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S. 2145

To regulate the unauthorized installation of computer software, to require clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 27, 2004

Mr. BURNS (for himself, Mr. WYDEN, Mrs. BOXER, and Mrs. CLINTON) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

NOVEMBER 19, 2004

Reported by Mr. MCCAIN, with an amendment

[Strike all after the enacting clause and insert the part printed in *italic*]

A BILL

To regulate the unauthorized installation of computer software, to require clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Software Principles
3 Yielding Better Levels of Consumer Knowledge Act” or
4 the “SPY BLOCK Act”.

5 **SEC. 2. UNAUTHORIZED INSTALLATION OF COMPUTER**
6 **SOFTWARE.**

7 (a) NOTICE, CHOICE, AND UNINSTALL PROCE-
8 DURES.—It is unlawful for any person who is not the user
9 of a protected computer to install computer software on
10 that computer, or to authorize, permit, or cause the instal-
11 lation of computer software on that computer, unless—

12 (1) the user of the computer has received notice
13 that satisfies the requirements of section 3;

14 (2) the user of the computer has granted con-
15 sent that satisfies the requirements of section 3; and

16 (3) the computer software’s uninstall proce-
17 dures satisfy the requirements of section 3.

18 (b) RED HERRING PROHIBITION.—It is unlawful for
19 any person who is not the user of a protected computer
20 to install computer software on that computer, or to au-
21 thorize, permit, or cause the installation of computer soft-
22 ware on that computer, if the design or operation of the
23 computer software is intended, or may reasonably be ex-
24 pected, to confuse or mislead the user of the computer
25 concerning the identity of the person or service responsible

1 for the functions performed or content displayed by such
 2 computer software.

3 **SEC. 3. NOTICE, CONSENT, AND UNINSTALL REQUIRE-**
 4 **MENTS.**

5 (a) NOTICE.—For purposes of section 2(a)(1), notice
 6 to the user of a computer shall—

7 (1) include a clear notification, displayed on the
 8 screen until the user either grants or denies consent
 9 to installation, of the name and general nature of
 10 the computer software that will be installed if the
 11 user grants consent; and

12 (2) include a separate disclosure, with respect
 13 to each information collection, advertising, distrib-
 14 uted computing, and settings modification feature
 15 contained in the computer software, that—

16 (A) remains displayed on the screen until
 17 the user either grants or denies consent to that
 18 feature;

19 (B) in the case of an information collection
 20 feature, provides a clear description of—

21 (i) the type of personal or network in-
 22 formation to be collected and transmitted
 23 by the computer software; and

1 (ii) the purpose for which the personal
2 or network information is to be collected,
3 transmitted, and used;

4 (C) in the case of an advertising feature,
5 provides—

6 (i) a representative example of the
7 type of advertisement that may be deliv-
8 ered by the computer software;

9 (ii) a clear description of—

10 (I) the estimated frequency with
11 which each type of advertisement may
12 be delivered; or

13 (II) the factors on which the fre-
14 quency will depend; and

15 (iii) a clear description of how the
16 user can distinguish each type of advertise-
17 ment that the computer software delivers
18 from advertisements generated by other
19 software, Internet website operators, or
20 services;

21 (D) in the case of a distributed computing
22 feature, provides a clear description of—

23 (i) the types of information or mes-
24 sages the computer software will cause the
25 computer to transmit;

1 (ii)(I) the estimated frequency with
2 which the computer software will cause the
3 computer to transmit such messages or in-
4 formation; or

5 (II) the factors on which the fre-
6 quency will depend;

7 (iii) the estimated volume of such in-
8 formation or messages, and the likely im-
9 pact, if any, on the processing or commu-
10 nications capacity of the user's computer;
11 and

12 (iv) the nature, volume, and likely im-
13 pact on the computer's processing capacity
14 of any computational or processing tasks
15 the computer software will cause the com-
16 puter to perform in order to generate the
17 information or messages the computer
18 software will cause the computer to trans-
19 mit;

20 (E) in the case of a settings modification
21 feature, provides a clear description of the na-
22 ture of the modification, its function, and any
23 collateral effects the modification may produce;
24 and

1 (F) provides a clear description of proce-
 2 dures the user may follow to turn off such fea-
 3 ture or uninstall the computer software.

4 (b) ~~CONSENT.~~—For purposes of section 2(a)(2), con-
 5 sent requires—

6 (1) consent by the user of the computer to the
 7 installation of the computer software; and

8 (2) separate affirmative consent by the user of
 9 the computer to each information collection feature;
 10 advertising feature; distributed computing feature;
 11 and settings modification feature contained in the
 12 computer software.

13 (c) ~~UNINSTALL PROCEDURES.~~—For purposes of sec-
 14 tion 2(a)(3), computer software shall—

15 (1) appear in the “Add/Remove Programs”
 16 menu or any similar feature, if any, provided by
 17 each operating system with which the computer soft-
 18 ware functions;

19 (2) be capable of being removed completely
 20 using the normal procedures provided by each oper-
 21 ating system with which the computer software func-
 22 tions for removing computer software; and

23 (3) in the case of computer software with an
 24 advertising feature, include an easily identifiable link
 25 clearly associated with each advertisement that the

1 software causes to be displayed, such that selection
 2 of the link by the user of the computer generates an
 3 on-screen window that informs the user about how
 4 to turn off the advertising feature or uninstall the
 5 computer software.

6 **SEC. 4. UNAUTHORIZED USE OF CERTAIN COMPUTER SOFT-**
 7 **WARE.**

8 It is unlawful for any person who is not the user of
 9 a protected computer to use an information collection, ad-
 10 vertising, distributed computing, or settings modification
 11 feature of computer software installed on that computer,
 12 if—

13 (1) the computer software was installed in vio-
 14 lation of section 2;

15 (2) the use in question falls outside the scope
 16 of what was described to the user of the computer
 17 in the notice provided pursuant to section 3(a); or

18 (3) in the case of an information collection fea-
 19 ture, the person using the feature fails to establish
 20 and maintain reasonable procedures to protect the
 21 security and integrity of personal information so col-
 22 lected.

23 **SEC. 5. EXCEPTIONS.**

24 (a) **PREINSTALLED SOFTWARE.**—A person who in-
 25 stalls, or authorizes, permits, or causes the installation of,

1 computer software on a protected computer before the
 2 first retail sale of the computer shall be deemed to be in
 3 compliance with this Act if the user of the computer re-
 4 ceives notice that would satisfy section 3(a)(2) and grants
 5 consent that would satisfy section 3(b)(2) prior to—

6 (1) the initial collection of personal or network
 7 information, in the case of any information collection
 8 feature contained in the computer software;

9 (2) the initial generation of an advertisement
 10 on the computer, in the case of any advertising fea-
 11 ture contained in the computer software;

12 (3) the initial transmission of information or
 13 messages, in the case of any distributed computing
 14 feature contained in the computer software; and

15 (4) the initial modification of user settings, in
 16 the case of any settings modification feature.

17 (b) OTHER EXCEPTIONS.—Sections 3(a)(2), 3(b)(2),
 18 and 4 do not apply to any feature of computer software
 19 that is reasonably needed to—

20 (1) provide capability for general purpose online
 21 browsing, electronic mail, or instant messaging, or
 22 for any optional function that is directly related to
 23 such capability and that the user knowingly chooses
 24 to use;

1 (2) determine whether or not the user of the
2 computer is licensed or authorized to use the com-
3 puter software; and

4 (3) provide technical support for the use of the
5 computer software by the user of the computer.

6 (c) ~~PASSIVE TRANSMISSION, HOSTING, OR LINK.—~~

7 For purposes of this Act, a person shall not be deemed
8 to have installed computer software, or authorized, per-
9 mitted, or caused the installation of computer software,
10 on a computer solely because that person provided—

11 (1) the Internet connection or other trans-
12 mission capability through which the software was
13 delivered to the computer for installation;

14 (2) the storage or hosting, at the direction of
15 another person and without selecting the content to
16 be stored or hosted, of the software or of an Internet
17 website through which the software was made avail-
18 able for installation; or

19 (3) a link or reference to an Internet website
20 the content of which was selected and controlled by
21 another person, and through which the computer
22 software was made available for installation.

23 (d) ~~SOFTWARE RESIDENT IN TEMPORARY MEM-~~
24 ~~ORY.—~~In the case of an installation of computer software
25 that falls within the meaning of section 7(10)(B) but not

1 within the meaning of section 7(10)(A), the requirements
 2 set forth in subsections (a)(1), (b)(1), and (c) of section
 3 3 shall not apply.

4 (e) FEATURES ACTIVATED BY USER OPTIONS.—In
 5 the case of an information collection, advertising, distrib-
 6 uted computing, or settings modification feature that re-
 7 mains inactive or turned off unless the user of the com-
 8 puter subsequently selects certain optional settings or
 9 functions provided by the computer software, the require-
 10 ments of subsections (a)(2) and (b)(2) of section 3 may
 11 be satisfied by providing the applicable disclosure and ob-
 12 taining the applicable consent at the time the user selects
 13 the option that activates the feature, rather than at the
 14 time of initial installation.

15 **SEC. 6. ADMINISTRATION AND ENFORCEMENT.**

16 (a) IN GENERAL.—Except as provided in subsection
 17 (b), this Act shall be enforced by the Commission as if
 18 the violation of this Act were an unfair or deceptive act
 19 or practice proscribed under section 18(a)(1)(B) of the
 20 Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

21 (b) ENFORCEMENT BY CERTAIN OTHER AGEN-
 22 CIES.—Compliance with this Act shall be enforced
 23 under—

24 (1) section 8 of the Federal Deposit Insurance
 25 Act (12 U.S.C. 1818), in the case of—

1 (A) national banks, and Federal branches
2 and Federal agencies of foreign banks, by the
3 Office of the Comptroller of the Currency;

4 (B) member banks of the Federal Reserve
5 System (other than national banks), branches
6 and agencies of foreign banks (other than Fed-
7 eral branches, Federal agencies, and insured
8 State branches of foreign banks), commercial
9 lending companies owned or controlled by for-
10 eign banks, and organizations operating under
11 section 25 or 25A of the Federal Reserve Act
12 (12 U.S.C. 601 and 611), by the Board; and

13 (C) banks insured by the Federal Deposit
14 Insurance Corporation (other than members of
15 the Federal Reserve System) and insured State
16 branches of foreign banks, by the Board of Di-
17 rectors of the Federal Deposit Insurance Cor-
18 poration;

19 (2) section 8 of the Federal Deposit Insurance
20 Act (12 U.S.C. 1818), by the Director of the Office
21 of Thrift Supervision, in the case of a savings asso-
22 ciation the deposits of which are insured by the Fed-
23 eral Deposit Insurance Corporation;

24 (3) the Federal Credit Union Act (12 U.S.C.
25 1751 et seq.) by the National Credit Union Adminis-

1 tration Board with respect to any Federal credit
2 union;

3 (4) part A of subtitle VII of title 49, United
4 States Code, by the Secretary of Transportation
5 with respect to any air carrier or foreign air carrier
6 subject to that part;

7 (5) the Packers and Stockyards Act, 1921 (7
8 U.S.C. 181 et seq.) (except as provided in section
9 406 of that Act (7 U.S.C. 226, 227)), by the Sec-
10 retary of Agriculture with respect to any activities
11 subject to that Act; and

12 (6) the Farm Credit Act of 1971 (12 U.S.C.
13 2001 et seq.) by the Farm Credit Administration
14 with respect to any Federal land bank, Federal land
15 bank association, Federal intermediate credit bank,
16 or production credit association.

17 (c) EXERCISE OF CERTAIN POWERS.—For the pur-
18 pose of the exercise by any agency referred to in sub-
19 section (b) of its powers under any Act referred to in that
20 subsection, a violation of this Act is deemed to be a viola-
21 tion of a requirement imposed under that Act. In addition
22 to its powers under any provision of law specifically re-
23 ferred to in subsection (b), each of the agencies referred
24 to in that subsection may exercise, for the purpose of en-

1 forcing compliance with any requirement imposed under
 2 this Act, any other authority conferred on it by law.

3 (d) ACTIONS BY THE COMMISSION.—The Commis-
 4 sion shall prevent any person from violating this Act in
 5 the same manner, by the same means, and with the same
 6 jurisdiction, powers, and duties as though all applicable
 7 terms and provisions of the Federal Trade Commission
 8 Act (15 U.S.C. 41 et seq.) were incorporated into and
 9 made a part of this Act. Any entity that violates any provi-
 10 sion of that section is subject to the penalties and entitled
 11 to the privileges and immunities provided in the Federal
 12 Trade Commission Act in the same manner, by the same
 13 means, and with the same jurisdiction, power, and duties
 14 as though all applicable terms and provisions of the Fed-
 15 eral Trade Commission Act were incorporated into and
 16 made a part of that section.

17 (e) PRESERVATION OF COMMISSION AUTHORITY.—
 18 Nothing contained in this section shall be construed to
 19 limit the authority of the Commission under any other
 20 provision of law.

21 **SEC. 7. ACTIONS BY STATES.**

22 (a) IN GENERAL.—

23 (1) CIVIL ACTIONS.—In any case in which the
 24 attorney general of a State has reason to believe
 25 that an interest of the residents of that State has

1 been or is threatened or adversely affected by the
 2 engagement of any person in a practice that this Act
 3 prohibits, the State, as *parens patriae*, may bring a
 4 civil action on behalf of the residents of the State in
 5 a district court of the United States of appropriate
 6 jurisdiction—

7 (A) to enjoin that practice;

8 (B) to enforce compliance with the rule;

9 (C) to obtain damage, restitution, or other
 10 compensation on behalf of residents of the
 11 State; or

12 (D) to obtain such other relief as the court
 13 may consider to be appropriate.

14 (2) NOTICE.—

15 (A) IN GENERAL.—Before filing an action
 16 under paragraph (1), the attorney general of
 17 the State involved shall provide to the Commis-
 18 sion—

19 (i) written notice of that action; and

20 (ii) a copy of the complaint for that
 21 action.

22 (B) EXEMPTION.—

23 (i) IN GENERAL.—Subparagraph (A)
 24 shall not apply with respect to the filing of
 25 an action by an attorney general of a State

under this subsection, if the attorney general determines that it is not feasible to provide the notice described in that subparagraph before the filing of the action.

(ii) NOTIFICATION.—In an action described in clause (i), the attorney general of a State shall provide notice and a copy of the complaint to the Commission at the same time as the attorney general files the action.

(b) INTERVENTION.—

(1) IN GENERAL.—On receiving notice under subsection (a)(2), the Commission shall have the right to intervene in the action that is the subject of the notice.

(2) EFFECT OF INTERVENTION.—If the Commission intervenes in an action under subsection (a), it shall have the right—

(A) to be heard with respect to any matter that arises in that action; and

(B) to file a petition for appeal.

(c) CONSTRUCTION.—For purposes of bringing any civil action under subsection (a), nothing in this subtitle shall be construed to prevent an attorney general of a

1 State from exercising the powers conferred on the attorney
 2 general by the laws of that State to—

3 ~~(1) conduct investigations;~~

4 ~~(2) administer oaths or affirmations; or~~

5 ~~(3) compel the attendance of witnesses or the~~
 6 ~~production of documentary and other evidence.~~

7 ~~(d) ACTIONS BY THE COMMISSION.—In any case in~~
 8 ~~which an action is instituted by or on behalf of the Com-~~
 9 ~~mission for violation of section 2 of this Act, no State may,~~
 10 ~~during the pendency of that action, institute an action~~
 11 ~~under subsection (a) against any defendant named in the~~
 12 ~~complaint in that action for violation of that section.~~

13 ~~(e) VENUE; SERVICE OF PROCESS.—~~

14 ~~(1) VENUE.—Any action brought under sub-~~
 15 ~~section (a) may be brought in the district court of~~
 16 ~~the United States that meets applicable require-~~
 17 ~~ments relating to venue under section 1391 of title~~
 18 ~~28, United States Code.~~

19 ~~(2) SERVICE OF PROCESS.—In an action~~
 20 ~~brought under subsection (a), process may be served~~
 21 ~~in any district in which the defendant—~~

22 ~~(A) is an inhabitant; or~~

23 ~~(B) may be found.~~

24 **SEC. 8. DEFINITIONS.**

25 In this Act:

1 (1) ADVERTISEMENT.—The term “advertise-
 2 ment” means a commercial promotion for a product
 3 or service, but does not include promotions for prod-
 4 ucts or services that appear on computer software
 5 help or support pages that are displayed in response
 6 to a request by the user.

7 (2) ADVERTISING FEATURE.—The term “adver-
 8 tising feature” means a function of computer soft-
 9 ware that, when installed on a computer, delivers ad-
 10 vertisements to the user of that computer.

11 (3) AFFIRMATIVE CONSENT.—The term “af-
 12 firmative consent” means consent expressed through
 13 action by the user of a computer other than default
 14 action specified by the installation sequence and
 15 independent from any other consent solicited from
 16 the user during the installation process.

17 (4) CLEAR DESCRIPTION.—The term “clear de-
 18 scription” means a description that is clear, con-
 19 spicuous, concise, and in a font size that is at least
 20 as large as the largest default font displayed to the
 21 user by the software.

22 (5) COMPUTER SOFTWARE.—The term “com-
 23 puter software”—

1 (A) means any program designed to cause
2 a computer to perform a desired function or
3 functions; and

4 (B) does not include any cookie.

5 (6) COOKIE.—The term “cookie” means a text
6 file—

7 (A) that is placed on a computer by an
8 Internet service provider, interactive computer
9 service, or Internet website; and

10 (B) the sole function of which is to record
11 information that can be read or recognized by
12 an Internet service provider, interactive com-
13 puter service, or Internet website when the user
14 of the computer uses or accesses such provider,
15 service, or website.

16 (7) DISTRIBUTED COMPUTING FEATURE.—The
17 term “distributed computing feature” means a func-
18 tion of computer software that, when installed on a
19 computer, transmits information or messages, other
20 than personal or network information about the user
21 of the computer, to any other computer without the
22 knowledge or direction of the user and for purposes
23 unrelated to the tasks or functions the user inten-
24 tionally performs using the computer.

1 (8) FIRST RETAIL SALE.—The term “first retail
2 sale” means the first sale of a computer, for a pur-
3 pose other than resale, after the manufacture, pro-
4 duction, or importation of the computer. For pur-
5 poses of this paragraph, the lease of a computer
6 shall be considered a sale of the computer at retail.

7 (9) INFORMATION COLLECTION FEATURE.—The
8 term “information collection feature” means a func-
9 tion of computer software that, when installed on a
10 computer, collects personal or network information
11 about the user of the computer and transmits such
12 information to any other party on an automatic
13 basis or at the direction of a party other than the
14 user of the computer.

15 (10) INSTALL.—The term “install” means—

16 (A) to write computer software to a com-
17 puter’s persistent storage medium, such as the
18 computer’s hard disk, in such a way that the
19 computer software is retained on the computer
20 after the computer is turned off and subse-
21 quently restarted; or

22 (B) to write computer software to a com-
23 puter’s temporary memory, such as random ac-
24 cess memory, in such a way that the software
25 is retained and continues to operate after the

1 user of the computer turns off or exits the
2 Internet service, interactive computer service, or
3 Internet website from which the computer soft-
4 ware was obtained.

5 (11) NETWORK INFORMATION.—The term
6 “network information” means—

7 (A) an Internet protocol address or domain
8 name of a user’s computer; or

9 (B) a Uniform Resource Locator or other
10 information that identifies Internet web sites or
11 other online resources accessed by a user of a
12 computer.

13 (12) PERSONAL INFORMATION.—The term
14 “personal information” means—

15 (A) a first and last name, whether given at
16 birth or adoption, assumed, or legally changed;

17 (B) a home or other physical address in-
18 cluding street name, name of a city or town,
19 and zip code;

20 (C) an electronic mail address or online
21 username;

22 (D) a telephone number;

23 (E) a social security number;

24 (F) any personal identification number;

1 (G) a credit card number, any access code
2 associated with the credit card, or both;

3 (H) a birth date, birth certificate number,
4 or place of birth; or

5 (I) any password or access code.

6 (13) PERSON.—The term “person” has the
7 meaning given that term in section 3(32) of the
8 Communications Act of 1934 (47 U.S.C. 153(32)).

9 (14) PROTECTED COMPUTER.—The term “pro-
10 tected computer” has the meaning given that term
11 in section 1030(e)(2)(B) of title 18, United States
12 Code.

13 (15) SETTINGS MODIFICATION FEATURE.—The
14 term “settings modification feature” means a func-
15 tion of computer software that, when installed on a
16 computer—

17 (A) modifies an existing user setting, with-
18 out direction from the user of the computer,
19 with respect to another computer software ap-
20 plication previously installed on that computer;
21 or

22 (B) enables a user setting with respect to
23 another computer software application pre-
24 viously installed on that computer to be modi-

1 fied in the future without advance notification
2 to and consent from the user of the computer.

3 ~~(16) USER OF A COMPUTER.—~~The term “user
4 of a computer” means a computer’s lawful owner or
5 an individual who operates a computer with the au-
6 thorization of the computer’s lawful owner.

7 **SEC. 9. EFFECTIVE DATE.**

8 This Act shall take effect 180 days after the date of
9 enactment of this Act.

10 **SECTION 1. SHORT TITLE.**

11 *This Act may be cited as the “Software Principles*
12 *Yielding Better Levels of Consumer Knowledge Act” or the*
13 *“SPY BLOCK Act”.*

14 **SEC. 2. PROHIBITED PRACTICES IN RELATION TO SOFT-**
15 **WARE INSTALLATION IN GENERAL.**

16 (a) *SURREPTITIOUS INSTALLATION.—*

17 (1) *IN GENERAL.—It shall be unlawful for a per-*
18 *son who is not an authorized user of a protected com-*
19 *puter to cause the installation of software on the com-*
20 *puter in a manner designed to—*

21 (A) *conceal from the user of the computer*
22 *the fact that the software is being installed; or*

23 (B) *prevent the user of the computer from*
24 *having an opportunity to knowingly grant or*
25 *withhold consent to the installation.*

1 (2) *EXCEPTION.—This subsection shall not apply*
 2 *to—*

3 (A) *the installation of software that falls*
 4 *within the scope of a previous grant of author-*
 5 *ization by an authorized user;*

6 (B) *the installation of an upgrade to a soft-*
 7 *ware program that has already been installed on*
 8 *the computer with the authorization of an au-*
 9 *thorized user; or*

10 (C) *the installation of software before the*
 11 *first retail sale of the computer.*

12 (b) *MISLEADING INDUCEMENTS TO INSTALL.—It shall*
 13 *be unlawful for a person who is not an authorized user of*
 14 *a protected computer to induce an authorized user of the*
 15 *computer to consent to the installation of software on the*
 16 *computer by means of a materially false or misleading rep-*
 17 *resentation concerning—*

18 (1) *the identity of an operator of an Internet*
 19 *website or online service at which the software is*
 20 *made available for download from the Internet;*

21 (2) *the identity of the author or publisher of the*
 22 *software;*

23 (3) *the nature or function of the software; or*

24 (4) *the consequences of not installing the soft-*
 25 *ware.*

1 (c) *PREVENTING REASONABLE EFFORTS TO*
 2 *UNINSTALL.—*

3 (1) *IN GENERAL.—It shall be unlawful for a per-*
 4 *son who is not an authorized user of a protected com-*
 5 *puter to authorize or cause the installation of software*
 6 *on the computer if the software is designed to prevent*
 7 *reasonable efforts by an authorized user of the com-*
 8 *puter to uninstall or disable the software once it has*
 9 *been installed.*

10 (2) *LIMITATIONS.—*

11 (A) *AUTHORITY TO UNINSTALL.—Software*
 12 *that enables 1 authorized user of a computer,*
 13 *such as a parent or system administrator, to*
 14 *choose to prevent another user of the same com-*
 15 *puter from uninstalling or disabling the software*
 16 *shall not be considered to prevent reasonable ef-*
 17 *forts to uninstall or disable the software within*
 18 *the meaning of this subsection, provided that at*
 19 *least 1 authorized user retains the ability to*
 20 *uninstall or disable the software.*

21 (B) *CONSTRUCTION.—This subsection shall*
 22 *not be construed to require individual features or*
 23 *functions of a software program, updates to a*
 24 *previously installed software program, or soft-*
 25 *ware programs that were installed on a bundled*

1 *basis to be capable of being uninstalled or dis-*
 2 *abled on an individual basis.*

3 ***SEC. 3. INSTALLING SURREPTITIOUS INFORMATION COL-***
 4 ***LECTION FEATURES ON A USER'S COMPUTER.***

5 *(a) IN GENERAL.—It shall be unlawful for a person*
 6 *who is not an authorized user of a protected computer to*
 7 *authorize or cause the installation on that computer of soft-*
 8 *ware that collects information about the user of the com-*
 9 *puter or about the user's Internet browsing behavior or*
 10 *other use of the computer and transmits such information*
 11 *to any other person on an automatic basis or at the direc-*
 12 *tion of a person other than an authorized user of the com-*
 13 *puter, if—*

14 *(1) the software's collection and transmission of*
 15 *such information is not functionally related to or in*
 16 *support of a software capability or function that an*
 17 *authorized user of the computer has chosen or con-*
 18 *sented to execute or enable; and*

19 *(2) either—*

20 *(A) there has been no notification to an au-*
 21 *thorized user of the computer, prior to the soft-*
 22 *ware beginning to collect and transmit such in-*
 23 *formation, explaining the type of information*
 24 *the software will collect and transmit and the*

1 *types of ways the information may be used and*
 2 *distributed;*

3 *(B) notification pursuant to subparagraph*
 4 *(A) was not provided in a manner reasonably*
 5 *calculated to provide actual notice to an author-*
 6 *ized user of the computer; or*

7 *(C) notification pursuant to subparagraph*
 8 *(A) occurred at a time or in a manner that did*
 9 *not enable an authorized user of the computer to*
 10 *consider the information contained in the notifi-*
 11 *cation before choosing whether to permit the col-*
 12 *lection or transmission of information.*

13 *(b) AUTHORIZATION STATUS.—This section shall not*
 14 *be interpreted to prohibit a person from authorizing or*
 15 *causing the installation of software that collects and trans-*
 16 *mits information that is reasonably needed to determine*
 17 *whether or not the user of a protected computer is licensed*
 18 *or authorized to use the software.*

19 *(c) INTENTIONAL TRANSMISSION OF INFORMATION BY*
 20 *USER.—Information shall not be construed to have been col-*
 21 *lected and transmitted on an automatic basis or at the di-*
 22 *rection of a person other than a user of the protected com-*
 23 *puter, within the meaning of this section, if the collection*
 24 *or transmission of the information is intentionally initi-*
 25 *ated by an authorized user for the purpose of allowing the*

1 *direct or indirect access to the information by an intended*
 2 *recipient.*

3 ***SEC. 4. ADWARE THAT CONCEALS ITS OPERATION.***

4 *It shall be unlawful for a person who is not an author-*
 5 *ized user of a protected computer to authorize or cause the*
 6 *installation on that computer of software if—*

7 *(1) the software causes advertisements to be dis-*
 8 *played to the user—*

9 *(A) at a time when the user is not accessing*
 10 *an Internet website or online service operated by*
 11 *the publisher of the software; and*

12 *(B) in a manner or at a time such that a*
 13 *reasonable user would not understand that the*
 14 *software is responsible for delivering the adver-*
 15 *tisements; and*

16 *(2) the advertisements referred to in paragraph*
 17 *(1) do not contain a label or other reasonable means*
 18 *of identifying to the user of the computer, each time*
 19 *such an advertisement is displayed, which software is*
 20 *responsible for the advertisements' delivery.*

21 ***SEC. 5. OTHER PRACTICES THAT THWART USER CONTROL***
 22 ***OF COMPUTER.***

23 *It shall be unlawful for a person who is not an author-*
 24 *ized user of a protected computer to knowingly and without*
 25 *authorization of an authorized user of the computer—*

1 (1) *utilize the computer to send unsolicited infor-*
2 *mation or material from the user's computer to other*
3 *computers;*

4 (2) *divert an authorized user's Internet browser*
5 *away from the Internet website the user intended to*
6 *view to 1 or more other websites, unless such diversion*
7 *has been authorized by the website the user intended*
8 *to view;*

9 (3) *display an advertisement, series of advertise-*
10 *ments, or other content on the computer through win-*
11 *dows in an Internet browser, in such a manner that*
12 *the user of the computer cannot end the display of*
13 *such advertisements or content without turning off the*
14 *computer or terminating all sessions of the Internet*
15 *browser, provided that this paragraph shall not apply*
16 *to the display of content related to the functionality*
17 *or identity of the Internet browser;*

18 (4) *covertly modify settings relating to the use of*
19 *the computer or to the computer's access to or use of*
20 *the Internet, including—*

21 (A) *altering the default Web page that ini-*
22 *tially appears when a user of the computer*
23 *launches an Internet browser;*

24 (B) *altering the default provider or Web*
25 *proxy used to access or search the Internet;*

1 (C) altering bookmarks used to store favor-
 2 ite Internet website addresses; or

3 (D) altering settings relating to security
 4 measures that protect the computer and the in-
 5 formation stored on the computer against unau-
 6 thorized access or use;

7 provided that this paragraph shall not apply to any
 8 modification that restores settings previously changed
 9 without user consent;

10 (5) use software installed in violation of section
 11 3 to collect information about the user or the user's
 12 Internet browsing behavior; or

13 (6) remove, disable, or render inoperative a secu-
 14 rity or privacy protection technology installed on the
 15 computer.

16 **SEC. 6. LIMITATIONS ON LIABILITY.**

17 (a) *PASSIVE TRANSMISSION, HOSTING, OR LINKING.*—
 18 A person shall not be deemed to have violated any provision
 19 of this Act solely because the person provided—

20 (1) the Internet connection, telephone connection,
 21 or other transmission or routing function through
 22 which software was delivered to a protected computer
 23 for installation;

1 (2) *the storage or hosting of software or of an*
 2 *Internet website through which software was made*
 3 *available for installation to a protected computer; or*
 4 (3) *an information location tool, such as a direc-*
 5 *tory, index, reference, pointer, or hypertext link,*
 6 *through which a user of a protected computer located*
 7 *software available for installation.*

8 (b) *NETWORK SECURITY.*—*A provider of a network or*
 9 *online service that an authorized user of a protected com-*
 10 *puter uses or subscribes to shall not be deemed to have vio-*
 11 *lated section 3 or 5 for any monitoring of, interaction with,*
 12 *or installation of software for the purposes of—*

13 (1) *protecting the security of the network, service,*
 14 *or computer;*

15 (2) *facilitating diagnostics, technical support,*
 16 *maintenance, network management, or repair; or*

17 (3) *preventing or detecting unauthorized, fraudu-*
 18 *lent, or otherwise unlawful uses of the network or*
 19 *service.*

20 **SEC. 7. ADMINISTRATION AND ENFORCEMENT.**

21 (a) *IN GENERAL.*—*Except as provided in subsection*
 22 *(b), this Act shall be enforced by the Commission as if the*
 23 *violation of this Act were an unfair or deceptive act or*
 24 *practice proscribed under section 18(a)(1)(B) of the Federal*
 25 *Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).*

1 (b) *ENFORCEMENT BY CERTAIN OTHER AGENCIES.*—

2 *Compliance with this Act shall be enforced under—*

3 (1) *section 8 of the Federal Deposit Insurance*

4 *Act (12 U.S.C. 1818), in the case of—*

5 (A) *national banks, and Federal branches*

6 *and Federal agencies of foreign banks, by the Of-*

7 *fice of the Comptroller of the Currency;*

8 (B) *member banks of the Federal Reserve*

9 *System (other than national banks), branches*

10 *and agencies of foreign banks (other than Fed-*

11 *eral branches, Federal agencies, and insured*

12 *State branches of foreign banks), commercial*

13 *lending companies owned or controlled by for-*

14 *eign banks, and organizations operating under*

15 *section 25 or 25A of the Federal Reserve Act (12*

16 *U.S.C. 601 and 611), by the Board; and*

17 (C) *banks insured by the Federal Deposit*

18 *Insurance Corporation (other than members of*

19 *the Federal Reserve System) and insured State*

20 *branches of foreign banks, by the Board of Direc-*

21 *tors of the Federal Deposit Insurance Corpora-*

22 *tion;*

23 (2) *section 8 of the Federal Deposit Insurance*

24 *Act (12 U.S.C. 1818), by the Director of the Office of*

25 *Thrift Supervision, in the case of a savings associa-*

1 *tion the deposits of which are insured by the Federal*
 2 *Deposit Insurance Corporation;*

3 (3) *the Federal Credit Union Act (12 U.S.C.*
 4 *1751 et seq.) by the National Credit Union Adminis-*
 5 *tration Board with respect to any Federal credit*
 6 *union;*

7 (4) *part A of subtitle VII of title 49, United*
 8 *States Code, by the Secretary of Transportation with*
 9 *respect to any air carrier or foreign air carrier sub-*
 10 *ject to that part;*

11 (5) *the Packers and Stockyards Act, 1921 (7*
 12 *U.S.C. 181 et seq.) (except as provided in section 406*
 13 *of that Act (7 U.S.C. 226, 227)), by the Secretary of*
 14 *Agriculture with respect to any activities subject to*
 15 *that Act; and*

16 (6) *the Farm Credit Act of 1971 (12 U.S.C. 2001*
 17 *et seq.) by the Farm Credit Administration with re-*
 18 *spect to any Federal land bank, Federal land bank*
 19 *association, Federal intermediate credit bank, or pro-*
 20 *duction credit association.*

21 (c) *EXERCISE OF CERTAIN POWERS.—For the purpose*
 22 *of the exercise by any agency referred to in subsection (b)*
 23 *of its powers under any Act referred to in that subsection,*
 24 *a violation of this Act is deemed to be a violation of a re-*
 25 *quirement imposed under that Act. In addition to its pow-*

1 *ers under any provision of law specifically referred to in*
 2 *subsection (b), each of the agencies referred to in that sub-*
 3 *section may exercise, for the purpose of enforcing compli-*
 4 *ance with any requirement imposed under this Act, any*
 5 *other authority conferred on it by law.*

6 *(d) ACTIONS BY THE COMMISSION.—The Commission*
 7 *shall prevent any person from violating this Act in the same*
 8 *manner, by the same means, and with the same jurisdic-*
 9 *tion, powers, and duties as though all applicable terms and*
 10 *provisions of the Federal Trade Commission Act (15 U.S.C.*
 11 *41 et seq.) were incorporated into and made a part of this*
 12 *Act. Any entity that violates any provision of that section*
 13 *is subject to the penalties and entitled to the privileges and*
 14 *immunities provided in the Federal Trade Commission Act*
 15 *in the same manner, by the same means, and with the same*
 16 *jurisdiction, power, and duties as though all applicable*
 17 *terms and provisions of the Federal Trade Commission Act*
 18 *were incorporated into and made a part of that section.*

19 ***SEC. 8. ACTIONS BY STATES.***

20 *(a) IN GENERAL.—*

21 *(1) CIVIL ACTIONS.—In any case in which the*
 22 *attorney general of a State has reason to believe that*
 23 *an interest of the residents of that State has been or*
 24 *is threatened or adversely affected by the engagement*
 25 *of any person in a practice that this Act prohibits,*

1 *the State, as parens patriae, may bring a civil action*
 2 *on behalf of the residents of the State in a district*
 3 *court of the United States of appropriate jurisdic-*
 4 *tion—*

5 *(A) to enjoin that practice;*

6 *(B) to enforce compliance with the rule;*

7 *(C) to obtain damage, restitution, or other*
 8 *compensation on behalf of residents of the State;*
 9 *or*

10 *(D) to obtain such other relief as the court*
 11 *may consider to be appropriate.*

12 *(2) NOTICE.—*

13 *(A) IN GENERAL.—Before filing an action*
 14 *under paragraph (1), the attorney general of the*
 15 *State involved shall provide to the Commis-*
 16 *sion—*

17 *(i) written notice of that action; and*

18 *(ii) a copy of the complaint for that*
 19 *action.*

20 *(B) EXEMPTION.—*

21 *(i) IN GENERAL.—Subparagraph (A)*
 22 *shall not apply with respect to the filing of*
 23 *an action by an attorney general of a State*
 24 *under this subsection, if the attorney gen-*
 25 *eral determines that it is not feasible to pro-*

1 *vide the notice described in that subpara-*
 2 *graph before the filing of the action.*

3 (ii) *NOTIFICATION.*—*In an action de-*
 4 *scribed in clause (i), the attorney general of*
 5 *a State shall provide notice and a copy of*
 6 *the complaint to the Commission at the*
 7 *same time as the attorney general files the*
 8 *action.*

9 (b) *INTERVENTION.*—

10 (1) *IN GENERAL.*—*On receiving notice under*
 11 *subsection (a)(2), the Commission shall have the right*
 12 *to intervene in the action that is the subject of the no-*
 13 *tice.*

14 (2) *EFFECT OF INTERVENTION.*—*If the Commis-*
 15 *sion intervenes in an action under subsection (a), it*
 16 *shall have the right—*

17 (A) *to be heard with respect to any matter*
 18 *that arises in that action; and*

19 (B) *to file a petition for appeal.*

20 (c) *CONSTRUCTION.*—*For purposes of bringing any*
 21 *civil action under subsection (a), nothing in this subtitle*
 22 *shall be construed to prevent an attorney general of a State*
 23 *from exercising the powers conferred on the attorney general*
 24 *by the laws of that State to—*

25 (1) *conduct investigations;*

1 (2) *administer oaths or affirmations; or*

2 (3) *compel the attendance of witnesses or the*
3 *production of documentary and other evidence.*

4 (d) *ACTIONS BY THE COMMISSION.—In any case in*
5 *which an action is instituted by or on behalf of the Commis-*
6 *sion for violation of section 2, no State may, during the*
7 *pendency of that action, institute an action under sub-*
8 *section (a) against any defendant named in the complaint*
9 *in that action for violation of that section.*

10 (e) *VENUE; SERVICE OF PROCESS.—*

11 (1) *VENUE.—Any action brought under sub-*
12 *section (a) may be brought in the district court of the*
13 *United States that meets applicable requirements re-*
14 *lating to venue under section 1391 of title 28, United*
15 *States Code.*

16 (2) *SERVICE OF PROCESS.—In an action brought*
17 *under subsection (a), process may be served in any*
18 *district in which the defendant—*

19 (A) *is an inhabitant; or*

20 (B) *may be found.*

21 **SEC. 9. EFFECT ON OTHER LAWS.**

22 (a) *FEDERAL LAW.—Nothing in this Act shall be con-*
23 *strued to limit or affect in any way the Commission's au-*
24 *thority to bring enforcement actions or take any other meas-*

1 *ures under the Federal Trade Commission Act or any other*
 2 *provision of law.*

3 *(b) STATE LAW.—*

4 *(1) STATE LAW CONCERNING INFORMATION COL-*
 5 *LECTION SOFTWARE OR ADWARE.—This Act super-*
 6 *sedes any statute, regulation, or rule of a State or po-*
 7 *litical subdivision of a State that expressly limits or*
 8 *restricts the installation or use of software on a pro-*
 9 *ected computer to—*

10 *(A) collect information about the user of the*
 11 *computer or the user’s Internet browsing behav-*
 12 *ior or other use of the computer; or*

13 *(B) cause advertisements to be delivered to*
 14 *the user of the computer,*
 15 *except to the extent that any such statute, regulation,*
 16 *or rule prohibits deception in connection with the in-*
 17 *stallation or use of such software.*

18 *(2) STATE LAW NOT SPECIFIC TO SOFTWARE.—*
 19 *This Act shall not be construed to preempt the appli-*
 20 *cability of State trespass, contract, tort, or anti-fraud*
 21 *law.*

1 **SEC. 10. PENALTIES FOR CERTAIN UNAUTHORIZED ACTIVI-**
 2 **TIES RELATING TO COMPUTERS.**

3 (a) *IN GENERAL.*—Chapter 47 of title 18, United
 4 States Code, is amended by inserting after section 1030 the
 5 following:

6 **“§ 1030A. Illicit indirect use of protected computers**

7 “(a) Whoever intentionally accesses a protected com-
 8 puter without authorization, or exceeds authorized access to
 9 a protected computer, by causing a computer program or
 10 code to be copied onto the protected computer, and inten-
 11 tionally uses that program or code in furtherance of another
 12 Federal criminal offense shall be fined under this title or
 13 imprisoned 5 years, or both.

14 “(b) Whoever intentionally accesses a protected com-
 15 puter without authorization, or exceeds authorized access to
 16 a protected computer, by causing a computer program or
 17 code to be copied onto the protected computer, and by means
 18 of that program or code intentionally impairs the security
 19 protection of the protected computer shall be fined under
 20 this title or imprisoned not more than 2 years, or both.

21 “(c) A person shall not violate this section who solely
 22 provides—

23 “(1) an Internet connection, telephone connec-
 24 tion, or other transmission or routing function
 25 through which software is delivered to a protected
 26 computer for installation;

1 “(2) the storage or hosting of software, or of an
2 Internet website, through which software is made
3 available for installation to a protected computer; or

4 “(3) an information location tool, such as a di-
5 rectory, index, reference, pointer, or hypertext link,
6 through which a user of a protected computer locates
7 software available for installation.

8 “(d) A provider of a network or online service that an
9 authorized user of a protected computer uses or subscribes
10 to shall not violate this section by any monitoring of, inter-
11 action with, or installation of software for the purpose of—

12 “(1) protecting the security of the network, serv-
13 ice, or computer;

14 “(2) facilitating diagnostics, technical support,
15 maintenance, network management, or repair; or

16 “(3) preventing or detecting unauthorized, fraud-
17 ulent, or otherwise unlawful uses of the network or
18 service.

19 “(e) No person may bring a civil action under the law
20 of any State if such action is premised in whole or in part
21 upon the defendant’s violating this section. For the purposes
22 of this subsection, the term ‘State’ includes the District of
23 Columbia, Puerto Rico, and any other territory or posses-
24 sion of the United States.”.

1 (b) *CONFORMING AMENDMENT.*—*The table of sections*
 2 *at the beginning of chapter 47 of title 18, United States*
 3 *Code, is amended by inserting after the item relating to*
 4 *section 1030 the following new item:*

“1030A. Illicit indirect use of protected computers”

5 ***SEC. 11. DEFINITIONS.***

6 *In this Act:*

7 (1) *AUTHORIZED USER.*—*The term “authorized*
 8 *user”, when used with respect to a computer, means*
 9 *the owner or lessee of a computer, or someone using*
 10 *or accessing a computer with the actual or apparent*
 11 *authorization of the owner or lessee.*

12 (2) *CAUSE THE INSTALLATION.*—*The term*
 13 *“cause the installation” when used with respect to*
 14 *particular software, means to knowingly provide the*
 15 *technical means by which the software is installed, or*
 16 *to knowingly pay or provide other consideration to,*
 17 *or induce, another person to do so.*

18 (3) *COMMISSION.*—*The term “Commission”*
 19 *means the Federal Trade Commission.*

20 (4) *COOKIE.*—*The term “cookie” means a text*
 21 *file—*

22 *(A) that is placed on a computer by an*
 23 *Internet service provider, interactive computer*
 24 *service, or Internet website; and*

1 (B) the sole function of which is to record
2 information that can be read or recognized when
3 the user of the computer subsequently accesses
4 particular websites or online locations or serv-
5 ices.

6 (5) *FIRST RETAIL SALE.*—The term “first retail
7 sale” means the first sale of a computer, for a purpose
8 other than resale, after the manufacture, production,
9 or importation of the computer. For purposes of this
10 paragraph, the lease of a computer shall be considered
11 a sale of the computer at retail.

12 (6) *INSTALL.*—The term “install” means—

13 (A) to write computer software to a com-
14 puter’s persistent storage medium, such as the
15 computer’s hard disk, in such a way that the
16 computer software is retained on the computer
17 after the computer is turned off and subsequently
18 restarted; or

19 (B) to write computer software to a com-
20 puter’s temporary memory, such as random ac-
21 cess memory, in such a way that the software is
22 retained and continues to operate after the user
23 of the computer turns off or exits the Internet
24 service, interactive computer service, or Internet

1 *website from which the computer software was*
 2 *obtained.*

3 (7) *PERSON.*—*The term “person” has the mean-*
 4 *ing given that term in section 3(32) of the Commu-*
 5 *nications Act of 1934 (47 U.S.C. 153(32)).*

6 (8) *PROTECTED COMPUTER.*—*The term “pro-*
 7 *tected computer” has the meaning given that term in*
 8 *section 1030(e)(2)(B) of title 18, United States Code.*

9 (9) *SOFTWARE.*—*The term “software” means*
 10 *any program designed to cause a computer to perform*
 11 *a desired function or functions. Such term does not*
 12 *include any cookie.*

13 (10) *UPGRADE.*—*The term “upgrade”, when*
 14 *used with respect to a previously installed software*
 15 *program, means additional software that is issued by*
 16 *the publisher or any successor to the publisher of the*
 17 *software program to improve, correct, repair, en-*
 18 *hance, supplement, or otherwise modify the software*
 19 *program.*

20 **SEC. 12. EFFECTIVE DATE.**

21 *This Act shall take effect 180 days after the date of*
 22 *enactment of this Act.*

Calendar No. 811

108TH CONGRESS
2D SESSION

S. 2145

A BILL

To regulate the unauthorized installation of computer software, to require clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for other purposes.

NOVEMBER 19, 2004

Reported with an amendment