

109TH CONGRESS
1ST SESSION

S. 1004

To provide the Federal Trade Commission with the resources necessary to protect users of the Internet from the unfair and deceptive acts and practices associated with spyware, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 11, 2005

Mr. ALLEN (for himself, Mr. SMITH, and Mr. ENSIGN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To provide the Federal Trade Commission with the resources necessary to protect users of the Internet from the unfair and deceptive acts and practices associated with spyware, 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,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Enhanced Consumer
5 Protection Against Spyware Act of 2005”.

6 **SEC. 2. CONGRESSIONAL FINDINGS.**

7 Congress finds the following:

1 (1) Software commonly known as “spyware”
2 can cause significant harm to consumers by, among
3 other things, deceptively or unfairly causing a com-
4 puter to malfunction, slow down, lose data, cease
5 working properly, or share personal information
6 without a consumer’s knowledge.

7 (2) The unfair and deceptive practices associ-
8 ated with the distribution of spyware threaten the
9 confidence of millions of Americans who use the
10 Internet as a valuable medium for commerce and
11 communications.

12 (3) The Federal Trade Commission’s legal ac-
13 tions have clearly established the Commission’s au-
14 thority to combat unfair or deceptive acts or prac-
15 tices involving the Internet and consumers’ com-
16 puters.

17 (4) According to the Commission’s statements
18 to Congress, the vast majority of unfair or deceptive
19 acts or practices involving spyware, such as decep-
20 tively asserting control over a consumer’s computer
21 and capturing keystroke information, are already
22 unlawful under the Federal Trade Commission Act.

23 (5) The Commission has already taken legal ac-
24 tion against spyware purveyors. For example, in
25 FTC v. Seismic Entertainment, the Commission re-

1 requested that a district court of the United States
2 shut down a spyware operation that hijacks personal
3 computers, secretly changes computer settings, bar-
4 rages them with pop-up ads, and installs software
5 programs that “spy” on consumers’ web surfing.

6 (6) Because the fraudulent, deceptive, or unfair
7 installation of spyware is already a violation of Fed-
8 eral law, Congress must focus on providing adequate
9 resources to combat spyware. For example, because
10 a large percentage of the purveyors of spyware are
11 located outside of the United States, legislation that
12 increases the Commission’s authority to combat de-
13 ceptive or unfair acts or practices that occur over-
14 seas would promote enforcement actions against
15 spyware purveyors.

16 (7) Because spyware affects interstate com-
17 merce and over 20 States are considering legislation
18 on spyware and 2 States have already enacted laws
19 on spyware, Congress must establish a Federal regu-
20 latory and enforcement standard to protect against
21 the growing patchwork of State laws that unneces-
22 sarily confuses and burdens consumers and legiti-
23 mate software providers.

1 **SEC. 3. SENSE OF CONGRESS.**

2 On the basis of the findings in section 2, it is the
3 sense of the Congress that—

4 (1) combating spyware should be established as
5 a matter of high priority for Federal Trade Commis-
6 sion action; and

7 (2) the resources and tools available to the
8 Commission should be enhanced and expanded to in-
9 crease the breadth and strength of the Commission's
10 spyware enforcement efforts.

11 **SEC. 4. DEFINITIONS.**

12 As used in this Act:

13 (1) CABLE OPERATOR.—The term “cable oper-
14 ator” has the meaning given such term in section
15 602 of the Communications Act of 1934 (47 U.S.C.
16 522).

17 (2) COMPUTER; PROTECTED COMPUTER.—The
18 terms “computer” or “protected computer” have the
19 meanings given such terms in section 1030(e) of the
20 title 18, United States Code.

21 (3) COMMISSION.—The term “Commission”
22 means the Federal Trade Commission.

23 (4) INFORMATION SERVICE.—The term “infor-
24 mation service” has the meaning given such term in
25 section 3 of the Communications Act of 1934 (47
26 U.S.C. 153).

1 (5) INTERACTIVE COMPUTER SERVICE.—The
 2 term “interactive computer service” has the meaning
 3 given such term in section 230(f) of the Communica-
 4 tions Act of 1934 (47 U.S.C. 230(f)).

5 (6) OWNER OR AUTHORIZED USER.—The term
 6 “owner or authorized user” means—

7 (A) a natural person who owns a computer
 8 for commercial, family, household, or edu-
 9 cational purposes; or

10 (B) an individual who operates a computer
 11 with the authorization of a natural person who
 12 owns the computer for commercial, personal,
 13 family, household, or educational purposes.

14 (7) TELECOMMUNICATIONS CARRIER.—The
 15 term “telecommunications carrier” has the meaning
 16 given such term in section 3 of the Communications
 17 Act of 1934 (47 U.S.C. 153).

18 **SEC. 5. FEDERAL TRADE COMMISSION AUTHORITY TO COM-**
 19 **BAT DECEPTIVE ACTS OR PRACTICES RELAT-**
 20 **ING TO SPYWARE.**

21 (a) RESTATEMENT OF AUTHORITY.—

22 (1) VIOLATION.—It is a violation of section 18
 23 of the Federal Trade Commission Act (15 U.S.C.
 24 57a) to install through deceptive acts or practices
 25 software on protected computers.

1 (2) ENFORCEMENT.—Any violation of this Act
2 or of any rules implementing this Act, shall be en-
3 forced by the Commission as if it were an unfair or
4 deceptive act or practice proscribed under section
5 18(a)(1)(B) of the Federal Trade Commission Act
6 (15 U.S.C. 57a(a)(1)(B)).

7 (b) INCREASED FINES.—For any violation described
8 in subsection (a), the Commission may, in its discretion,
9 penalize such deceptive acts or practices by tripling the
10 amounts prescribed in the Federal Trade Commission Act
11 (15 U.S.C. 41 et seq.).

12 (c) PENALTY FOR PATTERN OR PRACTICE VIOLA-
13 TIONS.—

14 (1) IN GENERAL.—Notwithstanding the Federal
15 Trade Commission Act (15 U.S.C. 41 et seq.), in the
16 case of a person who engages in a pattern or prac-
17 tice that violates subsection (a), the Commission
18 may, in its discretion, seek a civil penalty for such
19 pattern or practice of violations in an amount, as de-
20 termined by the Commission, of not more than
21 \$3,000,000 for each violation of subsection (a).

22 (2) TREATMENT OF SINGLE ACTION OR CON-
23 DUCT.—For the purpose of enforcing paragraph (1),
24 any single action or conduct that violates subsection

1 (a) with respect to multiple protected computers
2 shall be treated as a single violation.

3 (d) ILL-GOTTEN GAINS.—For any violation described
4 in subsection (a), the Commission shall have authority to
5 disgorge and seize any ill-gotten gains procured through
6 such deceptive acts or practices.

7 (e) PREEMPTION OF STATE OR LOCAL LAW.—This
8 section supersedes any provision of a statute, regulation,
9 or rule, and any other requirement, prohibition or remedy
10 under State law or the law of a political subdivision of
11 a State that relates to or affects installation of software
12 through deceptive acts or practices or the use of computer
13 software installed by means of the Internet.

14 (f) PRIVATE RIGHT OF ACTION.—

15 (1) IN GENERAL.—This Act may not be consid-
16 ered or construed to provide any private cause of ac-
17 tion, including a class action.

18 (2) CIVIL ACTION.—No private civil action re-
19 lating to any act or practice governed under this Act
20 may be commenced or maintained in any State court
21 or under State law, including a pendent State claim
22 to an action under Federal law.

23 (g) ENFORCEMENT BY STATE ATTORNEY GEN-
24 ERALS.—

1 (1) CIVIL ACTIONS.—In any case in which the
2 attorney general of a State has reason to believe
3 that an interest of the residents of that State has
4 been or is threatened or adversely affected by the
5 engagement of any person in a practice that is pro-
6 hibited under this section, the State, as *parens*
7 *patriae*, may bring a civil action on behalf of the
8 residents of that State in a Federal district court of
9 the United States of appropriate jurisdiction, or any
10 other court of competent jurisdiction, to—

11 (A) enjoin that practice;

12 (B) enforce compliance with this section;

13 (C) obtain actual damage and restitution
14 on behalf of residents of the State; or

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

17 (2) NOTICE.—

18 (A) IN GENERAL.—Before filing an action
19 under paragraph (1), the attorney general of a
20 State shall provide to the Commission and the
21 Attorney General—

22 (i) written notice of the action; and

23 (ii) a copy of the complaint for the ac-
24 tion.

25 (B) EXEMPTION.—

1 (i) IN GENERAL.—Subparagraph (A)
2 shall not apply with respect to the filing of
3 an action by an attorney general of a State
4 under this subsection, if the attorney gen-
5 eral of a State determines that it is not
6 feasible to provide the notice described in
7 such subparagraph before the filing of the
8 action.

9 (ii) NOTIFICATION.—In an action de-
10 scribed in clause (i), the attorney general
11 of a State shall provide notice and a copy
12 of the complaint to the Commission and
13 the Attorney General at the time the attor-
14 ney general of a State files the action.

15 (C) ATTORNEY GENERAL’S RIGHT TO IN-
16 TervENE.—After having been notified, as pro-
17 vided in subparagraph (A), the United States
18 Attorney General shall have the right—

19 (i) to file an action;

20 (ii) to intervene in the action;

21 (iii) upon so intervening, to be heard
22 on all matters arising in that action;

23 (iv) to remove the action to the appro-
24 priate district court of the United States;
25 and

1 (v) to file petitions for appeal.

2 (D) PROHIBITION ON STATE ATTORNEY
3 GENERALS IF ATTORNEY GENERAL ACTS.—If
4 the Attorney General institutes an action under
5 this Act, no attorney general of a State or offi-
6 cial or agency of a State may bring an action
7 under this subsection for any violation of sub-
8 section (a) alleged in the complaint.

9 (E) PROHIBITION ON STATE ATTORNEY
10 GENERALS IF COMMISSION ACTS.—If the Com-
11 mission institutes an action under this sub-
12 section, no attorney general of a State or offi-
13 cial or agency of a State may bring an action
14 under this subsection for any violation of this
15 section alleged in the complaint.

16 (h) RULE OF CONSTRUCTION.—For purposes of
17 bringing any civil action under this section, nothing in this
18 Act shall be construed to prevent an attorney general of
19 a State from exercising the powers conferred on such at-
20 torney general by the laws of that State to—

21 (1) conduct investigations;
22 (2) administer oaths or affirmations; or
23 (3) compel the attendance of witnesses or the
24 production of documentary and other evidence.

25 (i) VENUE; SERVICE OF PROCESS.—

1 (1) VENUE.—Any action brought under sub-
2 section (g) may be brought in the district court of
3 the United States that meets applicable require-
4 ments relating to venue under section 1391 of title
5 28, United States Code.

6 (2) SERVICE OF PROCESS.—In an action
7 brought under subsection (g), process may be served
8 in any district in which the defendant—

9 (A) is an inhabitant; or

10 (B) may be found.

11 **SEC. 6. LIMITATIONS ON LIABILITY.**

12 (a) LAW ENFORCEMENT AUTHORITY.—Section 5
13 shall not apply to the transmission, installation, or execu-
14 tion of a computer program in compliance with a law en-
15 forcement, investigatory, national security, or regulatory
16 agency or department of the United States, or any State
17 in response to a request or demand made under authority
18 granted to that agency or department, including—

19 (1) a warrant issued under the Federal Rules
20 of Criminal Procedure;

21 (2) an equivalent State warrant; or

22 (3) a court order or other lawful process.

23 (b) PASSIVE TRANSMISSION, HOSTING, OR LINK-
24 ING.—A person shall not be deemed to have violated any
25 provision of this Act solely because the person provided—

1 (1) the Internet connection, telephone connec-
2 tion, or other transmission or routing function
3 through which software was delivered to a protected
4 computer for installation;

5 (2) the storage or hosting of software or of an
6 Internet website through which software was made
7 available for installation to a protected computer; or

8 (3) an information location tool, such as a di-
9 rectory, index, reference, pointer, or hypertext link,
10 through which a user of a protected computer lo-
11 cated software available for installation.

12 (c) EXCEPTION RELATING TO SECURITY.—Nothing
13 in this Act shall apply to—

14 (1) any monitoring of, or interaction with, a
15 consumer’s Internet or other network connection or
16 service, or a protected computer, by a telecommuni-
17 cations carrier, cable operator, computer hardware
18 or software provider, or provider of information serv-
19 ice or interactive computer service, to the extent that
20 such monitoring or interaction is for network or
21 computer security purposes, network management,
22 maintenance, diagnostics, technical support or re-
23 pair, or for the detection or prevention of fraudulent
24 activities; or

1 (2) a discrete interaction with a protected com-
2 puter by a provider of computer software solely to
3 determine whether the user of the computer is au-
4 thorized to use such software, that occurs upon—

5 (A) initialization of the software; or

6 (B) an affirmative request by the owner or
7 authorized user for an update of, addition to, or
8 technical service for, the software.

9 (d) **LIMITATION ON LIABILITY.**—A manufacturer or
10 retailer of computer equipment shall not be liable under
11 this Act to the extent that the manufacturer or retailer
12 is providing third party branded software that is installed
13 on the equipment the manufacturer or retailer is manufac-
14 turing or selling.

15 (e) **COMPLIANCE WITH LAW.**—No person shall be lia-
16 ble under this Act for engaging in any activity that is ex-
17 pressly permissible under any other provision of Federal
18 law.

19 (f) **COMMISSION AUTHORITY.**—In addition to the lim-
20 itation of liability specified in this section, the Commission
21 may by regulation establish additional limitations or ex-
22 ceptions upon the finding that such limitations or excep-
23 tions are reasonably necessary to promote the public inter-
24 est.

1 **SEC. 7. INTERNATIONAL CONSUMER PROTECTION AU-**
 2 **THORITY.**

3 (a) AVAILABILITY OF REMEDIES.—Section 5(a) of
 4 the Federal Trade Commission Act (15 U.S.C. 45(a)) is
 5 amended by adding at the end the following:

6 “(4)(A) For purposes of this subsection, the term
 7 ‘unfair or deceptive acts or practices’ includes unfair or
 8 deceptive acts or practices involving foreign commerce
 9 that—

10 “(i) cause or are likely to cause reasonable fore-
 11 seeable injury within the United States; or

12 “(ii) involve material conduct occurring within
 13 the United States.

14 “(B) All remedies available to the Commission with
 15 respect to unfair and deceptive acts or practices shall be
 16 available for acts and practices described in this para-
 17 graph, including restitution to domestic or foreign vic-
 18 tims.”.

19 **SEC. 8. PENALTIES FOR CERTAIN UNAUTHORIZED ACTIVI-**
 20 **TIES RELATING TO COMPUTERS.**

21 (a) IN GENERAL.—Chapter 47 of title 18, United
 22 States Code, is amended by inserting after section 1030
 23 the following:

24 **“§ 1030A. Illicit indirect use of protected computers**

25 “(a) FURTHERANCE OF CRIMINAL OFFENSE.—Who-
 26 ever intentionally accesses a protected computer without

1 authorization, or exceeds authorized access to a protected
2 computer, by causing a computer program or code to be
3 copied onto the protected computer, and intentionally uses
4 that program or code in furtherance of another Federal
5 criminal offense shall be fined under this title or impris-
6 oned not more than 5 years, or both.

7 “(b) SECURITY PROTECTION.—Whoever intentionally
8 accesses a protected computer without authorization, or
9 exceeds authorized access to a protected computer, by
10 causing a computer program or code to be copied onto
11 the protected computer, and by means of that program
12 or code intentionally impairs the security protection of the
13 protected computer shall be fined under this title or im-
14 prisoned not more than 2 years, or both.

15 “(c) INDIVIDUAL EXEMPTION.—A person shall not
16 violate this section who solely provides—

17 “(1) an Internet connection, telephone connec-
18 tion, or other transmission or routing function
19 through which software is delivered to a protected
20 computer for installation;

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

24 “(3) an information location tool, such as a di-
25 rectory, index, reference, pointer, or hypertext link,

1 through which a user of a protected computer lo-
2 cates software available for installation.

3 “(d) NETWORK EXEMPTION.—A provider of a net-
4 work or online service that an authorized user of a pro-
5 tected computer uses or subscribes to shall not violate this
6 section by any monitoring or, interaction with, or installa-
7 tion of software for the purpose of—

8 “(1) protecting the security of the network,
9 service, or computer;

10 “(2) facilitating diagnostics, technical support,
11 maintenance, network management, or repair; or

12 “(3) preventing or detecting unauthorized,
13 fraudulent, or otherwise unlawful uses of the net-
14 work or service.

15 “(e) EXCLUSIVE JURISDICTION.—No person may
16 bring a civil action under the law of any State if such
17 action is premised in whole or in part upon the defendant’s
18 violation of this section.

19 “(f) DEFINITIONS.—As used in this section:

20 “(1) COMPUTER; PROTECTED COMPUTER.—The
21 terms ‘computer’ or ‘protected computer’ have the
22 meanings given such terms in section 1030(e) of this
23 title.

24 “(2) STATE.—The term ‘State’ includes each of
25 the several States, the District of Columbia, Puerto

1 Rico, and any other territory or possession of the
2 United States.”.

3 (b) CONFORMING AMENDMENT.—The table of sec-
4 tions at the beginning of chapter 47 of title 18, United
5 States Code, is amended by inserting after the item relat-
6 ing to section 1030 the following new item:

“1030A. Illicit indirect use of protected computers.”.

7 **SEC. 9. PRESERVATION OF FEDERAL TRADE COMMISSION**
8 **AUTHORITY.**

9 Nothing in this Act may be construed in any way to
10 limit or affect the Commission’s authority under any other
11 provision of law, including the authority to issue advisory
12 opinions, policy statements, or guidance regarding this
13 Act.

14 **SEC. 10. AUTHORIZATION OF APPROPRIATIONS.**

15 There is authorized to be appropriated, to the Com-
16 mission for the purposes of enforcing violations relating
17 to the unfair and deceptive practices associated with com-
18 puter and Internet related crimes, not more than
19 \$10,000,000 for each fiscal year beginning with fiscal year
20 2006.

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