Calendar No. 467

109TH CONGRESS
2D SESSION

S. 687

[Report No. 109–262]

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

MARCH 20, 2005

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

JUNE 12, 2006

Reported by Mr. STEVENS, with an amendment

[Strike out 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,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Software Principles Yielding Better Levels of Consumer Knowledge Act" or the "SPY BLOCK Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. PROHIBITED PRACTICES RELATED TO SOFTWARE INSTALLATION IN GENERAL.

(a) SURREPTITIOUS INSTALLATION.—

(1) IN GENERAL.—It is unlawful for a person who is not an authorized user of a protected computer to cause the installation of software on the computer in a manner that—

(A) conceals from the user of the computer the fact that the software is being installed; or

(B) prevents the user of the computer from having an opportunity to knowingly grant or withhold consent to the installation.

1   (2) EXCEPTION.—This subsection does not
2 apply 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
7   software program that has already been in-
8   stalled on the computer with the authorization
9   of an authorized user;

10   (C) the installation of software before the
11   first retail sale and delivery of the computer; or

12   (D) the installation of software that ceases
13   to operate when the user of the computer exits
14   the software or service through which the user
15   accesses the Internet, if the software so in-
16   stalled does not begin to operate again when
17   the user accesses the Internet via that computer
18   in the future.

19 (b) MISLEADING INDUCEMENTS TO INSTALL.—It is
20 unlawful for a person who is not an authorized user of
21 a protected computer to induce an authorized user of the
22 computer to consent to the installation of software on the
23 computer by means of a materially false or misleading rep-
24 resentation concerning—

1 (1) the identity of an operator of an Internet

2 website or online service at which the software is

3 made available for download from the Internet;

4 (2) the identity of the author, publisher, or au-

5 thorized distributor of the software;

6 (3) the nature or function of the software; or

7 (4) the consequences of not installing the soft-

8 ware.

9 (c) PREVENTING REASONABLE EFFORTS TO

10 UNINSTALL.—

11 (1) IN GENERAL.—It is unlawful for a person

12 who is not an authorized user of a protected com-

13 puter to cause the installation of software on the

14 computer if the software cannot subsequently be

15 uninstalled or disabled by an authorized user

16 through a program removal function that is usual

17 and customary with the user's operating system, or

18 otherwise as clearly and conspicuously disclosed to

19 the user.

20 (2) LIMITATIONS.—

21 (A) AUTHORITY TO UNINSTALL.—Software

22 that enables an authorized user of a computer,

23 such as a parent, employer, or system adminis-

24 trator, to choose to prevent another user of the

25 same computer from uninstalling or disabling

1 the software shall not be considered to prevent

2 reasonable efforts to uninstall or disable the

3 software within the meaning of this subsection

4 if at least 1 authorized user retains the ability

5 to uninstall or disable the software.

6 (B) CONSTRUCTION.—This subsection

7 shall not be construed to require individual fea-

8 tures or functions of a software program, up-

9 grades to a previously installed software pro-

10 gram, or software programs that were installed

11 on a bundled basis with other software or with

12 hardware to be capable of being uninstalled or

13 disabled separately from such software or hard-

14 ware.

15 **SEC. 3. INSTALLING SURREPTITIOUS INFORMATION COL-**

16 **LECTION FEATURES ON A USER'S COMPUTER.**

17 (a) IN GENERAL.—It is unlawful for a person who

18 is not an authorized user of a protected computer to—

19 (1) cause the installation on that computer of

20 software that includes a surreptitious information

21 collection feature; or

22 (2) use software installed in violation of para-

23 graph (1) to collect information about a user of the

24 computer or the use of a protected computer by that

25 user.

1 (b) AUTHORIZATION STATUS.—This section shall not

2 be interpreted to prohibit a person from causing the instal-

3 lation of software that collects and transmits only infor-

4 mation that is reasonably needed to determine whether or

5 not the user of a protected computer is licensed or author-

6 ized to use the software.

7 (c) SURREPTITIOUS INFORMATION COLLECTION

8 FEATURE DEFINED.—For purposes of this section, the

9 term "surreptitious information collection feature" means

10 a feature of software that—

11 (1) collects information about a user of a pro-

12 tected computer or the use of a protected computer

13 by that user, and transmits such information to any

14 other person or computer—

15 (A) on an automatic basis or at the direc-

16 tion of person other than an authorized user of

17 the computer, such that no authorized user

18 knowingly triggers or controls the collection and

19 transmission;

20 (B) in a manner that is not transparent to

21 an authorized user at or near the time of the

22 collection and transmission, such that no au-

23 thorized user is likely to be aware of it when in-

24 formation collection and transmission are occur-

25 ring; and

1   (C) for purposes other than—

2   (i) facilitating the proper technical

3   functioning of a capability, function, or

4   service that an authorized user of the com-

5   puter has knowingly used, executed, or en-

6   abled; or

7   (ii) enabling the provider of an online

8   service knowingly used or subscribed to by

9   an authorized user of the computer to

10   monitor or record the user's usage of the

11   service, or to customize or otherwise affect

12   the provision of the service to the user

13   based on such usage; and

14   (2) begins to collect and transmit such informa-

15   tion without prior notification that—

16   (A) clearly and conspicuously discloses to

17   an authorized user of the computer the type of

18   information the software will collect and the

19   types of ways the information may be used and

20   distributed; and

21   (B) is provided at a time and in a manner

22   such that an authorized user of the computer

23   has an opportunity, after reviewing the infor-

24   mation contained in the notice, to prevent ei-

25   ther—

1   (i) the installation of the software; or

2   (ii) the beginning of the operation of

3   the information collection and transmission

4   capability described in paragraph (1).

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

6   (a) IN GENERAL.—It is unlawful for a person who

7 is not an authorized user of a protected computer to cause

8 the installation on that computer of software that causes

9 advertisements to be displayed to the user without a label

10 or other reasonable means of identifying to the user of

11 the computer, each time such an advertisement is dis-

12 played, which software caused the advertisement's deliv-

13 ery.

14   (b) EXCEPTION.—Software that causes advertise-

15 ments to be displayed without a label or other reasonable

16 means of identification shall not give rise to liability under

17 subsection (a) if those advertisements are displayed to a

18 user of the computer—

19   (1) only when a user is accessing an Internet

20   website or online service—

21   (A) operated by the publisher of the soft-

22   ware; or

23   (B) the operator of which has provided ex-

24   press consent to the display of such advertise-

25   ments to users of the website or service; or

1   (2) only in a manner or at a time such that a

2   reasonable user would understand which software

3   caused the delivery of the advertisements.

4 **SEC. 5. OTHER PRACTICES THAT THWART USER CONTROL**

5   **OF COMPUTER.**

6   It is unlawful for a person who is not an authorized

7 user of a protected computer to engage in an unfair or

8 deceptive act or practice that involves—

9   (1) utilizing the computer to send unsolicited

10   information or material from the user's computer to

11   other computers;

12   (2) diverting an authorized user's Internet

13   browser away from the Internet website the user in-

14   tended to view to 1 or more other websites, unless

15   such diversion has been authorized by the website

16   the user intended to view;

17   (3) displaying an advertisement, series of adver-

18   tisements, or other content on the computer through

19   windows in an Internet browser, in such a manner

20   that the user of the computer cannot end the display

21   of such advertisements or content without turning

22   off the computer or terminating all sessions of the

23   Internet browser (except that this paragraph shall

24   not apply to the display of content related to the

25   functionality or identity of the Internet browser);

1   (4) modifying settings relating to the use of the

2   computer or to the computer's access to or use of

3   the Internet, including—

4   (A) altering the default Web page that ini-

5   tially appears when a user of the computer

6   launches an Internet browser;

7   (B) altering the default provider or Web

8   proxy used to access or search the Internet;

9   (C) altering bookmarks used to store fa-

10   vorite Internet website addresses; or

11   (D) altering settings relating to security

12   measures that protect the computer and the in-

13   formation stored on the computer against unau-

14   thorized access or use; or

15   (5) removing, disabling, or rendering inoper-

16   ative a security or privacy protection technology in-

17   stalled on the computer.

18 **SEC. 6. LIMITATIONS ON LIABILITY.**

19   (a) PASSIVE TRANSMISSION, HOSTING, OR LINK-

20 ING.—A person shall not be deemed to have violated any

21 provision of this Act solely because the person provided—

22   (1) the Internet connection, telephone connec-

23   tion, or other transmission or routing function

24   through which software was delivered to a protected

25   computer 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 di-

5 rectory, index, reference, pointer, or hypertext link,

6 through which a user of a protected computer lo-

7 cated software available for installation.

8 (b) NETWORK SECURITY.—It is not a violation of

9 section 2, 3, or 5 for a provider of a network or online

10 service used by an authorized user of a protected com-

11 puter, or to which any authorized user of a protected com-

12 puter subscribes, to monitor, interact with, or install soft-

13 ware for the purpose of—

14 (1) protecting the security of the network, serv-

15 ice, or computer;

16 (2) facilitating diagnostics, technical support,

17 maintenance, network management, or repair; or

18 (3) preventing or detecting unauthorized, fraud-

19 ulent, or otherwise unlawful uses of the network or

20 service.

21 (c) MANUFACTURER'S LIABILITY FOR THIRD-PARTY

22 SOFTWARE.—A manufacturer or retailer of a protected

23 computer shall not be liable under any provision of this

24 Act for causing the installation on the computer, prior to

25 the first retail sale and delivery of the computer, of third-

1 party branded software, unless the manufacturer or re-

2 tailer—

3   (1) uses a surreptitious information collection

4   feature included in the software to collect informa-

5   tion about a user of the computer or the use of a

6   protected computer by that user; or

7   (2) knows that the software will cause adver-

8   tisements for the manufacturer or retailer to be dis-

9   played to a user of the computer.

10 (d) INVESTIGATIONAL EXCEPTION.—Nothing in this

11 Act prohibits any lawfully authorized investigative, protec-

12 tive, or intelligence activity of a law enforcement agency

13 of the United States, a State, or a political subdivision

14 of a State, or of an intelligence agency of the United

15 States.

16 (e) SERVICES PROVIDED OVER MVPD SYSTEMS.—

17 It is not a violation of this Act for a multichannel video

18 programming distributor (as defined in section 602(13) of

19 the Communications Act of 1934 (47 U.S.C. 522(13)) to

20 utilize a navigation device, or interact with such a device,

21 or to install or use software on such a device, in connection

22 with the provision of multichannel video programming or

23 other services offered over a multichannel video program-

24 ming system or the collection or disclosure of subscriber

25 information, if the provision of such service or the collec-

1 tion or disclosure of such information is subject to section

2 338(i) or section 631 of the Communications Act of 1934

3 (47 U.S.C. 338(i) or 551).

SEC. 7. FTC RULEMAKING AUTHORITY.

5 (a) IN GENERAL.—Subject to the limitations of sub-

6 section (b), the Commission may issue such rules in ac-

7 cordance with section 553 of title 5, United States Code,

8 as may be necessary to implement or clarify the provisions

9 of this Act.

10 (b) SAFE HARBORS.—

11 (1) IN GENERAL.—The Commission may issue

12 regulations establishing specific wordings or formats

13 for—

14 (A) notification that is sufficient under

15 section 3(c)(2) to prevent a software feature

16 from being a surreptitious information collec-

17 tion feature (as defined in section 3(c)); or

18 (B) labels or other means of identification

19 that are sufficient to avoid violation of section

20 4(a).

21 (2) FUNCTION OF COMMISSION'S SUGGESTED

22 WORDINGS OR FORMATS.—

23 (A) USAGE IS VOLUNTARY.—The Commis-

24 sion may not require the use of any specific

1   wording or format prescribed under paragraph

2   (1) to meet the requirements of section 3 or 4.

3   (B) OTHER MEANS OF COMPLIANCE.—The

4   use of a specific wording or format prescribed

5   under paragraph (1) shall not be the exclusive

6   means of providing notification, labels, or other

7   identification that meet the requirements of sec-

8   tions 3 and 4.

9   (c) LIMITATIONS ON LIABILITY.—In addition to the

10 limitations on liability specified in section 6, the Commis-

11 sion may by regulation establish additional limitations or

12 exceptions upon a finding that such limitations or excep-

13 tions are reasonably necessary to promote the public inter-

14 est and are consistent with the purposes of this Act. No

15 such additional limitation of liability may be made contin-

16 gent upon the adoption of any specific wording or format

17 specified in regulations under subsection (b)(1).

18 **SEC. 8. ADMINISTRATION AND ENFORCEMENT.**

19   (a) IN GENERAL.—Except as provided in subsection

20 (b), this Act shall be enforced by the Commission as if

21 a violation of this Act or of any regulation promulgated

22 by the Commission under this Act were an unfair or de-

23 ceptive act or practice proscribed under section

24 18(a)(1)(B) of the Federal Trade Commission Act (15

25 U.S.C. 57a(a)(1)(B)).

1 (b) ENFORCEMENT BY CERTAIN OTHER AGEN-

2 CIES.—Compliance with this Act shall be enforced

3 under—

4 (1) section 8 of the Federal Deposit Insurance

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

6 (A) national banks, and Federal branches

7 and Federal agencies of foreign banks, by the

8 Office of the Comptroller of the Currency;

9 (B) member banks of the Federal Reserve

10 System (other than national banks), branches

11 and agencies of foreign banks (other than Fed-

12 eral branches, Federal agencies, and insured

13 State branches of foreign banks), commercial

14 lending companies owned or controlled by for-

15 eign banks, and organizations operating under

16 section 25 or 25A of the Federal Reserve Act

17 (12 U.S.C. 601 and 611), by the Board; and

18 (C) banks insured by the Federal Deposit

19 Insurance Corporation (other than members of

20 the Federal Reserve System) and insured State

21 branches of foreign banks, by the Board of Di-

22 rectors of the Federal Deposit Insurance Cor-

23 poration;

24 (2) section 8 of the Federal Deposit Insurance

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

1 of Thrift Supervision, in the case of a savings associa-

2 tion the deposits of which are insured by the Federal

3 Deposit Insurance Corporation;

4   (3) the Federal Credit Union Act (12 U.S.C.

5 1751 et seq.) by the National Credit Union Adminis-

6 tration Board with respect to any Federal credit

7 union;

8   (4) part A of subtitle VII of title 49, United

9 States Code, by the Secretary of Transportation

10 with respect to any air carrier or foreign air carrier

11 subject to that part;

12   (5) the Packers and Stockyards Act, 1921 (7

13 U.S.C. 181 et seq.) (except as provided in section

14 406 of that Act (7 U.S.C. 226, 227)), by the Sec-

15 retary of Agriculture with respect to any activities

16 subject to that Act; and

17   (6) the Farm Credit Act of 1971 (12 U.S.C.

18 2001 et seq.) by the Farm Credit Administration

19 with respect to any Federal land bank, Federal land

20 bank association, Federal intermediate credit bank,

21 or production credit association.

22 (c) EXERCISE OF CERTAIN POWERS.—For the pur-

23 pose of the exercise by any agency referred to in sub-

24 section (b) of its powers under any Act referred to in that

25 subsection, a violation of this Act is deemed to be a viola-

1 tion of a requirement imposed under that Act. In addition

2 to its powers under any provision of law specifically re-

3 ferred to in subsection (b), each of the agencies referred

4 to in that subsection may exercise, for the purpose of en-

5 forcing compliance with any requirement imposed under

6 this Act, any other authority conferred on it by law.

7 (d) ACTIONS BY THE COMMISSION.—The Commis-

8 sion shall prevent any person from violating this Act in

9 the same manner, by the same means, and with the same

10 jurisdiction, powers, and duties as though all applicable

11 terms and provisions of the Federal Trade Commission

12 Act (15 U.S.C. 41 et seq.) were incorporated into and

13 made a part of this Act. Any entity that violates any provi-

14 sion of that section is subject to the penalties and entitled

15 to the privileges and immunities provided in the Federal

16 Trade Commission Act in the same manner, by the same

17 means, and with the same jurisdiction, power, and duties

18 as though all applicable terms and provisions of the Fed-

19 eral Trade Commission Act were incorporated into and

20 made a part of that section.

21 **SEC. 9. 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

1 under this subsection, if the attorney gen-

2 eral determines that it is not feasible to

3 provide the notice described in that sub-

4 paragraph before the filing of the action.

5 (ii) NOTIFICATION.—In an action de-

6 scribed in clause (i), the attorney general

7 of a State shall provide notice and a copy

8 of the complaint to the Commission at the

9 same time as the attorney general files the

10 action.

11 (b) INTERVENTION.—

12 (1) IN GENERAL.—On receiving notice under

13 subsection (a)(2), the Commission shall have the

14 right to intervene in the action that is the subject

15 of the notice.

16 (2) EFFECT OF INTERVENTION.—If the Com-

17 mission intervenes in an action under subsection (a),

18 it shall have the right—

19 (A) to be heard with respect to any matter

20 that arises in that action; and

21 (B) to file a petition for appeal.

22 (c) CONSTRUCTION.—For purposes of bringing any

23 civil action under subsection (a), nothing in this subtitle

24 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 this Act, no State may, during the

10 pendency of that action, institute an action under sub-

11 section (a) against any defendant named in the complaint

12 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.

1 **SEC. 10. EFFECT ON OTHER LAWS.**

2 (a) FEDERAL LAW.—Nothing in this Act shall be

3 construed to limit or affect in any way the Commission's

4 authority to bring enforcement actions or take any other

5 measures under the Federal Trade Commission Act or any

6 other provision of law.

7 (b) STATE LAW.—

8 (1) STATE LAW CONCERNING INFORMATION

9 COLLECTION SOFTWARE OR ADWARE.—This Act su-

10 persedes any statute, regulation, or rule of a State

11 or political subdivision of a State that expressly lim-

12 its or restricts the installation or use of software on

13 a protected computer to—

14 (A) collect information about the user of

15 the computer or the user's Internet browsing

16 behavior or other use of the computer; or

17 (B) cause advertisements to be delivered to

18 the user of the computer,

19 except to the extent that any such statute, regula-

20 tion, or rule prohibits deception in connection with

21 the installation or use of such software.

22 (2) STATE LAW CONCERNING NOTICE OF SOFT-

23 WARE INSTALLATION.—This Act supersedes any

24 statute, regulation, or rule of a State or political

25 subdivision of a State that prescribes specific meth-

1 ods for providing notification before the installation
2 of software on a computer.

3   (3) STATE LAW NOT SPECIFIC TO SOFTWARE.—
4 This Act shall not be construed to preempt the ap-
5 plicability of State criminal, trespass, contract, tort,
6 or anti-fraud law.

SEC. 11. LIABILITY PROTECTIONS FOR ANTI-SPYWARE
SOFTWARE OR SERVICES.

9   No provider of computer software or of an interactive
10 computer service may be held liable under this Act or any
11 other provision of law for identifying, naming, removing,
12 disabling, or otherwise affecting the operation or potential
13 operation on a computer of computer software published
14 by a third party, if—

15   (1) the provider's software or interactive com-
16 puter service is intended to identify, prevent the in-
17 stallation or execution of, remove, or disable com-
18 puter software that is or was installed in violation of
19 section 2, 3, or 4 of this Act or used to violate sec-
20 tion 5 of this Act;

21   (2) an authorized user of the computer has con-
22 sented to the use of the provider's computer soft-
23 ware or interactive computer service on the com-
24 puter;

1   (3) the provider believes in good faith that the

2   installation or operation of the third-party computer

3   software involved or involves a violation of section 2,

4   3, 4, or 5 of this Act; and

5   (4) the provider either notifies and obtains the

6   consent of an authorized user of the computer before

7   taking any action to remove, disable, or otherwise

8   affect the operation or potential operation of the

9   third-party software on the computer, or has ob-

10   tained prior authorization from an authorized user

11   to take such action without providing such notice

12   and consent.

13   **SEC. 12. PENALTIES FOR CERTAIN UNAUTHORIZED ACTIVI-**

14   **TIES RELATING TO COMPUTERS.**

15   (a) IN GENERAL.—Chapter 47 of title 18, United

16   States Code, is amended by inserting after section 1030

17   the following:

18   **"§ 1030A. Illicit indirect use of protected computers**

19   "(a) Whoever intentionally accesses a protected com-

20   puter without authorization, or exceeds authorized access

21   to a protected computer, by causing a computer program

22   or code to be copied onto the protected computer, and in-

23   tentionally uses that program or code in furtherance of

24   another Federal criminal offense shall be fined under this

25   title or imprisoned 5 years, or both.

1 ''(b) Whoever intentionally accesses a protected com-

2 puter without authorization, or exceeds authorized access

3 to a protected computer, by causing a computer program

4 or code to be copied onto the protected computer, and by

5 means of that program or code intentionally impairs the

6 security protection of the protected computer shall be

7 fined under this title or imprisoned not more than 2 years,

8 or both.

9 ''(c) A person shall not violate this section who solely

10 provides—

11 ''(1) an Internet connection, telephone connec-

12 tion, or other transmission or routing function

13 through which software is delivered to a protected

14 computer for installation;

15 ''(2) the storage or hosting of software, or of an

16 Internet website, through which software is made

17 available for installation to a protected computer; or

18 ''(3) an information location tool, such as a di-

19 rectory, index, reference, pointer, or hypertext link,

20 through which a user of a protected computer lo-

21 cates software available for installation.

22 ''(d) A provider of a network or online service that

23 an authorized user of a protected computer uses or sub-

24 scribes to shall not violate this section by any monitoring

1 of, interaction with, or installation of software for the pur-

2 pose of—

3   "(1) protecting the security of the network,

4   service, or computer;

5   "(2) facilitating diagnostics, technical support,

6   maintenance, network management, or repair; or

7   "(3) preventing or detecting unauthorized,

8   fraudulent, or otherwise unlawful uses of the net-

9   work or service.

10 "(e) No person may bring a civil action under the

11 law of any State if such action is premised in whole or

12 in part upon the defendant's violating this section. For

13 the purposes of this subsection, the term 'State' includes

14 the District of Columbia, Puerto Rico, and any other terri-

15 tory or possession of the United States.".

16   (b) CONFORMING AMENDMENT.—The table of sec-

17 tions at the beginning of chapter 47 of title 18, United

18 States Code, is amended by inserting after the item relat-

19 ing to section 1030 the following new item:

"1030A. Illicit indirect use of protected computers.".

20 **SEC. 13. DEFINITIONS.**

21   In this Act:

22   (1) AUTHORIZED USER.—The term "authorized

23   user", when used with respect to a computer, means

24   the owner or lessee of a computer, or someone using

1 or accessing a computer with the actual or apparent

2 authorization of the owner or lessee.

3 (2) CAUSE THE INSTALLATION.—The term

4 "cause the installation" when used with respect to

5 particular software, means to knowingly provide the

6 technical means by which the software is installed,

7 or to knowingly pay or provide other consideration

8 to, or to knowingly induce or authorize, another per-

9 son to do so.

10 (3) COMMISSION.—The term "Commission"

11 means the Federal Trade Commission.

12 (4) COOKIE.—The term "cookie" means a text

13 file—

14 (A) that is placed on a computer by, or on

15 behalf of, an Internet service provider, inter-

16 active computer service, or Internet website;

17 and

18 (B) the sole function of which is to record

19 information that can be read or recognized

20 when the user of the computer subsequently ac-

21 cesses particular websites or online locations or

22 services.

23 (5) FIRST RETAIL SALE AND DELIVERY.—The

24 term "first retail sale and delivery" means the first

25 sale, for a purpose other than resale, of a protected

1   computer and the delivery of that computer to the

2   purchaser or a recipient designated by the purchaser

3   at the time of such first sale. For purposes of this

4   paragraph, the lease of a computer shall be consid-

5   ered a sale of the computer for a purpose other than

6   resale.

7   (6) INSTALL.—

8   (A) IN GENERAL.—The term "install"

9   means—

10   (i) to write computer software to a

11   computer's persistent storage medium,

12   such as the computer's hard disk, in such

13   a way that the computer software is re-

14   tained on the computer after the computer

15   is turned off and subsequently restarted;

16   or

17   (ii) to write computer software to a

18   computer's temporary memory, such as

19   random access memory, in such a way that

20   the software is retained and continues to

21   operate after the user of the computer

22   turns off or exits the Internet service,

23   interactive computer service, or Internet

24   website from which the computer software

25   was obtained.

1   (B) EXCEPTION FOR TEMPORARY

2   CACHE.—The term "install" does not include

3   the writing of software to an area of the per-

4   sistent storage medium that is expressly re-

5   served for the temporary retention of recently

6   accessed or input data or information if the

7   software retained in that area remains inoper-

8   ative unless a user of the computer chooses to

9   access that temporary retention area.

10   (7) PERSON.—The term "person" has the

11 meaning given that term in section 3(32) of the

12 Communications Act of 1934 (47 U.S.C. 153(32)).

13   (8) PROTECTED COMPUTER.—The term "pro-

14 tected computer" has the meaning given that term

15 in section 1030(e)(2)(B) of title 18, United States

16 Code.

17   (9) SOFTWARE.—The term "software" means

18 any program designed to cause a computer to per-

19 form a desired function or functions. Such term does

20 not include any cookie.

21   (10) UNFAIR OR DECEPTIVE ACT OR PRAC-

22 TICE.—The term "unfair or deceptive act or prac-

23 tice" has the same meaning as when used in section

24 5 of the Federal Trade Commission Act (15 U.S.C.

25 45).

1   (11) ~~Upgrade.—The term "upgrade", when~~

2   ~~used with respect to a previously installed software~~

3   ~~program, means additional software that is issued~~

4   ~~by, or with the authorization of, the publisher or any~~

5   ~~successor to the publisher of the software program~~

6   ~~to improve, correct, repair, enhance, supplement, or~~

7   ~~otherwise modify the software program.~~

8 **~~SEC. 14. EFFECTIVE DATE.~~**

9   ~~This Act shall take effect 180 days after the date of~~

10 ~~enactment of this Act.~~

11 ***SECTION 1. TABLE OF CONTENTS.***

12   *The table of contents for this Act is as follows:*

TITLE I—SPYWARE

1

SEC. 101. SHORT TITLE.

2

3 *This title may be cited as the "Software Principles*

4 *Yielding Better Levels of Consumer Knowledge Act" or the*

5 *"SPY BLOCK Act".*

SEC. 102. FEDERAL TRADE COMMISSION AUTHORITY TO

6

COMBAT DECEPTIVE ACTS OR PRACTICES RE-

7

LATING TO SPYWARE.

8

9 *(a) IN GENERAL.—It is a violation of section 5 of the*

10 *Federal Trade Commission Act (15 U.S.C. 45) to install*

11 *through unfair or deceptive acts or practices software on*

12 *protected computers.*

13 *(b) RULE OF CONSTRUCTION.—This title shall not be*

14 *construed to limit in any way what is an unfair or decep-*

15 *tive act or practice under the Federal Trade Commission*

16 *Act (15 U.S.C. 41 et seq.).*

SEC. 103. PROHIBITED BEHAVIORS.

17

18 *It is unlawful for a person who is not an authorized*

19 *user of a protected computer to cause the installation on*

20 *that computer of software that—*

21 *(1) takes control of the protected computer by—*

22 *(A) ZOMBIES.—transmitting or relaying*

23 *commercial electronic mail or a computer virus*

24 *from a protected computer if the transmission or*

25 *relaying is initiated by a person other than an*

1   *authorized user and without the authorization of*

2   *an authorized user;*

3   *(B) MODEM HIJACKING.—accessing or using*

4   *the modem or Internet service of an authorized*

5   *user of a protected computer for the purpose of—*

6   *(i) causing damage to the protected*

7   *computer; or*

8   *(ii) causing the authorized user to*

9   *incur financial charges for a service that is*

10   *not authorized by that authorized user;*

11   *(C) DENIAL OF SERVICE ATTACKS.—using a*

12   *protected computer as part of an activity per-*

13   *formed by a group of computers for the purpose*

14   *of causing damage, including launching a denial*

15   *of service attack; or*

16   *(D) ENDLESS LOOP POP-UP ADVERTISE-*

17   *MENTS.—opening multiple, sequential, stand-*

18   *alone advertisements in an authorized user's pro-*

19   *tected computer without the authorization of that*

20   *user and with knowledge that a reasonable com-*

21   *puter user cannot close the advertisements with-*

22   *out turning off the computer or forcing an appli-*

23   *cation to close using means other than the ordi-*

24   *nary means for closing the application, except*

1 *that this subparagraph does not apply to com-*

2 *munications—*

3   *(i) originated by the computer's oper-*

4   *ating system;*

5   *(ii) originated by software that the*

6   *user knowingly chooses to activate;*

7   *(iii) originated by a service provider*

8   *that the user chooses to use; or*

9   *(iv) presented for any of the purposes*

10   *described in section 106;*

11 *(2) modifies—*

12   *(A) ENABLING IDENTITY THEFT.—an au-*

13 *thorized user's security or other settings related*

14 *to access to, or use of, the Internet on a protected*

15 *computer that protect information about the au-*

16 *thorized user for the purpose of stealing the au-*

17 *thorized user's sensitive personal information; or*

18   *(B) DISABLING SECURITY.—the security set-*

19 *tings of a protected computer for the purpose of*

20 *causing damage to that computer or another*

21 *computer; or*

22   *(C) BROWSER SETTINGS.—through unfair*

23 *or deceptive means—*

24   *(i) the page that appears when an au-*

25   *thorized user launches an Internet browser*

33

1   *or similar software program used to access*

2   *and navigate the Internet;*

3   *(ii) the default provider or Web proxy*

4   *the authorized user uses to access or search*

5   *the Internet; or*

6   *(iii) the authorized user's list of book-*

7   *marks used to access Web pages; or*

8   *(3) prevents, without authorization from the au-*

9   *thorized user, that user's reasonable efforts to block the*

10   *installation of, to disable, or to uninstall software by*

11   *unfair or deceptive means, including—*

12   *(A) FALSIFYING OPTION TO DECLINE IN-*

13   *STALLS.—presenting the authorized user with an*

14   *option to decline installation of software with*

15   *knowledge that, when the option is selected by the*

16   *authorized user, the installation nevertheless pro-*

17   *ceeds; or*

18   *(B) EVADING UNINSTALLS BY UNFAIR OR*

19   *DECEPTIVE MEANS.—*

20   *(i) falsely representing that the soft-*

21   *ware has been disabled;*

22   *(ii) requiring in an unfair or deceptive*

23   *manner the user to access the Internet to re-*

24   *move the software with knowledge or reckless*

25   *disregard of the fact that the software fre-*

1   *quently operates in a manner that prevents*

2   *the user from accessing the Internet;*

3   *(iii) changing the name, location or*

4   *other designation information of the soft-*

5   *ware for the purpose of preventing an au-*

6   *thorized user from locating the software to*

7   *remove it;*

8   *(iv) using randomized or intentionally*

9   *deceptive filenames, directory folders, for-*

10   *mats, or registry entries for the purpose of*

11   *avoiding detection and removal of the soft-*

12   *ware by an authorized user;*

13   *(v) causing the installation of software*

14   *in a particular computer directory or com-*

15   *puter memory for the purpose of evading*

16   *authorized users' attempts to remove the*

17   *software from the computer; or*

18   *(vi) requiring, without the authority of*

19   *the owner of the computer, that an author-*

20   *ized user obtain a special code or download*

21   *software from a third party to uninstall the*

22   *software.*

SEC. 104. INSTALLING PERSONAL INFORMATION COLLEC-

TION FEATURES ON A USER'S COMPUTER.

(a) IN GENERAL.—*It is unlawful for a person who is not an authorized user of a protected computer to cause the installation on that computer of software that collects sensitive personal information from an authorized user, unless that person provides a clear and conspicuous disclosure of such collection and obtains the authorized user's consent prior to any such collection of information in any case in which the software extracts from the hard drive or other storage medium of the protected computer the authorized user's—*

(1) *Social Security number;*

(2) *tax identification number;*

(3) *driver's license number;*

(4) *passport number;*

(5) *any other government-issued identification number;*

(6) *financial account, credit card, or debit card numbers;*

(7) *account balances, or overdraft history; or*

(8) *other sensitive personal information.*

(b) OTHER PERSONALLY IDENTIFYING INFORMA-TION.—*It is unlawful for a person who is not an authorized user of a protected computer to cause the installation on that computer of software that engages in any of the fol-*

1 *lowing practices without a prior disclosure that is clearly*

2 *and conspicuously available to, or with the knowledge of,*

3 *the authorized user, and for a purpose unrelated to any of*

4 *the purposes of the software or service described to an au-*

5 *thorized user:*

6   *(1) The use of a keystroke-logging function that*

7   *records all or substantially all keystrokes made by an*

8   *owner or operator of a computer and transfers that*

9   *information from the computer to another person.*

10   *(2) Collection in a manner that correlates per-*

11   *sonally identifying information with a history of all*

12   *or substantially all of the Web sites visited by an*

13   *owner or operator, other than Web sites operated by*

14   *the person providing such software, if the computer*

15   *software was installed in a manner designed to con-*

16   *ceal from all authorized users of the computer the fact*

17   *that the software is being installed and would perform*

18   *such a function.*

19   *(3) Extracting from the hard drive or other stor-*

20   *age medium of the computer—*

21   *(A) the substantive contents of files, data,*

22   *software, or other information knowingly saved*

23   *or installed by the authorized user of a protected*

24   *computer, exclusive of data that provide a purely*

25   *technical function; or*

1   *(B) the substantive contents of communica-*

2   *tions sent by a user of a protected computer from*

3   *that computer to any other computer.*

4   *(c) EXCEPTION.—This section shall not be interpreted*

5 *to restrict a person from causing the installation of software*

6 *that collects information for the provider of an online serv-*

7 *ice or website knowingly used or subscribed to by an author-*

8 *ized user if the information collected is used only to affect*

9 *the user's experience while using the online service or*

10 *website.*

11   *(d) UNINSTALL FUNCTIONALITY.—*

12   *(1) IN GENERAL.—It is unlawful for a person*

13   *who is not an authorized user of a protected computer*

14   *to cause the installation of software that performs any*

15   *function described in subsection (a) or (b) if the soft-*

16   *ware cannot subsequently be uninstalled or disabled*

17   *by an authorized user through a program removal*

18   *function that is usual and customary with the com-*

19   *puter's operating system or otherwise as clearly and*

20   *conspicuously disclosed to the user.*

21   *(2) CONSTRUCTION.—*

22   *(A) AUTHORITY TO UNINSTALL.—Software*

23   *that enables an authorized user of a protected*

24   *computer, such as a parent, employer, or system*

25   *administrator, to choose to prevent another user*

1   *of the same computer from uninstalling or dis-*

2   *abling the software shall not be considered to*

3   *prevent reasonable efforts to uninstall or disable*

4   *the software within the meaning of paragraph*

5   *(1) if at least 1 authorized user retains the abil-*

6   *ity to uninstall or disable the software.*

7   *(B) RULE OF CONSTRUCTION.—This sub-*

8   *section shall not be construed to require indi-*

9   *vidual features or functions of a software pro-*

10   *gram, upgrades to a previously installed soft-*

11   *ware program, or software programs that were*

12   *installed on a bundled basis with other software*

13   *or with hardware to be capable of being*

14   *uninstalled or disabled separately from such soft-*

15   *ware or hardware.*

16 **SEC. 105. ADWARE THAT CONCEALS ITS OPERATION.**

17   *(a) IN GENERAL.—It is unlawful for a person who is*

18 *not an authorized user of a protected computer to cause the*

19 *installation on that computer of software that causes adver-*

20 *tising windows to appear on the protected computer regard-*

21 *less of whether any other non-advertising-related*

22 *functionality of the software or of other software installed*

23 *as part of bundle with such software is—*

24   *(1) activated by the authorized user; or*

1   *(2) conspicuously active on the protected com-*

2   *puter unless the software complies with subsection (b).*

3   *(b) LABEL REQUIRED FOR CERTAIN ADVERTISE-*

4 *MENTS.—Subsection (a) does not apply if—*

5   *(1) the software displays to the user, each time*

6   *the software causes an advertisement to appear, a*

7   *clear and conspicuous label or other reasonable means*

8   *of identifying to the user of the computer the identity*

9   *or name of the software that caused the advertisement*

10   *to appear;*

11   *(2) the software was installed as part of a bundle*

12   *of software, the name of a program in such bundle*

13   *that the authorized user is likely to identify as the*

14   *main component of the software bundle; and*

15   *(3) a clear and conspicuous hypertext link to in-*

16   *structions concerning how the user may uninstall the*

17   *software causing the advertisement to appear through*

18   *usual and customary means within the computer's*

19   *operating system.*

20   *(c) EXCEPTION.—Software that causes advertisements*

21 *to be displayed without a clear and conspicuous label or*

22 *other reasonable means of identification shall not give rise*

23 *to liability under subsection (a) if those advertisements are*

24 *displayed to a user of the computer only when a user is*

25 *accessing or using an Internet website or online service—*

1   *(1) owned or operated by the author or publisher*

2   *of the software; or*

3   *(2) the owner or operator of which has author-*

4   *ized the author or publisher of the software to display*

5   *such advertisements to users of that website or service.*

6 **SEC. 106. LIMITATIONS ON LIABILITY.**

7   *(a) IN GENERAL.—The restrictions imposed by sec-*

8 *tions 103, 104, and 105 of this title do not apply to any*

9 *monitoring of, or interaction with, a subscriber's Internet*

10 *or other network connection or service, or a protected com-*

11 *puter, by or at the direction of a telecommunications car-*

12 *rier, cable operator, computer hardware or software pro-*

13 *vider, financial institution or provider of information serv-*

14 *ices or interactive computer service for—*

15   *(1) network or computer security purposes;*

16   *(2) diagnostics;*

17   *(3) technical support;*

18   *(4) repair;*

19   *(5) network management;*

20   *(6) authorized updates of software or system*

21   *firmware;*

22   *(7) authorized remote system management;*

23   *(8) authorized provision of protection for users of*

24   *the computer from objectionable content;*

1   *(9) authorized scanning for computer software*

2   *used in violation of sections 103, 104, or 105 for re-*

3   *moval by an authorized user; or*

4   *(10) detection or prevention of the unauthorized*

5   *use of software fraudulent or other illegal activities.*

6 *(b) MANUFACTURER'S LIABILITY FOR THIRD-PARTY*

7 *SOFTWARE.—A manufacturer or retailer of a computer*

8 *shall not be liable under any provision of this title for caus-*

9 *ing the installation on the computer, prior to the first retail*

10 *sale and delivery of the computer, of third-party branded*

11 *software, unless the manufacturer or retailer—*

12   *(1) uses the software to collect information about*

13   *a user of the computer or the use of a protected com-*

14   *puter by that user; or*

15   *(2) knows that the software will cause advertise-*

16   *ments for the manufacturer or retailer to be displayed*

17   *to a user of the computer, or derives a direct financial*

18   *benefit from other advertisements displayed on the*

19   *computer.*

20 *(c) EXCEPTION FOR AUTHORIZED INVESTIGATIVE*

21 *AGENCIES.—Nothing in this title prohibits any lawfully*

22 *authorized investigative, protective, or intelligence activity*

23 *of a law enforcement agency of the United States, a State,*

24 *or a political subdivision of a State, or of an intelligence*

25 *agency of the United States.*

1 *(d) SERVICES PROVIDED OVER MVPD SYSTEMS.—It*

2 *is not a violation of this title for a multichannel video pro-*

3 *gramming distributor (as defined in section 602(13) of the*

4 *Communications Act of 1934 (47 U.S.C. 522(13))) to utilize*

5 *a navigation device, or interact with such a device, or to*

6 *install or use software on such a device, in connection with*

7 *the provision of multichannel video programming or other*

8 *services offered over a multichannel video programming sys-*

9 *tem or the collection or disclosure of subscriber information,*

10 *if the provision of such service or the collection or disclosure*

11 *of such information is subject to section 338(i) or section*

12 *631 of the Communications Act of 1934 (47 U.S.C. 338(i);*

13 *551).*

14 **SEC. 107. FTC ADMINISTRATION AND ENFORCEMENT.**

15 *(a) IN GENERAL.—Except as provided in section 108,*

16 *109, and 110, this title shall be enforced by the Commission*

17 *as if a violation of this title or of any regulation promul-*

18 *gated by the Commission under this title were an unfair*

19 *or deceptive act or practice proscribed under section*

20 *18(a)(1)(B) of the Federal Trade Commission Act (15*

21 *U.S.C. 57a(a)(1)(B)).*

22 *(b) PENALTIES.—*

23 *(1) TREBLE FINE.—The penalty for a violation*

24 *of this title or of any regulation promulgated by the*

25 *Commission under this title may be increased by the*

1 *Commission to threefold the amount of penalty other-*

2 *wise applicable under section 5 of the Federal Trade*

3 *Commission Act (15 U.S.C. 45).*

4 *(2) PENALTY FOR PATTERN OR PRACTICE OF*

5 *VIOLATIONS.—*

6 *(A) IN GENERAL.—If the Commission deter-*

7 *mines that a person has engaged in a pattern or*

8 *practice of activity that violates the provisions of*

9 *this title, the Commission may, in its discretion,*

10 *seek a civil penalty for such pattern or practice*

11 *of violations in an amount, as determined by the*

12 *Commission, of not more than $3,000,000 for*

13 *each such violation of this title.*

14 *(B) TREATMENT OF SINGLE ACTION OR*

15 *CONDUCT.—For purposes of subparagraph (A),*

16 *any single action or conduct that violates this*

17 *title with respect to multiple protected computers*

18 *shall be treated as a single violation.*

19 *(c) SEIZURE AND FORFEITURE OF TAINTED ASSETS*

20 *OF VIOLATOR.—In an enforcement action brought for a vio-*

21 *lation of this title under section 19(b) of the Federal Trade*

22 *Commission Act (15 U.S.C. 57b(b)), the Commission may*

23 *petition the court to order the seizure and forfeiture of any*

24 *assets of the violator attributable to violation of this title.*

1   *(d) ILL-GOTTEN GAINS.—The Commission may re-*

2 *quire any person who violates this title to disgorge any ill-*

3 *gotten gains procured through unfair or deceptive acts or*

4 *practices in violation of this title and shall seize any such*

5 *gains it has required to be disgorged.*

6   *(e) ACTIONS BY THE COMMISSION.—*

7   *(1) IN GENERAL.—The Commission shall prevent*

8   *any person from violating this title in the same man-*

9   *ner, by the same means, and with the same jurisdic-*

10   *tion, powers, and duties as though all applicable*

11   *terms and provisions of the Federal Trade Commis-*

12   *sion Act (15 U.S.C. 41 et seq.) were incorporated into*

13   *and made a part of this title. Any entity that violates*

14   *any provision of this title is subject to the penalties*

15   *and entitled to the privileges and immunities pro-*

16   *vided in the Federal Trade Commission Act in the*

17   *same manner, by the same means, and with the same*

18   *jurisdiction, power, and duties as though all applica-*

19   *ble terms and provisions of the Federal Trade Com-*

20   *mission Act were incorporated into and made a part*

21   *of this title.*

22   *(2) OTHER AUTHORITY NOT AFFECTED.—Noth-*

23   *ing in this title shall be construed to limit or affect*

24   *in any way the Commission's authority to bring en-*

25   *forcement actions or take any other measure under*

1 *the Federal Trade Commission Act (15 U.S.C. 41 et*

2 *seq.) or any other provision of law.*

3 **SEC. 108. ENFORCEMENT BY OTHER AGENCIES.**

4 *(a) IN GENERAL.—Compliance with this title shall be*

5 *enforced exclusively under—*

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

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

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

9 *and Federal agencies of foreign banks, and any*

10 *subsidiaries of such entities (except brokers, deal-*

11 *ers, persons providing insurance, investment*

12 *companies, and investment advisers), by the Of-*

13 *fice of the Comptroller of the Currency;*

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

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

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

17 *eral branches, Federal agencies, and insured*

18 *State branches of foreign banks), commercial*

19 *lending companies owned or controlled by for-*

20 *eign banks, organizations operating under sec-*

21 *tion 25 or 25A of the Federal Reserve Act (12*

22 *U.S.C. 601 and 611), and bank holding compa-*

23 *nies and their nonbank subsidiaries or affiliates*

24 *(except brokers, dealers, persons providing insur-*

25 *ance, investment companies and investment ad-*

1   *visers), by the Board of Governors of the Federal*

2   *Reserve System;*

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

4   *Insurance Corporation (other than members of*

5   *the Federal Reserve System), insured State*

6   *branches of foreign banks, and any subsidiaries*

7   *of such entities (except brokers, dealers, persons*

8   *providing insurance, investment companies and*

9   *investment advisers), by the Board of Directors*

10   *of the Federal Deposit Insurance Corporation;*

11   *and*

12   *(D) savings associations the deposits of*

13   *which are insured by the Federal Deposit Insur-*

14   *ance Corporation, and any subsidiaries of such*

15   *savings associations (except brokers, dealers, per-*

16   *sons providing insurance, investment companies*

17   *and investment advisers), by the Director of the*

18   *Office of Thrift Supervision;*

19   *(2) the Federal Credit Union Act (12 U.S.C.*

20   *1751 et seq.) by the Board of the National Credit*

21   *Union Administration Board with respect to any*

22   *Federal credit union and any subsidiaries of such a*

23   *credit union;*

1   *(3) the Securities and Exchange Act of 1934 (15*

2   *U.S.C. 78a et seq.) by the Securities and Exchange*

3   *Commission with respect to—*

4   *(A) a broker or dealer subject to that Act;*

5   *(B) an investment company subject to the*

6   *Investment Company Act of 1940 (15 U.S.C.*

7   *80a–1 et seq.); and*

8   *(C) an investment advisor subject to the In-*

9   *vestment Advisers Act of 1940 (15 U.S.C. 80b–*

10   *1 et seq.);*

11   *(4) the Communications Act of 1934 (47 U.S.C.*

12   *151 et seq.) by the Federal Communications Commis-*

13   *sion with respect to any person subject to the provi-*

14   *sions of that Act;*

15   *(5) part A of subtitle VII of title 49, United*

16   *States Code, by the Secretary of Transportation with*

17   *respect to any air carrier or foreign air carrier sub-*

18   *ject to that part; and*

19   *(6) State insurance law, in the case of any per-*

20   *son engaged in providing insurance, by the applicable*

21   *State insurance authority of the State in which the*

22   *person is domiciled.*

23   *(b) EXERCISE OF CERTAIN POWERS.—For the purpose*

24 *of the exercise by any agency referred to in subsection (a)*

25 *of its powers under any Act referred to in that subsection,*

1 *a violation of this title is deemed to be a violation of a*
2 *requirement imposed under that Act. In addition to its*
3 *powers under any provision of law specifically referred to*
4 *in subsection (a), each of the agencies referred to in that*
5 *subsection may exercise, for the purpose of enforcing compli-*
6 *ance with any requirement imposed under this title, any*
7 *other authority conferred on it by law.*

8 **SEC. 109. STATE ENFORCEMENT.**

9 *(a) IN GENERAL.—*

10 *(1) CIVIL ACTIONS.—In any case in which the*
11 *attorney general of a State has reason to believe that*
12 *an interest of the residents of that State has been or*
13 *is threatened or adversely affected by the engagement*
14 *of any person in a practice that is prohibited under*
15 *this section, the State, as parens patriae, may bring*
16 *a civil action on behalf of the residents of that State*
17 *in a district court of the United States of appropriate*
18 *jurisdiction, or any other court of competent jurisdic-*
19 *tion—*

20 *(A) to enjoin that practice;*
21 *(B) to enforce compliance with this title;*
22 *(C) to obtain damage, restitution, or other*
23 *compensation on behalf of residents of the State;*
24 *or*

1   (D) to obtain such other relief as the court

2   may consider to be appropriate.

3   (2) NOTICE.—

4   (A) IN GENERAL.—Before filing an action

5   under paragraph (1), the attorney general of a

6   State shall provide to the Commission—

7   (i) written notice of the action; and

8   (ii) a copy of the complaint for the ac-

9   tion.

10   (B) EXEMPTION.—

11   (i) IN GENERAL.—Subparagraph (A)

12   shall not apply with respect to the filing of

13   an action by an attorney general of a State

14   under this subsection, if the attorney gen-

15   eral of a State determines that it is not fea-

16   sible to provide the notice described in that

17   subparagraph before the filing of the action.

18   (ii) NOTIFICATION.—In an action de-

19   scribed in clause (i), the attorney general of

20   a State shall provide notice and a copy of

21   the complaint to the Commission at the

22   same time as the attorney general files the

23   action.

24   (b) INTERVENTION.—

1   *(1) IN GENERAL.—On receiving notice under*

2   *subsection (a)(2), the Commission shall have the right*

3   *to intervene in the action that is the subject of the no-*

4   *tice.*

5   *(2) EFFECT OF INTERVENTION.—If the Commis-*

6   *sion intervenes in an action under subsection (a), it*

7   *shall have the right—*

8   *(A) to be heard with respect to any matter*

9   *that arises in that action; and*

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

11   *(c) CONSTRUCTION.—For purposes of bringing any*

12   *civil action under subsection (a), nothing in this title shall*

13   *be construed to prevent an attorney general of a State from*

14   *exercising the powers conferred on the attorney general by*

15   *the laws of that State—*

16   *(1) to conduct investigations;*

17   *(2) to administer oaths or affirmations; or*

18   *(3) to compel the attendance of witnesses or the*

19   *production of documentary and other evidence.*

20   *(d) ACTION BY THE COMMISSION MAY PRECLUDE*

21   *STATE ACTION.—In any case in which an action is insti-*

22   *tuted by or on behalf of the Commission for violation of*

23   *this title, no State may, during the pendency of that action,*

24   *institute an action under subsection (a) against any defend-*

1 *ant named in the complaint in that action for violation*

2 *of that section.*

3   *(e) VENUE; SERVICE OF PROCESS.—*

4   *(1) VENUE.—Any action brought under sub-*

5 *section (a) may be brought in the district court of the*

6 *United States that meets applicable requirements re-*

7 *lating to venue under section 1391 of title 28, United*

8 *States Code.*

9   *(2) SERVICE OF PROCESS.—In an action brought*

10 *under subsection (a), process may be served in any*

11 *district in which the defendant—*

12   *(A) is an inhabitant; or*

13   *(B) may be found.*

14 **SEC. 110. OTHER ENFORCEMENT.**

15   *(a) ADDITIONAL ENFORCEMENT OF MODEM HIJACK-*

16 *ING VIOLATIONS.—In the case of a violation of section*

17 *103(1)(B)(ii) that causes a telecommunications carrier to*

18 *incur costs for the origination, transport, or termination*

19 *of a call triggered using the modem of a customer of such*

20 *telecommunications carrier as a result of such violation, the*

21 *telecommunications carrier may bring a civil action*

22 *against the violator—*

23   *(1) to recover—*

24   *(A) the charges such carrier is obligated to*

25 *pay to another carrier or to an information serv-*

1 *ice provider as a result of the violation, includ-*

2 *ing but not limited to charges for the origina-*

3 *tion, transport, or termination of the call;*

4 *(B) the costs of handling customer inquiries*

5 *or complaints with respect to amounts billed for*

6 *such calls; and*

7 *(C) other related costs and reasonable attor-*

8 *neys fees; and*

9 *(2) to obtain an order to enjoin the violation.*

10 *(b) STATE ACTION PREMISED ON A VIOLATION OF*

11 *THIS TITLE.—No person may bring a civil action under*

12 *the law of any State to the extent that such action is pre-*

13 *mised in whole or in part upon the defendant's violation*

14 *of any provision of this title.*

15 **SEC. 111. EFFECT ON OTHER LAWS.**

16 *(a) FEDERAL LAW.—Nothing in this title shall be con-*

17 *strued to limit or affect in any way the Commission's au-*

18 *thority to bring enforcement actions or take any other meas-*

19 *ures under the Federal Trade Commission Act or any other*

20 *provision of law.*

21 *(b) PREEMPTION OF STATE OR LOCAL LAW.—This*

22 *title supersedes any provision of a statute, regulation, or*

23 *rule, and any requirement, prohibition, or remedy under*

24 *the law of any State or political subdivision thereof that*

25 *relates to, or confers a remedy for—*

1   *(1) the installation or use of software to deliver*

2   *advertisements to a protected computer;*

3   *(2) the installation or use of software to collect*

4   *information about a user of a protected computer or*

5   *the user's use of that computer;*

6   *(3) the installation or use of software to allow a*

7   *person other than an authorized user of the computer*

8   *to direct or control a protected computer; or*

9   *(4) the method or manner of uninstalling or dis-*

10   *abling software that performs any of the functions de-*

11   *scribed in paragraphs (1) through (3).*

12   *(c) STATE LAW NOT SPECIFIC TO SOFTWARE.—This*

13 *title shall not be construed to preempt actions or remedies*

14 *based upon—*

15   *(1) a State's generally applicable common law;*

16   *or*

17   *(2) any provision of generally applicable State*

18   *consumer protection law.*

19 **SEC. 112. DEFINITIONS.**

20   *In this title:*

21   *(1) ADVERTISING WINDOW.—The term "adver-*

22   *tising window" means a window—*

23   *(A) that is displayed separately from other*

24   *windows displayed to the authorized user (at the*

1   *time a software program is activated) by any*

2   *other active program; and*

3   *(B) the content of which is entirely or in*

4   *substantial part related to advertising.*

5   *(2) AUTHORIZED USER.—The term "authorized*

6 *user", when used with respect to a computer, means*

7 *the owner or lessee of a computer, or someone using*

8 *or accessing a computer with the authorization of the*

9 *owner or lessee.*

10   *(3) BUNDLE.—With respect to software, the term*

11 *"bundle" means a set of executable software programs*

12 *that are installed together.*

13   *(4) CAUSE THE INSTALLATION.—*

14   *(A) IN GENERAL.—The term "cause the in-*

15 *stallation" when used with respect to particular*

16 *software, means (with knowledge or conscious*

17 *avoidance of actual knowledge that software per-*

18 *forms a function described in section 103, 104,*

19 *or 105)—*

20   *(i) knowingly to provide the technical*

21 *means by which the software is installed; or*

22   *(ii) knowingly to pay or provide other*

23 *consideration to, or knowingly to induce or*

24 *authorize, another person to provide the*

1   *technical means by which the software is in-*

2   *stalled.*

3   *(B) EXCEPTIONS.—The term "cause the in-*

4   *stallation" does not include providing—*

5   *(i) the Internet connection, telephone*

6   *connection, or other transmission or routing*

7   *function through which software was deliv-*

8   *ered to a protected computer for installa-*

9   *tion;*

10   *(ii) the storage or hosting of software*

11   *or of an Internet website through which the*

12   *software was made available by a third*

13   *party for installation to the protected com-*

14   *puter; or*

15   *(iii) an information location tool, such*

16   *as a directory, index, reference, pointer, or*

17   *hypertext link, through which a user of a*

18   *protected computer located software avail-*

19   *able for installation.*

20   *(5) COMMISSION.—The term "Commission"*

21 *means the Federal Trade Commission.*

22   *(6) COOKIE.—The term "cookie" means a text*

23 *file—*

1   *(A) that is placed on a computer by, or on*

2   *behalf of, an Internet service provider, inter-*

3   *active computer service, or Internet website; and*

4   *(B) the sole function of which is to record*

5   *information that can be read or recognized when*

6   *the user of the computer subsequently accesses*

7   *particular websites or online locations or serv-*

8   *ices.*

9   *(7) DAMAGE.—The term "damage" has the*

10   *meaning given that term in section 1030(e)(8) of title*

11   *18, United States Code.*

12   *(8) INSTALL.—*

13   *(A) IN GENERAL.—The term "install"*

14   *means—*

15   *(i) to write computer software to a*

16   *computer's persistent storage medium, such*

17   *as the computer's hard disk, in such a way*

18   *that the computer software is retained on*

19   *the computer after the computer is turned*

20   *off and subsequently restarted; or*

21   *(ii) to write computer software to a*

22   *computer's temporary memory, such as ran-*

23   *dom access memory, in such a way that the*

24   *software is retained and continues to oper-*

25   *ate after the user of the computer turns off*

1   *or exits the Internet service, interactive*

2   *computer service, or Internet website from*

3   *which the computer software was obtained.*

4   *(B) EXCEPTION FOR TEMPORARY CACHE.—*

5   *The term "install" does not include the writing*

6   *of software to an area of the persistent storage*

7   *medium that is expressly reserved for the tem-*

8   *porary retention of recently accessed or input*

9   *data or information, if the software retained in*

10   *that area remains inoperative unless a user of*

11   *the computer chooses to access that temporary re-*

12   *tention area.*

13   *(9) LOSS.—The term "loss" has the meaning given*

14 *that term in section 1030(e)(11) of title 18, United States*

15 *Code.*

16   *(10) PERSON.—The term "person" has the mean-*

17   *ing given that term in section 3(32) of the Commu-*

18   *nications Act of 1934 (47 U.S.C. 153(32)).*

19   *(11) PROTECTED COMPUTER.—The term "pro-*

20   *tected computer" has the meaning given that term in*

21   *section 1030(e)(2)(B) of title 18, United States Code.*

22   *(12) PERSONALLY IDENTIFYING INFORMATION.—*

23   *The term "personally identifying information"*

24   *means, with respect to a protected computer—*

1   *(A) the authorized user's last name, com-*
2   *bined with the user's first initial or first name;*
3   *(B) the authorized user's home address;*
4   *(C) the authorized user's telephone number;*
5   *or*
6   *(D) or other information that is sufficient*
7   *to identify an authorized user by name.*
8   *(13) SENSITIVE PERSONAL INFORMATION.—The*
9 *term "sensitive personal information" means an indi-*
10 *vidual's name, address, or telephone number, when*
11 *combined with that individual's—*
12   *(A) Social Security number, taxpayer iden-*
13   *tification number, or an employer identification*
14   *number that is the same as or is derived from*
15   *the Social Security number;*
16   *(B) financial account number, or credit*
17   *card or debit card number, combined with any*
18   *required security code, access code, or password*
19   *that would permit access to such individual's ac-*
20   *count; or*
21   *(C) driver's license identification number or*
22   *State resident identification number.*
23   *(14) SOFTWARE.—The term "software" means*
24 *any program designed to cause a computer to perform*
25 *a function or functions, but does not include a cookie.*

(15) UNFAIR OR DECEPTIVE ACT OR PRACTICE.—

The term "unfair or deceptive act or practice" has the same meaning as when used in section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

SEC. 113. CRIMINAL PENALTIES FOR CERTAIN UNAUTHORIZED ACTIVITIES RELATING TO COMPUTERS.

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

"§ 1030A. Illicit indirect use of protected computers

"(a) FURTHERANCE OF CRIMINAL OFFENSE.—Whoever intentionally accesses a protected computer without authorization, or exceeds authorized access to a protected computer, by causing a computer program or code to be copied onto the protected computer, and intentionally uses that program or code in furtherance of another Federal criminal offense shall be fined under this title or imprisoned not more than 5 years, or both.

"(b) SECURITY PROTECTION.—Whoever intentionally accesses a protected computer without authorization, or exceeds authorized access to a protected computer, by causing a computer program or code to be copied onto the protected computer, and by means of that program or code intentionally impairs the security protection of the protected

computer shall be fined under this title or imprisoned not

more than 2 years, or both.

"(c) INDIVIDUAL EXEMPTION.—A person shall not vio-late this section who solely provides—

> *"(1) an Internet connection, telephone connec-tion, or other transmission or routing function through which software is delivered to a protected computer for installation;*

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

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

"(d) NETWORK EXEMPTION.—A provider of a network or online service that an authorized user of a protected com-puter uses or subscribes to shall not violate this section by any monitoring or, interaction with, or installation of soft-ware for the purpose of—

> *"(1) protecting the security of the network, serv-ice, or computer;*

> *"(2) facilitating diagnostics, technical support, maintenance, network management, or repair; or*

1   *"(3) preventing or detecting unauthorized, fraud-*

2   *ulent, or otherwise unlawful uses of the network or*

3   *service.*

4   *"(e) DEFINITIONS.—In this section:*

5   *"(1) COMPUTER; PROTECTED COMPUTER.—The*

6   *terms 'computer' and 'protected computer' have the*

7   *meanings given such terms in section 1030(e) of this*

8   *title.*

9   *"(2) STATE.—The term 'State' includes each of*

10   *the several States, the District of Columbia, Puerto*

11   *Rico, and any other territory or possession of the*

12   *United States.".*

13   *(b) CONFORMING AMENDMENT.—The table of sections*

14 *at the beginning of chapter 47 of title 18, United States*

15 *Code, is amended by inserting after the item relating to*

16 *section 1030 the following new item:*

"1030A. Illicit indirect use of protected computers.".

17 **SEC. 114. EFFECTIVE DATE.**

18   *This title shall take effect 180 days after the date of*

19 *enactment of this Act.*

TITLE II—INCREASE IN CERTAIN PENALTIES

SEC. 201. INCREASE IN PENALTIES FOR UNFAIR OR DECEP- TIVE ACTS OR PRACTICES EXPLOITING REAC- TION TO CERTAIN EMERGENCIES AND MAJOR DISASTERS.

(a) VIOLATIONS OF PROHIBITION AGAINST UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—Section 5(m)(1) of the Federal Trade Commission Act (15 U.S.C. 45(m)(1)) is amended by adding at the end the following:

"(D) In the case of a violation involving an unfair or deceptive act or practice in a national emergency period or disaster period, or relating to an international disaster, the amount of the civil penalty under this paragraph shall be double the amount otherwise provided in this paragraph, if the act or practice exploits popular reaction to the national emergency or major disaster that is the basis for such period, or to the international disaster.

"(E) In this paragraph:

"(i) The term 'national emergency period' means the period that—

"(I) begins on the date the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.); and

1   *"(II) ends on the expiration of the 1-year*

2   *period beginning on the date of the termination*

3   *of the national emergency.*

4   *"(ii) The term 'disaster period' means the 1-year*

5   *period beginning on the date the President declares*

6   *an emergency or major disaster under the Robert T.*

7   *Stafford Disaster Relief and Emergency Assistance*

8   *Act (42 U.S.C. 5121 et seq.).*

9   *"(iii) The term 'international disaster' means*

10   *any natural or man-made disaster in response to*

11   *which the President furnishes assistance to any for-*

12   *eign country, international organization, or private*

13   *voluntary organization pursuant to section 491 of the*

14   *Foreign Assistance Act (22 U.S.C. 2292(b)).".*

15   *(b) VIOLATIONS OF OTHER LAWS ENFORCED BY THE*

16 *FEDERAL TRADE COMMISSION.—Section 13 of the Federal*

17 *Trade Commission Act (15 U.S.C. 53) is amended by add-*

18 *ing at the end the following:*

19   *"(e) NATIONAL EMERGENCY OR DISASTER PERIOD.—*

20   *"(1) IN GENERAL.—If a person, partnership, or*

21   *corporation is found, in an action under subsection*

22   *(b), to have committed a violation involving an un-*

23   *fair or deceptive act or practice in a national emer-*

24   *gency period or a disaster period, or relating to an*

25   *international disaster, and if the act or practice ex-*

1 *ploits popular reaction to the national emergency or*

2 *major disaster that is the basis for such period, or to*

3 *the international disaster, the court, after awarding*

4 *equitable relief (if any) under any other authority of*

5 *the court, shall hold the person, partnership, or cor-*

6 *poration liable for a civil penalty of not more than*

7 *$22,000 for each such violation.*

8 *"(2) DEFINITIONS.—In this subsection:*

9 *"(A) NATIONAL EMERGENCY PERIOD.—The*

10 *term 'national emergency period' means the pe-*

11 *riod that—*

12 *"(i) begins on the date the President*

13 *declares a national emergency under the*

14 *National Emergencies Act (50 U.S.C. 1601*

15 *et seq.); and*

16 *"(ii) ends on the expiration of the 1-*

17 *year period beginning on the date of the ter-*

18 *mination of the national emergency.*

19 *"(B) DISASTER PERIOD.—The term 'dis-*

20 *aster period' means the 1-year period beginning*

21 *on the date the President declares an emergency*

22 *or major disaster under the Robert T. Stafford*

23 *Disaster Relief and Emergency Assistance Act*

24 *(42 U.S.C. 5121 et seq.).*

1   *"(C) INTERNATIONAL DISASTER.—The term*

2   *'international disaster' means any natural or*

3   *man-made disaster in response to which the*

4   *President furnishes assistance to any foreign*

5   *country, international organization, or private*

6   *voluntary organization pursuant to section 491*

7   *of the Foreign Assistance Act (22 U.S.C.*

8   *2292(b))."*.

Calendar No. 467

109TH CONGRESS
2D SESSION

S. 687

[Report No. 109–262]

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.

JUNE 12, 2006

Reported with an amendment