9 listed in the bill as far as the monetary
10 penalties. So with that, Mr. Speaker, I would be'
11 open for questions.

12 PRESIDENT PRO TEM: We'll open House
13 Bill 143 to further discussion. Representative
14 Pace?

15 REPRESENTATIVE PACE: Thank you, Mr.
16 Speaker pro tem. I would like to reserve the
17 right to make a motion and speak first.

18 PRESIDENT PRO TEM: That right is no
19 noted.

20 REPRESENTATIVE PACE: Thank you very
21 much. As I was reading this piece of legislation
22 last night, I was thinking back to a few years
23 ago. I have, one of my foster sons has a large
24 family of seven children, a wonderful, sweet
25 family I adore. But a few years ago he got



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 hooked on pornography on the internet. And I
2 don't have time to go into any detail, or is it
3 necessary, but to tell you that a very sweet
4 family was destroyed because of this kind of
5 information on the internet. If I had a right,
6 my concern is we always say what's not good for
7 minors just isn't good for anybody. I think it's
8 probably at the root of a lot of domestic
9 violence that we have, the abuse of all ages, et
10 cetera, because of what's going on here. I think
11 it's just an insidious thing that's in our
12 society. And I really applaud this Representative
13 for bringing forth his legislation. So we at
14 least can be forewarned that there is content in
15 there that we know is going to be damaging to all
16 of us.

17 And my concern is that I don't think a
18 class C misdemeanor is hard enough. I think we
19 ought to have this a more serious penalty.
20 Because I think it's so much at the root of
21 breaking up families and destroying people, that I
22 think we ought to take it more seriously. And so
23 I would move that we--let's see. I can't find
24 the line here. Thank you. On line 79 I would
25 move that we change the C to a B and send a more



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 serious message of the ills that this is causing
2 in our society today.

3 PRESIDENT PRO TEM: Thank you
4 Representative Pace. Then to clarify that, on
5 line 79 you're changing it actually from a class
6 C misdemeanor to a class B misdemeanor in your
7 motion?

8 REPRESENTATIVE PACE: Yes.

9 PRESIDENT PRO TEM: Then do you want to
10 proceed to talk to that or--

11 REPRESENTATIVE PACE: No. I think I've
12 addressed it. Thank you.

13 PRESIDENT PRO TEM: Okay. Back to you,
14 Representative Winn, in terms of your response to
15 the motion?

16 REPRESENTATIVE WINN: I consider that a
17 friendly amendment. I would consider that a
18 friendly amendment.

19 PRESIDENT PRO TEM: Then we
20 (inaudible). So further discussion to the motion
21 to amend? Okay, then I'll put the amendment out
22 to vote Those in favor?

23 FROM THE CONGREGATION: Aye.

24 PRESIDENT PRO TEM: Those opposed?
25 Those voting no? I'll rule the motion passes.



Thacker + Co LLC
Court Reporters
Utah's Leader in Litigation Support

1 Any further discussion to House Bill 143?

2 Representative Ferrin?

3 REPRESENTATIVE FERRIN: Thank you Mr.
4 Speaker pro tem. Would the sponsor yield the
5 question?

6 PRESIDENT PRO TEM: Will the sponsor
7 yield?

8 REPRESENTATIVE WINN: Yes.

9 REPRESENTATIVE FERRIN: On line 61 I
10 believe, yeah line 61. You have a requirement
11 that the sender include a toll free number,
12 telephone number, so that the recipient may be
13 excluded from future email. But only if the
14 sender has a toll free number. Too, it would be
15 pretty easy if I were going to be a porn SPAMer
16 to not have a toll free number and be exempt from
17 that requirement. Was there any special reason
18 why that provision was left open for that?

19 REPRESENTATIVE WINN: There are two
20 ways that you should be able to get off a porn
21 SPAMer's list. One would be by them putting in
22 the body of the email a way for you to respond by
23 email to get off their list. And if they have a
24 toll free number they can give you, they are
25 required to give you that option as well.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 REPRESENTATIVE FERRIN: Thank you. And
2 having already spoken I won't make the motion that
3 I had contemplated reserving, the right to make.
4 But if anybody in here feels strongly enough about
5 it that they want to make the motion, I was going
6 to suggest that we simply remove the words, "If
7 the center has a toll free telephone number," it
8 simply includes a valid toll free telephone
9 number. Yeah, that would impose a cost upon the
10 porn SPAMers. But I would consider that an
11 appropriate cost of doing business in the State of
12 Utah. If you're going to be a porn SPAMer, you
13 ought to pay the whatever it is dollars a month
14 to maintain a toll free number.

15 However, having spoken already, I won't
16 make that motion. Thank you.

17 PRESIDENT PRO TEM: Seeing no further
18 lights, we'll go back to the Representative for
19 summation.

20 REPRESENTATIVE WINN: The core of the
21 concern that I have is the societal impact that
22 we are having with internet and pornography. The
23 number one complaint that our Obscenity Ombudsman
24 gets is unsolicited pornographic email
25 advertisements. I think that Representative Pace



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 spoke eloquently to the concerns and the impact.
2 The internet's a wonderful thing. Every day I'm
3 learning new things I can do as far as a tool.
4 But I think we all know this is a billion and
5 billion dollar industry out there that's using
6 this. And I think that for us as a state to not
7 make a strong statement on this is problematic.
8 And I appreciate your support on what is not a
9 panacea to stop this, but I think a first step in
10 trying to stem the tide. Thank you.

11 PRESIDENT PRO TEM: We'll now open HB
12 143 for a vote.

13 Seeing all present having voted, we'll
14 close the vote. House Bill 143 having received
15 65 yes votes and no no votes, passes this House
16 and will be transmitted to the Senate for further
17 action.

18 House Floor Debate

19 House Bill 143

20 March 6, 2002

21 PRESIDENT MANSELL: We'll go to
22 Representative Winn next and House Bill 143. Just
23 a second Representative Winn. Okay, proceed.

24 REPRESENTATIVE WINN: Thank you, Mr.
25 Speaker. I move that we concur with the Senate



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 amendments on House Bill 143.

2 PRESIDENT MANSELL: The motion is that
3 we concur with the Senate amendments. Do you
4 want to explain those, Representative Winn?

5 REPRESENTATIVE WINN: Thank you.
6 You'll recall that we passed out House Bill 80,
7 Unsolicited Commercial Email, sponsored by
8 Representative Arent. All that this amendment
9 does is coordinate the sexually explicit email
10 bill with the commercial email bill. And so all
11 it does is put these two together in the same
12 act.

13 PRESIDENT MANSELL: Discussion to the
14 motion to concur. Representative Arent?

15 REPRESENTATIVE ARENT: Yes. I urge you
16 to support this motion. It's just to make sure
17 the two bills coordinate together as the sponsors
18 indicated. And it makes a lot of sense. And if
19 not, we're going to have all kinds of problems in
20 the code.

21 PRESIDENT MANSELL: Seeing no further
22 lights, Representative Winn for summation.

23 REPRESENTATIVE WINN: This amendment
24 was brought to us by (inaudible) research. That's
25 all I have to add.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 PRESIDENT MANSELL: Those in favor of
2 the motion to concur with the Senate amendment,
3 say aye.

4 FROM THE CONGREGATION: Aye.

5 PRESIDENT MANSELL: Opposed say no.
6 Motion passes. The House will concur with the
7 Senate amendments. Voting is open on House Bill
8 143 as amended by the Senate.

9 Seeing all present having voted,
10 Representative Morgan, Representative Buttars.
11 Voting will be closed. House Bill 143 having
12 received 68 yes votes and 0 notes passes this
13 body and will refer to the Senate for the
14 signature of the president.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

C E R T I F I C A T E

STATE OF UTAH)
 : ss.
Salt Lake County)

I, KELLY THACKER, Certified Court Transcriber for the State of Utah, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability from the audiotape furnished to me.

DATED: August 14, 2002



Kelly Thacker

APPELLEE'S ADDENDUM NO. 3

ORIGINAL TRANSCRIPT

UTAH STATE SENATE AND HOUSE FLOOR DEBATES

REGARDING:

HOUSE BILL 80

HOUSE BILL 143

DATES:

JANUARY 25, 2002

FEBRUARY 27, 2002

FEBRUARY 28, 2002

MARCH 1, 2002

MARCH 4, 2002

MARCH 5, 2002

MARCH 6, 2002



Thacker + Co. LLC

Court Reporters

Utah's Leader in Litigation Support

Salt Lake City

Washington, DC

New York

Los Angeles

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

www.thackerco.com

House Floor Debate

January 25, 2002

PROCEEDINGS

PRESIDENT MANSELL: Okay. Senator Steele, have you got the next bill?

MS. ERICKSON: (Inaudible) House Bill 80, Unsolicited Commercial Email by Representative Arent. Senator Steele.

PRESIDENT MANSELL: Senator Steele?

SENATOR STEELE: Thank you, Mr. President.

I think you're going to like this bill for several reasons. Let me just ask if you look at your email list today, how many emails do you have? Do you ever get inundated by a number of emails?

And the second related question to that, do you get inundated by emails that you really don't want or don't know very much about? If they're advertisements or if they have some other purpose than to give you direct information that you were requesting or some other nature? Well, this reception of unsolicited email goes under a name, it's called SPAM. It is an issue that is emerging more and more, certainly because



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 of the use of technology is such a vital tool in
2 the way we communicate, and certainly the way that
3 business operates other things. But some of the
4 questions that all of us ask ourselves, like junk
5 mail, at what point are we not willing to accept
6 more junk mail? And this is the bill that
7 attempts to address that.

8 In the bill, very straightforward, very
9 simple, the sender must correctly identify
10 themselves, and what is the purpose of the email.
11 It requires that an adv attachment be listed under
12 the subject line so that we as the recipient
13 might understand that this is an advertisement.
14 This also requires an opt out provision. Have
15 you ever been on one of these lists, that you get
16 an email for an advertisement, then the next day
17 you get another one, next or whatever. It just
18 goes on forever and ever and ever. You try to
19 get off that list. I did this for the Olympics
20 and it took me six attempts, six days to actually
21 get removed, when I thought it would be an easier
22 process.

23 But this bill provides that opt out
24 provision. It requires it. It has broad
25 exemptions for business and personal



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

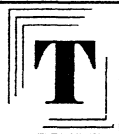
1 relationships, certainly. We're not trying to
2 limit the ability for individual email. It
3 provides a degree for compliance, a stimulus for
4 compliance, by way of a fine. Nineteen states
5 have already enacted laws to regulate unsolicited
6 commercial email. This attempt would be for us
7 to be the twentieth in that process. I have
8 distributed an amendment. This bill has been--I
9 would say because of the very important nature of
10 it, under a lot of technical scrutiny from all
11 sides. And so this particular amendment that has
12 just been distributed to you under my name, talks
13 about a provision of notice relating to an 800
14 number notification and requirement. That notice
15 or requirement is being eliminated. So let's
16 first deal with the amendment, about placing the
17 amendment before us.

18 PRESIDENT MANSELL: I have an amendment
19 before us. Any discussion to the amendment?
20 It's amendment No. 14 on the hand copy.
21 Clarification, Senator Walker.

22 SENATOR WALKER: (Inaudible) amendments
23 113 and 114. Is 13 no long pertinent?

24 PRESIDENT MANSELL: They're identical.

25 SENATOR WALKER: They're identical?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free 877-441-2180

Fax. 801-983-2181

1 They just--okay.

2 PRESIDENT MANSELL: Except for three
3 and four, that's what I'm being told. It's the
4 same one.

5 SENATOR WALKER: So we're tossing out
6 13 and just going with 14?

7 PRESIDENT MANSELL: Yes. So this is
8 amendment titled 13? 14?. Which one was just--I
9 apologize. They are exactly the same if you--

10 IDENTIFIED FEMALE: Senator Steele, the
11 only difference is 13 says House Committee
12 Amendments, Amendment 14 says Senate Committee.

13 PRESIDENT MANSELL: Thank you for the
14 clarification. So we would be on (inaudible),
15 they would be on 14 appropriately. Is there any
16 discussion related to the amendment? Seeing none,
17 all in favor say aye.

18 FROM THE CONGREGATION: Aye.

19 PRESIDENT MANSELL: Any opposed say no.
20 Then it passes. Senator Steele the bill is
21 amended.

22 SENATOR STEELE: But there has been, as
23 I mentioned, very careful work too. Bring parties
24 to the table to understand the implication of it.
25 Again, not to try to eliminate the process of



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 commercial business using the internet, but rather
2 to clarify the intent. And so this bill does
3 that. I have pledged that there will be one
4 other additional consideration, but I'd like to
5 have that discussion on the third reading calendar
6 and would answer any questions relating to the
7 bill at this time.

8 PRESIDENT MANSELL: Senator Valentine,
9 do you have a question for Senator Steele?
10 Senator Valentine.

11 SENATOR VALENTINE: Thank you. I
12 notice that there was an amendment, it looks like
13 at probably the House either on the committee or
14 on the floor on line 40 dealing with unsolicited.
15 (Inaudible.)

16 SENATOR STEELE: Yes, what happens,
17 there are several examples where people have been
18 doing business in transaction for a previous
19 association with one another. And so that type
20 of association shouldn't be hampered or changed by
21 this kind of legislation. So we want to protect
22 that.

23 SENATOR VALENTINE: Protection is in
24 one person's mind, but in another person's mind I
25 look at that as being continually harassed. And



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 if you buy one thing from somebody, then you have
2 to have their email forever and receive their SPAM
3 forever?

4 SENATOR STEELE: As far as the
5 provision, they would still have to have the same
6 kind of opt out provision that the bill has, the
7 other kinds of--

8 SENATOR VALENTINE: It seems like line
9 40 is a trump card, though. It doesn't allow you
10 to opt out. It seems like it overrides your
11 attempt to opt out.

12 SENATOR STEELE: I think you've got a
13 very good point as far as the definition of what
14 is a preexisting relationship.

15 SENATOR VALENTINE: I've got a concern
16 with the bill on that aspect of it. There's a
17 couple of other things that other people have, but
18 that's one that bothers me, that before I can
19 vote for final passage, it would have to have
20 that cleaned--

21 SENATOR STEELE: Could we have that
22 discussion then if (inaudible)?

23 PRESIDENT MANSELL: Other questions or
24 discussion relating to this bill? Senator
25 Bramble?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

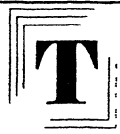
Fax: 801-983-2181

1 SENATOR BRAMBLE: Thank you, Mr.
2 President. I told the House sponsor that I would
3 stand and speak favorably on this bill. I voted
4 yes, and in committee I got some additional
5 information. I then got spammed. Well the
6 supporters of this bill, all those people who
7 wanted to get rid of spamming took the opportunity
8 to spam me and tell me why we needed to get rid
9 of spamming. So I'm convinced. So I just stand
10 in support of this.

11 PRESIDENT MANSELL: Senator Stevenson?

12 SENATOR STEVENSON: Thank you, Mr.
13 President. I just have some questions. I wasn't
14 part of the discussion in committee on this, and
15 so I'm kind of at a disadvantage. But I wanted
16 to know how this affects Utah businesses trying to
17 advertise to Utah consumers as opposed to out of
18 state businesses advertising to Utah consumers.
19 Is there a difference? Are we putting our
20 businesses at a disadvantage to out of state
21 businesses?

22 SENATOR STEELE: As I mentioned, we
23 would be the twentieth in a series of states.
24 This is a very national kind of movement,
25 California being one of the most recent ones to



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 go through a court test of that advertising
2 procedure. And I think you probably were aware
3 that that court challenge was upheld as
4 appropriate under California law. So the
5 existence of what will happen in a business sense
6 nationally will continue to have the kind of
7 emphasis, so that from your question will Utah
8 businesses be disadvantaged because they're
9 putting the advertising requirement in the subject
10 space line, no. That's just going to be for them
11 very good business practice, because they're going
12 to be in compliance with how everyone else is
13 doing the same type of exchange of information.

14 SENATOR STEVENSON: What about a
15 business located in a state that does not have
16 such an ordinance or such a law requiring the adv
17 designation?

18 SENATOR STEELE: Ultimately they'll
19 find themselves, like many of us do, with a file
20 filter that takes out anything that has that
21 subject area--

22 SENATOR STEVENSON: No. I guess I'm
23 not--I guess I'm not making myself clear. A Utah
24 business trying to advertise to Utah email
25 recipients will have to put the adv designation on



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 all their email. What about an out of state
2 business sending email to Utah potential customers
3 who do not have to put the adv designation on
4 their email?

5 SENATOR STEELE: It would require the
6 same, exactly the same designation. It's not a
7 tiered separation.

8 SENATOR STEVENSON: If they don't? I
9 guess I'll have to read the bill again, then,
10 because it was my understanding that we could not
11 regulate out of state businesses sending email to
12 Utah.

13 SENATOR STEELE: One of the issues of
14 the bill, obviously in that compromised position
15 where it stands, is to look at how other states
16 will apply Utah law as they deal with Utah
17 prospective clients. The counsel that we have
18 received is that that same Utah code would affect
19 anyone doing business just outside of the state
20 just as the person inside the state of Utah is
21 attempting to do business. So that advertising
22 requirement would stand. And the court challenge
23 from outside the state, as I mentioned in
24 California, upheld the constitutionality of that
25 issue.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 So my point is, will there be
2 businesses that will try to circumvent that
3 advertising requirement? I would guess that an
4 education process is in place. But can we apply
5 Utah law as they do that kind of business with
6 us, and our counsel says yes we may.

7 SENATOR STEVENSON: And the statue that
8 we're considering right now--

9 SENATOR STEELE: Yes.

10 SENATOR STEVENSON: --basically reaches
11 outside of our borders and requires that
12 designation on all email addresses.

13 SENATOR STEELE: Yes.

14 SENATOR STEVENSON: Thank you.

15 PRESIDENT MANSELL: Senator Hickman?

16 SENATOR HICKMAN: Go ahead, and then
17 I'll follow.

18 PRESIDENT MANSELL: Senator Walker?

19 SENATOR WALKER: This probably shows my
20 ignorance in terms of high tech email. My
21 question is how do you know the origin, or the
22 state origin of an email when it's coming in to
23 you? And how do you control something that's
24 coming from the great out there in terms of
25 receiving an email? How do you know what state



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 they're in when they're emailing you? I can't
2 tell when I get an email where it's coming from.

3 SENATOR STEELE: The process of saying
4 it will eliminate every undesired piece the first
5 time? This bill won't eliminate that. Because
6 as you've said, this could be off shore, it could
7 come from so many different places. But the
8 provision as well as we can establish for those
9 individuals that are trying to do reputable
10 commercial practice, those that are outside of
11 that bound, you know, we're not going to have
12 that much of an impact on them directly. But
13 those that are trying to be reputable and provide
14 business information for us so that they can
15 conduct business and we can respond to the
16 solicitation and other information provided, the
17 parameter of the bill covers and requires them to
18 participate. And we then could seek remedy, and
19 that's what this bill's about. The first option
20 that we've ever had to seek remedy.

21 And so if you get one or two, I don't
22 think you're going to try to say, well, where's
23 this coming from? But if you were inundated, or
24 if all of us were inundated by a large group and
25 we wanted to seek remedy to find out who in the



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 heck is doing this and what penalty could be
2 attached to them for doing that, then this is the
3 trigger that allows us that option. Previously we
4 didn't have that option.

5 SENATOR WALKER: So if I understand
6 this, these are the higher profile, more
7 legitimate companies that will be regulated. And
8 at least it will be a, it will be a step forward.
9 So those that are really trying to sidestep it
10 and that are not mainstream can sidestep it,
11 because like you say, this is a step in the right
12 direction, but it's not going to regulate those
13 that are lower profile, smaller companies that
14 are--

15 SENATOR STEELE: The attempt is to have
16 everyone impacted but--

17 SENATOR WALKER: But that's kind of
18 impossible is what you're saying, because not
19 being able to pinpoint the origination of an
20 email.

21 SENATOR STEELE: Yes, I don't want to--

22 SENATOR WALKER: I may not be
23 understanding correctly.

24 SENATOR STEELE: No, I think you were
25 understanding properly and appropriately. What



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 we're trying to do is provide that mechanism of
2 some kind of remedy towards--you've cited a case
3 where will we be able to identify everyone the
4 first or second time. That's the question, it's
5 no, it's just like pornography. We're not going
6 to be able to do that in my opinion yet. But can
7 we then seek remedy for those individuals for
8 whatever reason their activity becomes very
9 questionable, or is the unsolicited repetitious
10 kind of mail, regardless of the size, and the
11 answer to that question is yes, now we can.

12 SENATOR WALKER: I don't want you to
13 misread me. I'm certainly not against this. I
14 just was trying to understand. Because it seems
15 to me it's very hard for me to understand when I
16 get all these emails, where they're coming from.
17 And I've always been curious as to how you would
18 control something like this. Because you never
19 know where they're coming from.

20 SENATOR STEELE: One of the things that
21 electronic signature provides is that string to
22 find it. Again I want to emphasize why this is
23 such an important piece of legislation for us.
24 It requires work and a lot of effort sometimes to
25 follow that electronic trail of who is sending,



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 and then ask the question from where and for what
2 purpose. The reason that that doesn't happen is
3 there's no motivation to do it. You may be
4 annoyed and say, oh I don't like that kind of
5 thing happening. But you stand in your annoyance.
6 And so you have to go through what I did, six
7 separate days to finally get my name off the
8 list. There was little motivation. This bill
9 then provides the State the option to seek these
10 individuals out and follow that electronic trail
11 and say you're in violation here, and here is the
12 consequence of that violation.

13 So the penalty attachment by monetary,
14 it could be the stimulus to cause the felonious--
15 not from a felony, but the common unsolicited,
16 just junk mail from being just the norm. This
17 would cause it to be not just the norm.

18 SENATOR WALKER: Correct me if I'm
19 wrong. But this is really a step in the right
20 direction in terms of one more state adding this
21 bill to their law. What we really need is for
22 all of the states to be consistent or to at least
23 to have something in statute that is against this.
24 And then we will be making a real significant
25 step forward, correct?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 SENATOR STEELE: I believe that's true,
2 but I also believe that in the interim this is a
3 huge step in that direction for us.

4 SENATOR WALKER: Thank you.

5 PRESIDENT MANSELL: Senator Hickman?
6 And then we'll go to Senator Spencer following
7 that. Senator Hickman?

8 SENATOR HICKMAN: Thank you, Mr.
9 President. A couple of things that I think--I
10 was going to talk about the penalty, but I think
11 Senator Spencer is going to address the penalty
12 area. So I'll go to him.

13 But I was watching TV the other night,
14 and during that process of watching the Olympics,
15 I got about 15 unsolicited vmails. They were
16 vmails, not emails. They're visual. They come
17 in on the TV and they're advertising and they're
18 soliciting my business. And they pay a dear
19 price for that. And I didn't ask for them to
20 come in on the TV. I appreciate them doing that
21 because they sponsored the Olympics and I thought
22 it was worthwhile. But, and I had the option of
23 getting up and going to the refrigerator and so
24 on. But some of them I found to be rather
25 informative.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 Unsolicited emails are similar to
2 unsolicited credit card applications that we all
3 get in the mail on a regular basis. And there
4 may be some problems with those as far as what it
5 might affect as far as personal privacy is
6 concerned. But there's also an issue here called
7 restraint of trade. We live in a capitalist
8 society that has done a pretty good job in making
9 us all financially sound, or most of us all
10 financially sound. And providing for some of the
11 necessities or some of the luxuries of life. I
12 have a real concern when we start restraining
13 those kinds of things. I don't care for all the
14 credit card applications I get and so on. But I
15 understand that in this society where we are
16 business oriented and we are trying to keep this
17 economy going, and it has been very friendly to
18 most all of us. Then maybe this is some of the
19 burdens that we have to bear. And I'm willing to
20 do that. I'm willing for that Coca-cola
21 commercial to come on or that Chevrolet automobile
22 commercial to come on and actually interrupt my
23 watching of the Olympic games. I think that's
24 part of our society. And as long as they're not
25 offensive, I think they're okay.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 I have some real problems with that
2 bill based on restraint of trade. Thank you, Mr.
3 President.

4 SENATOR STEELE: Mr. President, may I
5 respond to that?

6 THE PRESIDENT: Yes. Senator Steele?

7 SENATOR STEELE: Thank you. And I'm
8 sensitive, too, because there are opportunities
9 where we learn, as the Senator mentioned, from a
10 variety of influences. But the big difference is,
11 is I get a credit card application in the mail,
12 which I don't really want, it didn't cost me a
13 penny. If I get an email, the very access point,
14 or the ability for me to collect email costs me
15 money. I pay for that service. So if someone
16 sends me an email, I pay for it. If someone
17 sends me a credit card application in the mail,
18 they do. And that is a very clear and a very
19 important distinction between the two. Now we may
20 say, well what is the service provider rate?
21 That's an interesting question. Some of us may
22 have an economic rate at 10.99 a month, or some
23 may have another rate. I know some businesses in
24 the place that have high speed access to the
25 internet and thus email. They're paying in excess



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 of \$150 a month. Or an opportunity to receive
2 something that they don't want. Now that is the
3 point of inference between the Senator and myself.

4 PRESIDENT MANSELL: Senator Hickman?

5 SENATOR HICKMAN: Well, I pay \$39.83 a
6 month as I recall for my cable TV service. And I
7 receive unsolicited vmails on that. We all accept
8 that as a way of life. We all accept that as the
9 price we pay for the services we get and the
10 benefits we get from having television available
11 to us. We solicit and we join an internet
12 provider so that we have access to the internet
13 and all of the other wonders that go along with
14 it. I just don't think that--I can't see a
15 tremendous amount of difference in my sitting in
16 my family room watching television and being,
17 having these advertisements come on, or sitting in
18 my family room downstairs and having unsolicited
19 emails come in on my computer. I just don't see
20 that much difference. Thank you.

21 PRESIDENT MANSELL: Senator Spencer?

22 SENATOR SPENCER: Thank you, Mr.
23 President. My problem is with the penalties on
24 line 86. \$25,000 per day the violation occurs.
25 You're going to have some poor sucker who does



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 business in Utah who's out there for the world to
2 see, get the email address, you can drive over
3 and visit that person. Well, what about the out
4 of state people who may send their email through
5 a clearinghouse? How much time are you going to
6 spend to go after those people? Aren't we
7 setting up a two-tiered system where we're
8 disadvantaging Utah businesses when we compare
9 that to businesses in other places across the
10 country and around the world?

11 Alternatively aren't we forcing those
12 businesses out of state to send their email
13 through Sri Lanka or someplace like that and make
14 it difficult for them to trace under this bill?
15 That only takes a couple of keystrokes. Why are
16 we doing this to Utah businesses? If you don't
17 like the email, don't print it out. Just hit the
18 delete button. How is that so different from
19 getting unsolicited credit card applications in
20 the mail? How is that so much different than the
21 advertisements that we have in the newspaper?
22 How's that so much different than the commercials
23 that we have on television? You don't like the
24 stuff, don't read it, don't deal with it. But
25 why should we take away a business individual's



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

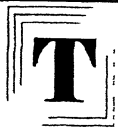
Fax: 801-983-2181

1 right to send that stuff to try and increase his
2 or her business? I just think this is bad public
3 policy.

4 PRESIDENT MANSELL: Any other questions
5 or discussion related to this bill? Senator
6 Steele, would you like to (inaudible)?

7 SENATOR STEELE: I would, thank you,
8 Mr. President. As I mentioned, there are a
9 couple of issues that in third reading I would
10 like to address. Senator Valentine mentioned one.
11 I want you to understand this doesn't say that
12 you can't send mail, a business cannot send mail.
13 What this says is if business is going to send
14 mail, then put on it the type of correspondence
15 that it is.

16 The reference of the television. I'll
17 talk to that. Many of us have recorders that opt
18 out the commercial. So we can set a television
19 on, record it, watch it. Or if the commercial is
20 on, we get up and do whatever we want to do or
21 sit and watch and learn from the commercial.
22 That's not the issue here. The issue here is
23 having something that comes to our system that we
24 can't even filter unless we open it and read it.
25 There's no provision here trying to exempt or



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 limit business' opportunity to give us
2 information, none whatsoever. The emphasis here
3 is, say business, well this is an advertisement.
4 So I understand what category this is so we can
5 deal appropriately with it, so it is just not
6 some unsolicited information piece that we don't
7 know about the origin and others.

8 Now as far as the cost. ISP providers
9 in other states, Washington being an example of a
10 state that has collected under this provision.
11 Our provision for failure, \$25,000 per day, and
12 this is the large business operational thing, it's
13 the lowest in the nation. There are already 19
14 states that have adopted this. This is the
15 lowest threshold to start. It isn't at the top
16 end. So again this modification, the SPAM
17 process, is it a cure all? Is this the ultimate?
18 No it is not. But is this a very positive first
19 step in the mechanism to allow us to have some
20 control over the information that we get so that
21 we can opt out, so that we can have the ability
22 to say I don't want to read that, I don't have
23 to read this or open this first. And with that
24 I'll call the question.

25 PRESIDENT MANSELL: Okay, the question



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 is being called. We have first substitute house
2 bill 80 be read for the third time. Will call
3 vote.

4 MS. ERICKSON: (Inaudible) Blackham?

5 SENATOR BLACKHAM: Aye.

6 MS. ERICKSON: Bramble? Buttars?
7 Davis?

8 SENATOR DAVIS: Aye.

9 MS. ERICKSON: Dmitrich?

10 SENATOR DMITRICH: Aye.

11 MS. ERICKSON: Eastman?

12 SENATOR EASTMAN: Aye.

13 MS. ERICKSON: Evans?

14 SENATOR EVANS: No.

15 MS. ERICKSON: Gladwell?

16 SENATOR GLADWELL: Aye.

17 MS. ERICKSON: Hale?

18 SENATOR HALE: Aye.

19 MS. ERICKSON: Hellewell?

20 SENATOR HELLEWELL: No.

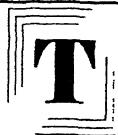
21 MS. ERICKSON: Hickman?

22 SENATOR HICKMAN: No.

23 MS. ERICKSON: Hillyard?

24 SENATOR HILLYARD: Aye.

25 MS. ERICKSON: Jenkins?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 SENATOR JENKINS: (Inaudible.)
2 MS. ERICKSON: Julander? Knudson?
3 Mayne?
4 SENATOR MAYNE: Aye.
5 MS. ERICKSON: Peterson?
6 SENATOR PETERSON: Aye.
7 MS. ERICKSON: Poulton? Spencer?
8 SENATOR SPENCER: No.
9 MS. ERICKSON: Steele?
10 SENATOR STEELE: Aye.
11 MS. ERICKSON: Stephenson?
12 SENATOR STEPHENSON: (Inaudible.)
13 MS. ERICKSON: Suazo?
14 SENATOR SUAZO: Aye.
15 MS. ERICKSON: Valentine?
16 SENATOR VALENTINE: (Inaudible.)
17 MR. MANSEL: Senator Valentine?
18 SENATOR VALENTINE: I will be voting
19 aye on two. And I'm going to be asking the
20 sponsor to look very carefully at the following
21 type of amendment under lines 38 delete, "Except
22 as provided in subsection 7 b," I would like 40
23 and 41 deleted in that language entirely. We
24 would then have, "Unsolicited means without
25 recipient's express permission." I believe that



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 that is where it should be on that particular
2 issue. That's what's required to have me vote
3 yes on three. So aye on two.

4 MS. ERICKSON: Senator Waddoups?

5 SENATOR WADDOUPS: Aye.

6 MS. ERICKSON: Walker?

7 SENATOR WALKER: Aye.

8 MS. ERICKSON: Wright?

9 SENATOR WRIGHT: (Inaudible.)

10 MS. ERICKSON: Senator Bramble?

11 SENATOR BRAMBLE (Inaudible.)

12 MS. ERICKSON: Senator Buttars?

13 SENATOR BUTTARS: (Inaudible.)

14 MS. ERICKSON: Senator Knudson?

15 SENATOR KNUDSON: (Inaudible.)

16 MS. ERICKSON: Mr. Mansell?

17 PRESIDENT MANSELL: First substitute
18 Senate Bill or House Bill 80 with 22 ayes, 5 nay
19 votes and 2 being absent, passes to the bottom of
20 the third reading calendar. We'll now go to
21 House Bill 255.

22 Morning Session

23 February 27, 2002

24 PROCEEDINGS

25 PRESIDENT MANSELL: House Bill 42. I'm



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 sorry, just a minute. Did you have something?
2 Uncircle one? Okay, Senator Steele go ahead.

3 SENATOR STEELE: I'd like to uncircle
4 First House Substitute 80 for the purpose of
5 substituting until we have something to look at
6 and then--

7 PRESIDENT MANSELL: That will be great.

8 SENATOR STEELE: --take a look at it
9 again.

10 PRESIDENT MANSELL: Do we have a motion
11 on uncircle? All in favor say aye.

12 FROM THE CONGREGATION: Aye.

13 PRESIDENT MANSELL: The proposed motion
14 passes. Senator Steele?

15 SENATOR STEELE: I would like to
16 Substitute First House Bill 80--First Substitute
17 House Bill 80 with Second Substitute House Bill
18 80.

19 PRESIDENT MANSELL: The motion is to
20 substitute. All in favor say aye?

21 FROM THE CONGREGATION: Aye.

22 PRESIDENT MANSELL: Opposed? The
23 motion passes.

24 SENATOR STEELE: I move to circle
25 Second Substitute House Bill 80.



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 PRESIDENT MANSELL: The motion is to
2 circle. All in favor say aye.

3 FROM THE CONGREGATION: Aye.

4 PRESIDENT MANSELL: Opposed? Motion
5 passes. Senator Allen? I believe we'll next go
6 to House Bill 42.

7 Morning Session

8 February 28, 2002

9 PROCEEDINGS

10 PRESIDENT MANSELL: About to House
11 Bill--are there any other bills that anyone wishes
12 to uncircle on third reading at this point?
13 Seeing none, we'll go to House Bill--I'm sorry.
14 No, we're still on third, I just wondered if
15 anybody had any they wished to uncircle. Senator
16 Steele?

17 SENATOR STEELE: I move to circle on
18 Second House Substitute 80.

19 PRESIDENT MANSELL: There it is.
20 Second Substitute House Bill 80?

21 SENATOR STEELE: Yes, thank you. The
22 purpose of replacing it with Third Substitute,
23 then to recircle.

24 PRESIDENT MANSELL: All right. Motion
25 is that we uncircle Second Substitute House Bill



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 80. All in favor say aye.

2 FROM THE CONGREGATION: Aye.

3 PRESIDENT MANSELL: Any opposed?

4 Senator Steele.

5 SENATOR STEELE: Thank you, Mr.

6 President. I move to replace Second House

7 Substitute 80 with Third House Substitute 80. And

8 this clarifies the language, it puts everything

9 into a clear form. I think we have a pretty much

10 agreed upon bill. Then we'll circle it.

11 PRESIDENT MANSELL: Thank you. The

12 motion is that we delete title and body Second

13 Substitute House Bill 80 and replace it with Third

14 Substitute House Bill 80. All in favor say aye.

15 FROM THE CONGREGATION: Aye.

16 PRESIDENT MANSELL: Any opposed?

17 Senator Steele?

18 SENATOR STEELE: Motion to circle.

19 PRESIDENT MANSELL: Motion is to circle

20 Third Substitute House Bill 80. All in favor say

21 aye.

22 FROM THE CONGREGATION: Aye.

23 PRESIDENT MANSELL: Any opposed? Thank

24 you. Now we'll go to House Bill 83.

25 General Morning Session



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

March 1, 2002

PROCEEDINGS

SENATOR STEELE: Thank you, Mr. President. I would move to uncircle Third Substitute House Bill 80.

PRESIDENT MANSELL: Eighty? Motion is to uncircle 80 on the third reading calendar. All in favor say aye.

FROM THE CONGREGATION: Aye.

PRESIDENT MANSELL: Opposed? Two to one it passes. The bill's before us.

SENATOR STEELE: Thank you. This is the unsolicited commercial email bill. We've had it sitting here for several days. Just for reassurance purpose, the substitute fiscal note is in your book. There is no fiscal note attached. You've seen editorial comments in support, business letters in support. I apologize for doing this. This is what I got today. I swear this is the truth, I opened my email today. On the subject line it was re: "Hi, my name is Jen. I would like to flirt and show off my friends." We need this--

PRESIDENT MANSELL: How long did you look at that?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 SENATOR STEELE: Copies are available.

2 PRESIDENT MANSELL: Maybe we should
3 archive that one.

4 SENATOR STEELE: I'd answer any
5 questions.

6 PRESIDENT MANSELL: Senator Valentine?

7 SENATOR VALENTINE: It doesn't appear
8 that we've solved some of the major problems on
9 the legitimate side that we have on this. For
10 example, that email, does it show the address and
11 where it came from? Does it show that it came
12 from inside the state of Utah?

13 SENATOR STEELE: And I would agree with
14 the Senator. We're not in this process
15 eliminating everything. And yet as a first step,
16 if we don't start, then we never will. And so I
17 would agree with the Senator. This does not
18 eliminate all the potential, but it is one giant
19 step in the right direction in harmony with 19
20 other states that are taking similar steps. Have
21 or are now taking similar steps.

22 SENATOR VALENTINE: I tried to come up
23 with an amendment to solve that problem and the
24 problem that I raised last time which dealt with
25 once you get on a list you can't opt out if



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 you've bought anything or had any contact with
2 that person who created the list. So I've got
3 some problems with the bill the way it is now.
4 Thank you, Mr. President.

5 PRESIDENT MANSELL: Thank you, Senator.
6 Senator Waddoups?

7 SENATOR WADDOUPS: I believe, like
8 Senator Valentine, there's probably more than we
9 can do on this. But I'm pleased that we're doing
10 something. I think we need to do something.
11 That email that he just read, I had that one
12 forwarded to me by one of my constituents over
13 two weeks ago. That constituent was my wife, and
14 she says you darn well better vote for that bill.
15 So I will.

16 PRESIDENT MANSELL: Senator Hickman,
17 are you looking to speak?

18 SENATOR HICKMAN: (Inaudible.)

19 PRESIDENT MANSELL: Senator Steele, I
20 see no more questions.

21 SENATOR STEELE: Thank you. Then in
22 summary I appreciate the body looking at this
23 important issue. I certainly appreciate
24 Representative Arent's fine work. She's been a
25 champion to help in the sharing. And I'll call



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 the question.

2 PRESIDENT MANSELL: Thank you. The
3 question is shall Third Substitute House Bill 80
4 pass. Roll call vote?

5 MS. ERICKSON: Ed Allen?

6 SENATOR ALLEN: Aye.

7 MS. ERICKSON: Ron Allen?

8 SENATOR ALLEN: Aye.

9 MS. ERICKSON: Blackham? Bramble?

10 SENATOR BRAMBLE: Aye.

11 MS. ERICKSON: Buttars?

12 SENATOR BUTTARS: Aye.

13 MS. ERICKSON: Davis?

14 SENATOR DAVIS: Aye.

15 MS. ERICKSON: Dmitrich?

16 SENATOR DMITRICH: Aye.

17 MS. ERICKSON: Eastman?

18 SENATOR EASTMAN: Aye.

19 MS. ERICKSON: Evans? Gladwell? Hale?

20 SENATOR HALE: (Inaudible.)

21 MS. ERICKSON: Hellewell?

22 SENATOR HELLEWELL: Aye.

23 MS. ERICKSON: Hickman?

24 SENATOR HICKMAN: No.

25 MS. ERICKSON: Hillyard?

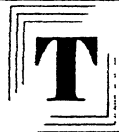


Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 SENATOR HILLYARD: Aye.
2 MS. ERICKSON: Jenkins?
3 SENATOR JENKINS: Aye.
4 MS. ERICKSON: Julander?
5 SENATOR JULANDER: Aye.
6 MS. ERICKSON: Knudson? Mayne?
7 SENATOR MAYNE: Aye.
8 MS. ERICKSON: Peterson?
9 SENATOR PETERSON: Aye.
10 MS. ERICKSON: Poulton? Spencer?
11 SENATOR SPENCER: Aye.
12 MS. ERICKSON: Steele?
13 SENATOR STEELE: Aye.
14 MS. ERICKSON: Stephenson?
15 SENATOR STEPHENSON: Aye.
16 MS. ERICKSON: Suazo?
17 SENATOR SUAZO: Aye.
18 MS. ERICKSON: Valentine?
19 SENATOR VALENTINE: No.
20 MS. ERICKSON: Waddoups?
21 SENATOR WADDOUPS: Aye.
22 MS. ERICKSON: Walker?
23 SENATOR WALKER: Aye.
24 MS. ERICKSON: Wright? President
25 Mansell?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 PRESIDENT MANSELL: Aye. Senator
2 Gladwell?
3 SENATOR GLADWELL: (Inaudible.)
4 PRESIDENT MANSELL: Third Substitute
5 House Bill 80 has received 22 aye votes, 3 no
6 votes, 4 being absent. Passes. It will be
7 referred back to the House since it has been
8 amended. Anything else on that third calendar?
9 We'll the move to the second reading calendar and
10 start with House Bill 76.

11 Morning Session

12 March 4, 2002

13 PROCEEDINGS

14 PRESIDENT MANSELL: --will be signed by
15 the president in open session. Return to the
16 staff for enrolling.

17 MS. ERICKSON: March 4, 2002. Mr.
18 President, the House concurred in the Senate
19 amendment and passed HB2, 2002 General Obligation
20 Bond and Capitol Facilities Authorizations by
21 Representative Adair. Third Substitute House Bill
22 80, Unsolicited Commercial Email by Representative
23 Arent. And Second Substitute HJR11.

24 Afternoon Session, Senate, House Bill 143

25 March 5, 2002



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

PROCEEDINGS

PRESIDENT MANSELL: We're ready to get started. I think we have a quorum now. I believe we're on the second reading calendar. We'll go to House Bill 143.

MS. ERICKSON: House Bill 143, Restrictions on Sexually Explicit Email by Representative Winn. Senator Walker.

SENATOR WALKER: Thank you. You should have in front of you an amendment No. 7 dated March 1, 1216. Does everyone have that? I would first like to make the motion that we accept this amendment.

PRESIDENT MANSELL: What does the amendment do? We'll take the motion now if you'll speak to it.

SENATOR WALKER: I will speak to the amendment. I probably need to back up and tell you that this is restrictions on sexually explicit email. The amendment does two things. It puts a coordinating clause in it with Representative Arent's email SPAM bill. And also it cleans up the fact that if an employee--

PRESIDENT MANSELL: Actually I wanted the--



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 SENATOR WALKER: --sends pornographic
2 email on their job, that the employer is not
3 liable for it. So I would entertain any
4 questions on the amendment.

5 PRESIDENT MANSELL: Questions on the
6 amendment.

7 SENATOR WALKER: I would move
8 acceptance of H--let's see. It would be amendment
9 No. 7 for HB 143.

10 PRESIDENT MANSELL: Thank you. The
11 motion is to amend. All in favor say aye.

12 FROM THE CONGREGATION: Aye.

13 PRESIDENT MANSELL: Opposed? Motion
14 passes. The bill is amended. Go ahead, Senator.

15 SENATOR WALKER: All right. Now
16 backing up on the bill itself. Unsolicited
17 sexually explicit emails are the number one
18 complaint made to the State's Obscenity and
19 Pornography Complaints Ombudsman. HB 143 would
20 require the unsolicited emails to include
21 adv:adult, advertisement adult in the subject
22 line. The sender must also provide an easy way
23 for the email recipient to have the messages
24 stopped. Violating the law would be a Class B
25 misdemeanor, and that was an amendment. It's now



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 Class B misdemeanor with a maximum penalty of six
2 months in jail and a \$1,000 fine. The bill would
3 allow those getting the unwanted email, porn, to
4 recover in civil court at least \$10 per
5 infraction, or 25,000 a day per violation. I
6 would entertain any questions if you have any on
7 this. Call the question.

8 PRESIDENT MANSELL: Thank you. The
9 question is shall HB 143 be read for a third
10 time? Roll call.

11 MS. ERICKSON: Ron Allen?

12 SENATOR ALLEN: (Inaudible.)

13 MS. ERICKSON: Blackham? Bramble?

14 SENATOR BRAMBLE: Aye.

15 MS. ERICKSON: Buttars?

16 SENATOR BUTTARS: Aye.

17 MS. ERICKSON: Davis? Dmitrich?

18 SENATOR DMITRICH: Aye.

19 MS. ERICKSON: Eastman?

20 SENATOR EASTMAN: Aye.

21 MS. ERICKSON: Evans?

22 SENATOR EVANS: Aye.

23 MS. ERICKSON: Gladwell?

24 SENATOR GLADWELL: Aye.

25 MS. ERICKSON: Hale? Hellewell?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

Corporate Offices: 50 West Broadway, Suite 905, Salt Lake City, Utah 84101

801-983-2180

Toll Free: 877-441-2180

Fax: 801-983-2181

1 SENATOR HELLEWELL: Aye.
2 MS. ERICKSON: Hickman?
3 SENATOR HICKMAN: I accept--
4 MS. ERICKSON: Hillyard? Jenkins?
5 SENATOR JENKINS: Aye.
6 MS. ERICKSON: Julander? Knudson?
7 Mayne?
8 SENATOR MAYNE: Aye.
9 MS. ERICKSON: Peterson? Poulton?
10 SENATOR POULTON: Aye.
11 MS. ERICKSON: Spencer? Steele?
12 SENATOR STEELE: Aye.
13 MS. ERICKSON: Stephenson?
14 SENATOR STEPHENSON: Aye.
15 MS. ERICKSON: Suazo?
16 SENATOR SUAZO: Aye.
17 MS. ERICKSON: Valentine? Waddoups?
18 Walker?
19 SENATOR WALKER: Aye.
20 MS. ERICKSON: Wright? Senator
21 Peterson? President Mansell?
22 PRESIDENT MANSELL: Aye..
23 MS. ERICKSON: Senator Davis?
24 PRESIDENT MANSELL: House Bill 143--
25 MS. ERICKSON: Senator Davis?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 PRESIDENT MANSELL: House Bill 143 has
2 received 19 aye votes, no nay votes, 10 being
3 absent. Passes to the third reading calendar.
4 We'll next go to HB 128.

5 Morning Session

6 House Bill 143

7 March 6, 2002

8 PROCEEDINGS

9 PRESIDENT MANSELL: Senator Hickman?

10 SENATOR HICKMAN: Thank you, Mr.
11 President. I would move that we circle Senate
12 Bill 2.

13 PRESIDENT MANSELL: Motion is to circle
14 so you can look at it. All in--pardon? Oh yeah,
15 we don't need to circle that, because we're not
16 on the second reading calendar. So we can just
17 leave it sit there. That's right. Thank you
18 very much for that clarification. And we'll
19 continue down the third reading calendar. We'll
20 go to House Bill 143.

21 MS. ERICKSON: House Bill 143,
22 Restrictions on Sexually Explicit Email by
23 Representative Winn. Senator Walker?

24 PRESIDENT MANSELL: Senator Walker?

25 SENATOR WALKER: Thank you. This is an



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 excellent bill. It gives us a chance to get rid
2 of pornographic email by being able to require
3 that unsolicited pornographic email have a subject
4 line which designates it as adult content and also
5 a way to get off these email lists.

6 There were no questions yesterday, and
7 it was unanimously supported. If there's no
8 questions today, I would call the question and ask
9 for it to pass.

10 PRESIDENT MANSELL: Questions of
11 Senator Walker?

12 SENATOR WALKER: I move that HB 143
13 pass.

14 PRESIDENT MANSELL: Thank you. I'll
15 place that motion. Roll call vote.

16 MS. ERICKSON: Senator Ed Allen? Ron
17 Allen?

18 SENATOR ALLEN: Aye.

19 MS. ERICKSON: Blackham?

20 SENATOR BLACKHAM: Aye.

21 MS. ERICKSON: Bramble?

22 SENATOR BRAMBLE: Aye.

23 MS. ERICKSON: Buttars?

24 SENATOR BUTTARS: Aye.

25 MS. ERICKSON: Davis?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 SENATOR DAVIS: Aye.
2 MS. ERICKSON: Dmitrich?
3 SENATOR DMITRICH: Aye.
4 MS. ERICKSON: Eastman?
5 SENATOR EASTMAN: Aye.
6 MS. ERICKSON: Evans? Gladwell? Hale?
7 Hellewell?
8 SENATOR HELLEWELL: Aye.
9 MS. ERICKSON: Hickman?
10 SENATOR HICKMAN: Aye.
11 MS. ERICKSON: Hillyard? Jenkins?
12 SENATOR JENKINS: Aye.
13 MS. ERICKSON: Julander? Knudson?
14 SENATOR KNUDSON: Aye.
15 MS. ERICKSON: Mayne? Peterson?
16 SENATOR PETERSON: Aye.
17 MS. ERICKSON: Poulton?
18 SENATOR POULTON: Aye.
19 MS. ERICKSON: Spencer?
20 SENATOR SPENCER: Aye.
21 MS. ERICKSON: Steele?
22 SENATOR STEELE: Aye.
23 MS. ERICKSON: Stephenson?
24 SENATOR STEPHENSON: Aye.
25 MS. ERICKSON: Suazo?



Thacker + Co LLC

Court Reporters

Utah's Leader in Litigation Support

1 SENATOR SUAZO: Aye.
2 MS. ERICKSON: Valentine?
3 SENATOR VALENTINE: Aye.
4 MS. ERICKSON: Waddoups? Walker?
5 SENATOR WALKER: Aye.
6 MS. ERICKSON: Wright?
7 SENATOR WRIGHT: Aye.
8 MS. ERICKSON: President Mansell?
9 PRESIDENT MANSELL: Aye. House Bill
10 143 has received 24 aye votes, no nay votes and 5
11 being absent. It has been amended and we refer
12 to the House for further consideration. We'll go
13 to House Bill 128.
14
15
16
17
18
19
20
21
22
23
24
25



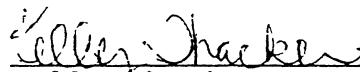
Thacker + Co LLC
Court Reporters
Utah's Leader in Litigation Support

C E R T I F I C A T E

STATE OF UTAH)
 : ss.
Salt Lake County)

I, KELLY THACKER, Certified Court Transcriber for the State of Utah, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability from the audiotape furnished to me.

DATED: August 12, 2002



Kelly Thacker