

EXHIBIT 49

Spyware



Workshop

Monitoring Software on Your PC: Spyware, Adware, and Other Software

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Monitoring Software on Your PC: Spyware, Adware, and Other Software

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**Deborah Platt Majoras, Chairman
Orson Swindle, Commissioner
Thomas B. Leary, Commissioner
Pamela Jones Harbour, Commissioner
Jon Leibowitz, Commissioner**

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I. INTRODUCTION

On April 19, 2004, the Federal Trade Commission (FTC)¹ sponsored *Monitoring Software on Your PC: Spyware, Adware, and Other Software*, a one-day public workshop to explore the issues associated with computer software known as “spyware.”² The workshop featured six panels made up of 34 representatives from the computer industry, the electronic advertising industry, anti-spyware product industry, trade associations, government agencies, consumer and privacy advocacy groups, and other interested parties. Panel topics included:

- Defining, Understanding, and Disseminating Spyware;
- Security Risks and PC Functionality;
- Privacy Risks;
- Industry Responses to Spyware – Industry Best Practices and Working with the Government;
- Technological Responses to Spyware; and
- Government Responses to Spyware – Law Enforcement, Consumer Education, and Coordinating with Industry.

One purpose of the workshop was to broaden the FTC’s understanding of the information practices of the online marketplace and their impact on consumers, and to continue the FTC’s longstanding tradition of facilitating initiatives that foster privacy protection and security. The workshop also was intended to provide information that would inform the public debate over spyware and assist government, businesses, and consumers in developing effective responses to spyware.³

FTC staff has prepared this report to present information concerning the issues discussed at the workshop. Part I of the report provides an overview of the issues the report covers and a summary of FTC staff’s conclusions. Part II discusses defining spyware, how it is distributed, and the challenge of uninstalling spyware from computers. Part III describes the effects of spyware, including its impact on computer performance and its creation of privacy and security risks. Part IV discusses industry efforts to address spyware through technological innovation, self-regulation, and consumer education. Part V describes government efforts to address spyware through law enforcement, legislation, and consumer education measures. Part VI provides a brief conclusion.

As explained in detail below, based on the information received in connection with the workshop⁴ and other available information, FTC staff concludes:

- It is difficult to define spyware with precision. The working definition proposed for purposes of the workshop was software that aids in gathering information about a person or organization without their knowledge and which may send such information to another entity without the consumer’s consent, or asserts control over a computer without the consumer’s knowledge. Panelists and commenters agreed that this was a useful starting point for defining spyware.

- However, the workshop discussions also highlighted additional challenges in defining spyware relating to what constitutes adequate consent, and what constitutes sufficient harm to merit software being labeled spyware. In FTC staff's view, a consensus definition of spyware cannot be developed until fundamental issues concerning consent and harm are resolved.
- Spyware is distributed in the same ways as other software; it can be downloaded from the Internet, bundled with other software, transferred via peer-to-peer ("P2P") file-sharing networks, installed from CDs, or pre-installed on new computers. In addition, spyware may be distributed by instant messaging, emails, or web pages.
- Spyware is a serious and growing problem.
 - Spyware can impair the operation of computers, causing them to crash and interfering with the ability of consumers to use them.
 - Spyware, especially keystroke loggers, can create substantial privacy risks.
 - Spyware can assert control over computers, and use that control to create security risks and cause other harms.
 - Spyware often is more difficult to uninstall than other types of software.
- The incidence of spyware can be decreased if the private sector and the government act, separately and in concert.
 - Technological solutions – firewalls, anti-spyware software, and improved browsers and operating systems – can provide significant protection to consumers from the risks related to spyware.
 - Industry should: (1) develop standards for defining spyware and disclosing information about it to consumers; (2) expand efforts to educate consumers about spyware risks; and (3) assist law enforcement efforts.
 - Government should: (1) increase criminal and civil prosecution under existing laws of those who distribute spyware; (2) increase efforts to educate consumers about the risks of spyware; and (3) encourage technological solutions.

II. DEFINING AND UNDERSTANDING SPYWARE AND ITS DISTRIBUTION

A. Defining Spyware

The first issue discussed at the workshop was the definition of "spyware." Despite its recent vintage, the etymology of "spyware" is unclear. Until 1999, it appears that the term was used to refer to monitoring equipment such as small cameras.⁵ "Spyware" first began to be used in the computer software context in 1999 when Zone Labs used it in a press release for its Zone Alarm firewall product.⁶

In 2000, Gibson Research launched the first anti-spyware product, OptOut. Steve Gibson, the developer of OptOut, described spyware as “any software that employs a user’s Internet connection in the background (the so-called ‘backchannel’) without their knowledge or explicit permission.”⁷ The term “spyware” thus apparently was used at the outset to refer to software that was installed without the knowledge and consent of users and that operated surreptitiously.

Spyware has evolved to have a variety of meanings.⁸ Panelists generally agreed that reaching an industry consensus on one definition has been elusive because of the technical complexity and dynamic nature of software.⁹ Several panelists observed that it is also difficult to define spyware because consumers and the business community may differ on what they believe is appropriate behavior in distributing software and because harmful software may cause a wide variety of problems.¹⁰

1. Challenges in Defining Spyware

Panelists identified three main conceptual challenges in reaching a consensus definition of spyware. The first challenge concerns knowledge and consent. There appears to be general agreement that software should be considered “spyware” only if it is downloaded or installed on a computer without the user’s knowledge and consent.¹¹ However, unresolved issues remain concerning how, what, and when consumers need to be told about software installed on their computers for consent to be adequate.¹² For instance, distributors often disclose in an End User Licensing Agreement (EULA) that there is additional software bundled with primary software, but some panelists and commenters did not view such disclosure as sufficient to infer consent to the installation of the bundled software.¹³

Second, another question is whether the definition should limit “spyware” to software that monitors and collects data relating to computer use. Such a definition would be consistent with the fundamental concept that the software must “spy” on computer users.¹⁴ However, it presumably would not include software that does not collect data but adversely affects computer performance or otherwise interferes with the use of computers.¹⁵

A final challenge in reaching consensus on the definition of spyware is determining the nature and extent of harm that the software must cause. For instance, some would treat software that “trespasses” on a computer as spyware because they consider trespass to be *per se* harmful,¹⁶ even if the software is otherwise benign or beneficial. In contrast, there was general consensus throughout the workshop that software should cause some harm to users before being labeled spyware. There was disagreement, however, as to the type and magnitude of injury needed to meet this definition.¹⁷

2. Classifying Adware as Spyware¹⁸

In FTC staff’s view, adware aptly illustrates the challenges associated with developing a workable definition of spyware. Adware is often bundled with other software programs, which are frequently provided to consumers for free. Some types of adware monitor computer use (including websites visited), analyze that information to determine ads in which the users might be interested, and then display targeted ads to users based on this analysis.¹⁹ On the other hand, other types of adware do not monitor computer use and instead just serve advertising messages to users.²⁰

Workshop panelists and commenters stated a range of views as to whether and when adware should be classified as spyware. Some panelists argued that adware is spyware if users have not received clear notice about what the software will do or have not provided adequate consent to its installation or operation.²¹ In turn, some types of adware would not meet some definitions of spyware because they do not monitor computer use.²² Other workshop participants apparently would view adware as spyware if it causes consumers to receive pop-up ads,²³ regardless of whether consumers are bombarded with such ads or just occasionally receive such ads.

3. Legislative and Regulatory Definitions of Spyware

Because of the challenges of developing a workable definition of spyware, nearly all panelists expressed the concern that legislation or regulations tied to a definition of the term “spyware” might define the term so broadly that it would inadvertently cover some types of beneficial or benign software.²⁴ One panelist stated that overly broad legislative definitions might inadvertently regulate software that many users depend upon for a safe Internet experience.²⁵ In his view, for example, parental control software might be considered spyware under a recently enacted Utah statute.²⁶ This statute might also treat security programs that banks and financial institutions use to monitor and protect access to their online services as spyware.²⁷

Because of the concern that a legislative or regulatory definition of spyware might be too broad, a number of panelists and commenters observed that it would be more productive to identify and prohibit unfair or deceptive practices associated with software.²⁸ Panelists expressed broad support for the Consumer Software Working Group’s effort to identify and prevent specific activities related to software that are unfair, deceptive, or devious.²⁹ Rather than adopting new laws to address spyware, some comments suggested that the government could challenge these particular acts and practices as unfair or deceptive in violation of Section 5 of the FTC Act.³⁰

4. Issues for Future Resolution

FTC staff agrees that a common understanding of what is meant by the term “spyware” would be extremely useful in discussing spyware, the problems that it causes, and possible solutions to these problems. In connection with the workshop, FTC staff offered a working definition of spyware, namely, “software that aids in gathering information about a person or organization without their knowledge and that may send such information to another entity without the consumer’s consent, or that asserts control over a computer without the consumer’s knowledge.”³¹ Panelists and commentators generally agreed that this definition provided a good starting point for discussing spyware and how it affects consumers.³²

FTC staff believes that the workshop discussions and related information provided important insights concerning how to address the conceptual challenges associated with defining spyware. There appears to be broad agreement that spyware should be defined to include software installed without adequate consent from the user. It also appears that, because both monitoring software and non-monitoring software can cause harm to consumers, spyware should be defined to include software regardless of whether it performs a monitoring function. Finally, to avoid inadvertently including software that is benign or beneficial, the term “spyware” should be limited to software that causes some harm to consumers.

FTC staff emphasizes that fundamental issues remain to be resolved before a clear and definitive definition of spyware can emerge. Software distributors should obtain consent to installation, yet there appear to be substantial differences of opinion as to what distributors must do to obtain such consent. Moreover, as discussed in Part III below, software installed without consent can cause any wide variety of harms to consumers, but there appear to be substantial differences of opinion as to when software has caused the type and magnitude of harm to warrant being treated as spyware.³³ In FTC staff's view, these fundamental issues of consent and harm need to be resolved before any common definition of spyware can be developed.

B. Prevalence and Distribution of Spyware

1. Prevalence of Spyware

Workshop participants generally agreed that spyware is becoming more prevalent on the computers of U.S. consumers.³⁴ However, the limited empirical evidence submitted in connection with the workshop does not permit quantification of the extent to which spyware has been disseminated. Researchers attempting to quantify such distribution have used definitions of spyware that differed in whether they included adware and cookies.³⁵ FTC staff believes that if a consensus definition of spyware is developed, it would assist in assessing the prevalence of spyware and changes in its prevalence.³⁶

2. General Methods of Distributing Spyware

Software distributors disseminate their products to consumers through many different channels. For example, original equipment manufacturers install some programs on computers before consumers purchase them. Users typically supplement these software programs with additional programs they obtain from software retailers or download from software distributors' websites on the Internet.

Spyware likewise may be distributed through these ordinary channels of software distribution. According to some commenters, spyware may be included with software that an original equipment manufacturer pre-installs on computers prior to purchase, or with programs that users purchase from software retailers.³⁷ It also may be "bundled" with other software applications that may be made available to users at no cost, such as P2P file-sharing software,³⁸ screen savers, and games.³⁹

Participants described various other means by which spyware is distributed as well. Users may receive spyware embedded in files shared over P2P networks.⁴⁰ Spyware may be distributed through email, including as an attachment to an email message, a hyperlink in an email message, or even in the email communication itself if it is in HTML format (*i.e.*, the email's contents are displayed as if it were a web page).⁴¹ Spyware may also be installed from a web page.⁴² As detailed below, participants emphasized that some spyware programs, particularly programs installed from web pages, are distributed by means that exploit browser vulnerabilities or use deception to undermine the ability of consumers to decide whether to install software on their computers.

3. Distribution Methods That Exploit Browser Vulnerabilities

One mechanism that web pages can use to install software is a technology called ActiveX. ActiveX is a tool designed by Microsoft to add interactive features to web pages.⁴³ The ActiveX technology is built into Microsoft's Internet Explorer ("IE") browser. In turn, some web pages include code (called an ActiveX control) designed to interact with the ActiveX technology in the IE browser. This interaction may result in the installation of additional browser-operated software programs, such as the Google search toolbar. Spyware developers can also use the ActiveX technology to install their programs.

As explained by a panelist from Microsoft, usually before an ActiveX-based program installs, a Security Warning dialogue box displays, telling a user the name of the program and asking if the consumer wants to install it.⁴⁴ Unless the user clicks on the "Yes" button, the program should not install.⁴⁵ However, some users change their IE Security settings from Medium – the default setting – to Medium Low or Low. At these settings, no Security Warning Box is displayed, and the software is installed without notice.⁴⁶ In short, by lowering their Security settings, these users have made themselves particularly vulnerable to the hidden installation of spyware.

A tactic known as a "drive-by" download allows spyware to be installed even if the IE default security level is unchanged. This tactic looks for various security vulnerabilities in the IE browser that will allow software to be installed from a web page without displaying the ActiveX Security Warning box.⁴⁷ Drive-by spyware distributors insert code into web pages, and this code exploits various IE browser vulnerabilities to install software without a Security Warning box being displayed.⁴⁸ Because users never see the Security Warning box, they do not know that the web page is installing spyware.⁴⁹

Even if the Security Warning dialogue box is displayed, spyware distributors may use other techniques to undermine or misuse the ActiveX warning process. For example, some spyware distributors bombard consumers with prompts requesting permission to install software until consumers finally click "Yes."⁵⁰ Others may insert misleading or confusing information in the "Do you want to install" dialogue box.⁵¹ Consumers may click "Yes" to authorize the installation without really understanding the purported disclosure.

4. Distribution Methods That Use Deceptive Tactics

Participants also described various deceptive tactics that distributors may employ to install spyware. Some of these techniques mislead users about the identity of the entity requesting permission to install software. One such technique is the "pop-under exploit."⁵² With this technique, for example, users visiting their favorite news website are presented with a Security Warning dialogue box asking if they want to install a software program. These users may click "Yes" because they believe that the request is from the operator of the news website. In fact, the person seeking permission may be the operator of a totally unrelated web page hiding underneath the news website's page.

Other distributors mislead consumers about the source of a program through the use of fake messages that have been formatted to mimic a message that their Windows operating system would generate.⁵³ These fake "operating system" messages typically ask for consent to install

software to fix a purported operating system problem. In fact, the “message” is from an entity that is distributing spyware.

In still another deceptive download technique described by participants, distributors may display what appears to be a window asking whether users want to install software. The “window” gives users the choice of clicking on a “Yes/OK” button, a “No/Cancel” button, or an “X” to close the “window.”⁵⁴ In fact, the “window” may simply be an image embedded in a web page; clicking anywhere in this image, including on the “No/Cancel” button, or on the “X,” initiates installation of the spyware program.⁵⁵

5. Prevalence of the Various Spyware Distribution Methods

No panelist pointed to any statistics or knew of any studies showing how often each distribution method described above is used. One anti-spyware company stated that, in its experience, bundling of spyware with other programs is the most common distribution method.⁵⁶ However, it is difficult to determine the frequency with which the various distribution methods are used without a common definition of the term “spyware.” Moreover, even with a common definition, it is often not clear to consumers or sometimes even software experts how a specific spyware program was loaded onto a particular computer. FTC staff therefore believes that public or private entities with expertise in the software industry should conduct further research on the different methods of disseminating spyware to assist in developing effective responses to spyware.

C. Difficulties of Removing Spyware

Software programs can usually be deleted with relative ease by using the Add/Remove Programs feature that the Windows operating system provides.⁵⁷ In other cases, a program might provide its own uninstaller. Several participants noted that spyware programs, in contrast, often cannot be removed using the Add/Remove Programs function and do not provide their own uninstaller.⁵⁸

Workshop participants also elaborated on various additional reasons why spyware can be difficult to remove. One stated reason is that spyware programs may install as many as 4,000 files and make up to 2,000 changes in the computer’s Registry (the basic configuration file for most computers with a Windows-based operating system).⁵⁹ To delete the spyware program, many of these files would have to be removed, and the Registry changes reversed or deleted.⁶⁰ Editing or revising Registry files creates a great risk that users will accidentally remove the wrong file, alter the wrong setting, or otherwise render their operating system or individual programs inoperable.⁶¹

Spyware distributors may also deliberately employ tactics that make their programs difficult to remove. For example, many spyware programs constantly change the file names and folder locations they use, thereby evading detection and removal by anti-spyware products.⁶² Spyware programs may also hide themselves by using well-known file names belonging to legitimate programs.⁶³ Further, because multiple spyware programs may be installed with a single click, even if users delete the spyware program they are aware of, other spyware programs may remain installed.⁶⁴

Finally, several panelists explained that even if users delete a spyware program, it may return on its own. In some cases, spyware accomplishes this by leaving a “trickler” behind when a user deletes it. The trickler gradually re-downloads, or “trickles down,” bits and pieces of the spyware whenever the user is online, until the spyware is complete and operational again.⁶⁵ Other spyware programs actively re-install themselves or their settings as quickly as someone deletes them. These programs have two programs in memory. When one program is deleted, the other program will re-load the deleted program and any deleted Registry settings.⁶⁶

In short, given the general lack of any easy means of uninstalling and the use of tactics to resist removal, FTC staff concludes that most spyware is more difficult – often much more difficult – to remove from computers than other software. This exacerbates the adverse effects of spyware described below.

III. THE EFFECTS OF SPYWARE

FTC staff concludes that spyware can harm computer operation and performance, increase privacy and confidentiality risks, make computers less secure, and impose significant costs on businesses. Panelists and commenters presented no empirical data, however, that quantified the nature and extent of these harms or benefits.

A. Impact of Spyware on Computer Operation

Spyware programs often cause significant degradation in system performance. Significantly slowed computer performance is the number one spyware-related complaint that computer manufacturer Dell receives, accounting for more than a quarter of all spyware-related complaints as of April 2004.⁶⁷ Spyware can even cause computers to crash. Microsoft reported that 50% of its customers’ computer crashes are traceable to spyware.⁶⁸ According to panelists, spyware may use so many system resources that users are no longer able to use their mouses, and their cursors freeze.⁶⁹

Spyware causes computers to malfunction in part because of the large number of tasks, or operations, it commonly forces a computer to run. One panelist noted that spyware can account for as many as 600 to 800 operations running simultaneously on a user’s computer, as contrasted with the normal number of perhaps 30 or 40 operations running.⁷⁰ These system degradation effects were described as cumulative over time, and increase as additional spyware programs are installed.⁷¹

Another adverse impact mentioned is that spyware can result in loss of Internet access.⁷² The explanation given for this result is that some spyware inserts itself into the chain of connections by which a user’s computer connects to the Internet to watch what is being transmitted over that connection. Subsequently, when the spyware is found and deleted, it leaves a gap in this chain, thereby preventing the consumer from reaching the Internet.⁷³

Participants also noted that removing spyware can also impose substantial costs on consumers and businesses.⁷⁴ In severe cases, if the spyware cannot be removed, the computer

hard drive may have to be erased and reformatted. If so, all systems, programs, and files must be reloaded, a process that can take hours if not days.⁷⁵ If users have not backed up their data, this reformatting process can result in loss of valuable documents, such as tax returns or photos.⁷⁶ One panelist stated that some users have even found that it is less expensive to buy an entirely new computer than to pay someone to clean up a spyware-infected one.⁷⁷ In other cases, users were reported to have canceled their broadband Internet accounts and returned to dial-up access, because they believed the faster broadband connection made them too much of a target for spyware.⁷⁸

B. Browser Hijacking and Other Changes to Settings or Files

There was general agreement that spyware can assert control over the operation of computers in ways that substantially limit the ability of consumers to use their computers. For example, some spyware programs change users' browser settings, which is often referred to as "browser hijacking."⁷⁹ Spyware may change the web page displayed when the browser first opens, *i.e.*, the home page, and frustrate efforts to replace that home page with the user's original home page.⁸⁰ According to one panelist, this is a common subject for tech support calls.⁸¹ Spyware may also insert links to its own websites into the user's "Bookmarks" or "Favorites" list. In some cases, these links may lead to adult content websites.⁸²

One panelist from a search engine company explained how spyware programs can redirect users' search requests to a website that the spyware selects.⁸³ The alternative website may display search results consisting of advertising links or links to adult websites, and even masquerade as the search engine users thought they were using. One spyware program, for instance, intercepts search queries sent to Google, a popular search engine, and then displays its own search results. The search results appear to be from Google but contain links to pornographic websites that would not have appeared with an actual Google search.⁸⁴

Panelists also reported that spyware can take control over users' computers through the installation of programs known as "dialers." The dialer program disables the Internet access phone number designated by a user, and substitutes an international phone number. Instead of calling their Internet Service Provider ("ISP"), users' computers place calls to the international telephone number, resulting in large telephone bills – as much as \$5,000 in some instances.⁸⁵ McAfee reported that it had detected 4.2 million dialers on its subscribers' computers during the period from August 2003 through March 2004.⁸⁶

C. Privacy and Confidentiality Risks

1. Consumer Privacy

Participants identified various privacy risks associated with spyware that vary in both scope and severity. These risks include the theft of personal information, monitoring of communications, and tracking of an individual's online activity.⁸⁷ Several panelists observed that the most serious privacy risks arise when spyware installed on a computer includes a "keystroke logger."⁸⁸

A keystroke logger captures all keystrokes that the user types on the computer keyboard, including passwords, personal information entered into an online registration form (e.g., a mailing address or telephone number), financial information submitted as part of an online transaction, and the contents of emails or instant messages.⁸⁹ Although some panelists stated that, at present, spyware that includes a keystroke logger does not seem to be installed frequently, they agreed that it poses a risk of substantial injury, such as identity theft, when it does occur.⁹⁰

Panelists also stated that spyware may monitor and collect sensitive information, including financial or medical information, about consumers. Some panelists suggested that the privacy invasion from such monitoring may be mitigated if the information was compiled in an anonymous or aggregated form,⁹¹ but other panelists disagreed.⁹²

2. Confidential Business Information

Panelists noted that businesses also face the risk that spyware will be used to access their information. The installation of spyware on a company's computer system could expose trade secrets and other confidential business information. It also could put the company at risk of compromising customer data in its possession, such as sensitive financial records, and lead to a loss of consumer confidence in conducting transactions online.⁹³

There is little hard data regarding the extent to which spyware has been used to obtain businesses' confidential or private information. Many companies apparently are aware of these risks and often have taken steps to protect themselves, which may have limited the instances of unauthorized access or their impact.⁹⁴ However, one panelist noted that as spyware becomes more sophisticated, businesses may face increased privacy risks.⁹⁵ To respond, companies may face increased costs in protecting confidential business information, including sensitive customer information.⁹⁶

D. Security Risks and Similar Harms

1. Interference with Security Tools

Panelists reported that some spyware programs have prevented users from downloading their Windows security patches or updating their anti-virus or anti-spyware programs. For instance, spyware may misdirect access requests and thereby prevent users from reaching the websites of McAfee, Lavasoft, Pest Patrol and other anti-virus or anti-spyware companies.⁹⁷ According to one commenter, some spyware will turn off users' firewalls and anti-virus programs.⁹⁸

2. Increased Risks of Unauthorized Access by Hackers

According to one panelist, spyware that includes a keystroke logger can create security risks.⁹⁹ Such software is designed to enable the person or entity who installed the keystroke logger to monitor remotely the activities and communications on a user's computer. If the keystroke logging program is poorly written, it could be hacked into by persons other than the person who installed it, which would allow these unknown hackers to remotely record all of the activity on that computer.

Another issue raised was that spyware could create security risks by allowing hackers to exploit the automatic update features found in many of these programs.¹⁰⁰ These features update either the software program itself or the ads that are made available for display. One panelist explained that if update mechanisms are poorly written, hackers could use them to gain access into computers, with hackers being particularly attracted to programs containing such mechanisms that have been installed on a large number of computers.¹⁰¹

3. Usurping Users' Computers

Participants explained various ways in which spyware distributors can take advantage of spyware installed on a computer to access and use that computer for their own purposes. For example, some spyware secretly "borrows" hard drive space on computers to store its own hidden files.¹⁰² Users are unaware that they are hosting these data or program files, and they do not know what these files might do (*e.g.*, they could be a virus) or what they might contain (*e.g.*, they could contain child pornography or copyrighted materials).

Spyware programs also may usurp computers by installing themselves in the shared files directory of a computer's P2P file-sharing program, using an attractive file name to entice others on the P2P network to download the file.¹⁰³ This can lead to rapid redistribution of the spyware program.

Finally, some spyware programs give the distributor the capability to join together the computers on which it is installed into so-called "bot farms" and take remote control of these networks of "robot" computers. Participants explained that, without the knowledge of the owners of these computers, distributors may use these "bot farms" in denial-of-service attacks against targeted websites,¹⁰⁴ to serve advertisements on websites,¹⁰⁵ or to send out spam email.¹⁰⁶

4. Security Impact on Businesses

According to participants, the security risks associated with spyware are generally the same for businesses as for consumers. Many larger corporations, however, may be more aware of the risks and have information technology staff to address them.¹⁰⁷ But, as one panelist noted, a company's information is often its most valuable asset, so it would be a potentially devastating breach of security if its information were accessed, deleted, or transmitted to an unauthorized or unknown entity.¹⁰⁸

E. Other Costs of Spyware

1. Costs of Responding to Calls to Tech Support

As detailed below, ISPs, operating system manufacturers, and computer manufacturers reported that they incur substantial costs resolving spyware-related problems. Consumers usually do not know they have spyware.¹⁰⁹ As explained by one panelist, they just know that their Internet connection or computer is not operating like it should, or that it is doing something unexpected – like sending out emails by itself, or opening to the wrong home page or search page.¹¹⁰

To get help, consumers call the tech support centers at their ISP, their operating system manufacturer, or their PC manufacturer. Dell reported that spyware had become the number one category of calls to its tech support staff by late 2003.¹¹¹ Likewise, McAfee stated that spyware has been a larger technical support issue for it than viruses over the past year.¹¹² At both Dell and McAfee, spyware-related calls have accounted for as much as 10% to 12% of all tech support calls.¹¹³

Participants stated that responding to these calls imposes substantial costs on businesses, which may be passed on to consumers.¹¹⁴ One reason given is that spyware-related tech support calls usually take longer than regular tech support calls.¹¹⁵ Because consumers often do not know they have spyware, tech support staff must troubleshoot to identify the source of the problem. One panelist reported that a regular tech support call to an ISP lasts about six minutes; spyware-related calls average 25 minutes, which increases the cost of the call by about \$15. Because subscribers typically pay \$20 to \$40 a month for Internet access, the cost of such tech support calls can severely decrease the ISP's profit margin.¹¹⁶

2. Costs Resulting from Lost Sales

Panelists also noted that spyware may tarnish the reputation of many high-tech companies. Some subscribers reportedly incorrectly blame their ISP for computer problems caused by spyware and cancel their accounts. One panelist estimated ISP losses due to higher support costs and increased cancellations to be in the millions of dollars.¹¹⁷ A similar concern raised was that some consumers would blame the manufacturer of their computers for the significantly decreased computer performance that spyware causes, thereby making them less likely to purchase another computer from that manufacturer.¹¹⁸

Finally, some companies commented that spyware has cost them business in a more direct fashion – that is, by diverting consumers from the e-commerce website they intended to visit to the website of a competing seller.¹¹⁹ In other cases, when consumers are browsing through the website of one e-commerce seller, spyware generates pop-up ads, based on the tracking information as to which sites the consumer is visiting, that display coupons or discount offers for a competitor's products. For example, when a consumer is reading about a particular book at an online bookseller's website, spyware may display a pop-up ad from a competing bookseller, offering that same book at a discount. These commenters complained that these tactics have resulted in lost sales, thus creating a disincentive for them to incur the costs associated with attracting consumers to their websites.¹²⁰

F. Potential Benefits of Spyware to Consumers or Competition

Panelists and commenters emphasized that users may receive benefits from some monitoring software installed on their computers. Monitoring software can allow parents to track computer use by their children. It also can allow tech support to perform remote diagnostic tests of computer systems, track inventory flows, and assist in inspecting computers for security protection.¹²¹ However, users or owners of the computers involved typically have consented to the installation of such monitoring software, and so FTC staff believes that such software usually would not be treated as spyware. Accordingly, it seems that the benefits resulting from monitoring software are not properly attributable to spyware.

Panelists and commenters also asserted that consumers and competition may benefit from the dissemination of adware. Consumers often may receive other software for free if they are willing to accept an adware program.¹²² Consumers also may receive offers targeted to their particular preferences and experiences or other attractive offers as a result of the ads.¹²³

As discussed above in Part II.A.2., there is substantial dispute as to when adware should be considered spyware, and, therefore, FTC staff concludes that it is unclear to what extent adware's benefits are attributable to spyware.

IV. INDUSTRY RESPONSES TO SPYWARE CONCERNS

As discussed above, consumers often are unaware that spyware has been installed. If they do discover the spyware, they may not know what to do to remove it, or may be concerned that attempting to remove it may inadvertently harm their computers. Given the difficulties inherent in relying on self-help to address spyware, many panelists said that a combination of industry and government action is needed to protect consumers. It was stated that industry's actions should include technological solutions, industry best practices, and consumer education.¹²⁴

A. Technological Solutions

1. Basic Security Protections

Many consumers and businesses employ firewalls to make their computers more secure.¹²⁵ Firewalls act as gatekeepers between computers and the Internet, and they may be either hardware or software. They close unneeded ports through which Internet communications can enter the computer, and block incoming Internet communications unless the consumer has specifically requested the communication. Some also filter or block outgoing Internet communications unless the user has initiated them.

Although firewalls are important for computer security, a panelist explained that they provide limited protection from spyware. Firewalls generally will not prevent spyware from being installed.¹²⁶ They are designed to block specific kinds of threats and look only at certain attributes of incoming transmissions (*i.e.*, packets), much like the U.S. Post Office looks only at the addresses on a letter, but does not look at, or attempt to evaluate, the letter's content.¹²⁷ However, firewalls do provide some increased protection from spyware because they may alert users if installed spyware attempts to send out information that it has collected. With this alert, users may take steps to uninstall or disable the spyware.

One panelist observed that consumers could protect themselves better against spyware by using browsers that, unlike IE, were "uncoupled" from, or less integrated into, the Windows operating system, such as Netscape, Mozilla, Firefox or Opera.¹²⁸ For similar reasons, some experts also have suggested that consumers may want to switch to using a different browser.¹²⁹ Other experts, however, have noted that switching to a different browser may limit the functionality of sites that require features specific to Internet Explorer.¹³⁰

2. Anti-Spyware Software

ActiveX blockers were one category of anti-spyware programs identified at the workshop. As explained by a panelist, these programs attempt to prevent the installation of ActiveX-related spyware.¹³¹ ActiveX blockers generally work by maintaining a list of the ActiveX numbers associated with known spyware programs.¹³² When a website tries to use an ActiveX control to install spyware, the ActiveX blocker checks the number of that ActiveX control against its list. If the number is found, the ActiveX blocker prevents the installation of the spyware. If the spyware has already been installed, some ActiveX blockers also prevent the spyware from running.¹³³ Some ActiveX blockers are available for free to consumers.¹³⁴

Spyware scanners form another category of anti-spyware programs. According to one panelist from a spyware scanner company, consumers can use scanner programs, including many free programs, to scan their hard drives for the presence of spyware. If spyware is found, scanner programs typically offer consumers the choice to disable it, delete it, or leave it alone.¹³⁵

Many of these scanner programs are signature-based, that is, the scanner program's software developer analyzes copies of known spyware programs to determine what they look like when installed on a computer.¹³⁶ From this analysis, the spyware scanner develops a "digital fingerprint" for each program, and each digital fingerprint is compared to the files on a computer's hard drive to identify matches.¹³⁷ Because the digital fingerprint is only developed after a spyware program is discovered and analyzed, there is a lag time between the distribution of a spyware program and the ability of anti-spyware programs to detect it.¹³⁸

One criticism raised about spyware scanners is that some scanners may identify particular programs as "spyware" even though some users might disagree with that assessment if they had full information about the program.¹³⁹ Another panelist noted, however, that to address such concerns, spyware scanners typically do not automatically delete programs after identifying them as spyware.¹⁴⁰ Instead, spyware scanners usually give the consumers the choice to keep, disable, or delete the specific programs that have been identified as spyware. However, another panelist stated that only a few spyware scanners offer enough information to help users decide whether to delete a particular program.¹⁴¹

Most anti-spyware programs must be installed on the user's computer. However, a panelist at the workshop identified at least one spyware program scanner that can be accessed for free and run from the Internet rather than from the user's hard drive.¹⁴²

In sum, FTC staff believes that consumers can protect themselves from spyware to some extent through the use of ActiveX blockers and spyware program scanners.¹⁴³ FTC staff, however, offers the caveat that such self-protection measures impose costs on consumers. As noted by several participants, the current environment requires consumers to understand and become experts in the installation and use of anti-spyware programs as well as anti-virus programs,¹⁴⁴ and operating system updates.¹⁴⁵ An additional challenge stems from the need to update self-protection mechanisms, including anti-spyware programs, on a regular basis. Consumers need to know that the one-time purchase or installation of a particular program or technology to protect their computers is not a sufficient defense, and that they will have to make a diligent effort to keep up-to-date their anti-virus programs, system updates, and anti-spyware programs.¹⁴⁶

3. Possible Actions at the Network Level

Some ISPs have made various desktop anti-spyware tools – primarily spyware program scanners and removers – available to their subscribers. AOL and Earthlink have made these tools available to approximately 35 million subscribers worldwide.¹⁴⁷ AOL's anti-spyware tool will automatically scan its subscribers' computers for potentially unwanted programs, display a list of the programs, and ask the subscriber if they want to disable any of them. Consumers can later re-enable the program if they find that another program with which it was bundled will not run without it.¹⁴⁸

Another possible means to counter spyware would be for ISPs to block it at the network level before the spyware reaches their subscribers' computers. Some panelists argued that such an effort would impose added burdens on the network. They also asserted that it would place ISPs in the position of regulating their subscribers' Internet use, including the decision whether to install particular software programs.¹⁴⁹ Another objection raised was that it could stifle innovation in the software industry if ISPs were to decide which software their subscribers can install or which websites they can visit.¹⁵⁰

However, several panelists stated that blocking spyware at the network level might work in some circumstances.¹⁵¹ Business organizations, in particular, might want to block spyware from being downloaded onto their networks, because of the potential for great harm. A panelist gave as an example a keystroke logger installed on the company computer of an accounts payable clerk, which creates a risk of wide-scale fraud.¹⁵²

4. Changes to Windows XP Operating System

A panelist from Microsoft described several additional tools for reducing spyware problems to which consumers using Microsoft's Windows XP operating system have access as part of its Service Pack 2 ("SP2") update for the XP operating system. Because ActiveX downloads often are initiated when a computer user clicks on a pop-up window, SP2 includes a pop-up blocker. Consumers are able to view blocked pop-ups from a particular site if they wish to, and can choose whether to turn the blocker off entirely.¹⁵³

Another SP2 feature prevents unsolicited, ActiveX-related software downloads. If an ActiveX control tries to download software, instead of displaying the Security Warning dialogue box that asks users if they want to install the software, a one-line message is displayed stating that the installation of software was blocked. Users can unblock the installation should they decide later that they actually need or want that software.¹⁵⁴ This particular change is intended to avoid interrupting the user's Internet experience and prevent the user from accidentally or hurriedly clicking "Yes" to an unwanted download. In addition, it is expected that this update will reduce incidences of children accidentally clicking "Yes" to the "do you want to install" question, because they will not even see the question.¹⁵⁵

The panelist from Microsoft also explained the steps that his company has taken to redesign the Security Warning dialogue box itself. The space for the name of the software is smaller, so spyware developers cannot include lengthy fine print designed to confuse consumers. The dialogue box also includes a new option to allow users to check a "Never install software from

this publisher” box to prevent the downloading of software from publishers that the user does not trust.¹⁵⁶

Finally, the panelist noted that to aid technical support professionals in diagnosing and fixing computer problems, SP2 includes an Add-on Manager, which lists the ActiveX controls and other add-ons, such as Browser Helper Objects, that have been installed. The Add-on Manager allows tech support to disable, and thereby neutralize, those add-ons that are unknown, unwanted, or installed accidentally.¹⁵⁷

5. Possible Future Changes to Browsers or Operating Systems

Another discussion topic at the FTC workshop was possible future technological changes to browsers or operating systems that could assist consumers in dealing with spyware. One panelist suggested the creation of a labeling system to identify the functions a particular program will execute. If users are considering installing a software program, their browsers would automatically compare the program’s functions with the functions the users have said that they would allow and inform them of any differences.¹⁵⁸ This would permit users to set their own standards to determine which software programs – and functions – they are willing to accept.¹⁵⁹ They could also decide not to download anything that does not participate in a labeling scheme.¹⁶⁰ This labeling system could enhance consumers’ ability to evaluate software that may be incompatible with their preferences, such as spyware, before it is installed.

Another possible technological change panelists discussed was an operating system that creates a separate compartment or “sandbox” for each software program and either confines that program to its own sandbox or establishes limits on what it can do outside its own sandbox.¹⁶¹ This technique could prevent spyware tactics such as browser hijacking or co-opting a user’s computer to send out spam.¹⁶² A major difficulty of such an approach would be ensuring that the operating system could still be used effectively.¹⁶³ It would also require redesigning all Windows-based browsers, emailers, etc.¹⁶⁴ One panelist observed, however, that a sandbox does not have to provide complete protection and suggested that it is possible to look at certain relationships among files and design the beginnings of sandboxes.¹⁶⁵

A similar idea panelists raised would be to design a “lockbox” for a Windows computer’s basic computer configuration file (the Registry) that would require a program to obtain the computer owner’s consent before making changes to this file. For example, because installing software makes changes to the Registry, users would receive an alert stating that a program wants to install and asking them to consent to the Registry changes and “unlock” the Registry file.¹⁶⁶ One difficulty with this approach is that most software programs routinely make a large number of changes to the Registry file, and thus consumers could be faced with frequent notices requiring them to click “Yes.”¹⁶⁷ However, several panelists or commenters suggested that instead of designing a “lockbox” for all Registry changes, it may be possible to identify particularly critical Registry changes for which such alerts would be useful, such as a program’s setting itself to run automatically when users start up their computers.¹⁶⁸

FTC staff believes that many panelists presented interesting ideas on how future technologies might aid in addressing spyware. Our past experience with other technological areas demonstrates that market forces will provide high-tech industry with powerful incentives to

develop technological solutions, although it is not clear exactly what that technology will be and when it will be available. FTC staff therefore believes that it will be important for policymakers to foster efforts and incentives to develop and deploy technological solutions.

B. Best Practices and Self-Regulation

Many panelists recognized that the private sector could play an important role in protecting consumers by developing a set of best practices for the software industry.¹⁶⁹ Developing a common industry definition of spyware was described as essential to this process.¹⁷⁰ Currently, each anti-spyware company has its own working definition of what is or is not spyware.¹⁷¹ Panelists agreed that a possible starting point for defining spyware or creating industry best practices would be to identify those practices that everyone could agree were deceptive, harmful, or malevolent, similar to the efforts already being undertaken by the Consumer Software Working Group.¹⁷² A panelist noted that private sector efforts might also focus on developing objective criteria for assessing software programs and a set of standards for their incorporation into best practices.¹⁷³

A panelist with experience in industry self-regulation suggested that these industry discussions should involve a wide range of entities – operating system companies, security and anti-spyware technology firms, non-profit and consumer advocacy groups, and consumers.¹⁷⁴ In addition, this panelist suggested that the process of developing best practices should be transparent and open. Moreover, there was general agreement among panelists that the standards adopted themselves should be open, so that no one company can control their use.¹⁷⁵

Panelists noted that developing a set of industry best practices relating to spyware could be more complex than other self-regulatory efforts, because of the difficulty in identifying interested parties. In addition, there are many “bad actors” involved in distributing spyware who have no interest in developing or complying with industry best practices.¹⁷⁶ On the other hand, because best practices tend to distinguish the more responsible companies from less responsible ones, a panelist suggested that companies would have an incentive to adopt them.¹⁷⁷

One panelist suggested that the optimal result might be a continuum of industry best practices. A minimum level of acceptable behavior could be established for all companies. Some companies could opt to do an even better job, with the expectation that they would be rewarded in the marketplace.¹⁷⁸ Another suggestion was that the private sector work to communicate any best practices to the public, and perhaps establish a seal or logo program, to help consumers readily determine whether a company is following best practices.¹⁷⁹

Panelists agreed that disclosing information to consumers about these types of software programs was one of the most important best practice principles.¹⁸⁰ One panelist observed that, although some software programs currently provide a disclosure prior to installation, these disclosures often are insufficient because of their inconspicuous location or failure to provide enough information.¹⁸¹ For instance, in the panelist’s view, a disclosure buried in a lengthy end-user license agreement (EULA) informing the user about bundled software may not be sufficient to provide clear and conspicuous disclosure. Another panelist proposed that, when providing notice, distributors of such software should clarify the relationship between the software program being installed and the effect of that program, for example, the display of pop-up advertising.¹⁸²

Another proposal suggested by several participants was that best practices include a component to assist consumers in evaluating the merits of anti-spyware programs. Many different software programs are available that purport to identify spyware for removal, but some of these programs may themselves install spyware.¹⁸³ The private sector could establish certification procedures to test whether these programs performed as claimed, such as ICSA Labs currently does for anti-virus programs.¹⁸⁴ Such a certification program might be combined with a seal program.¹⁸⁵

FTC staff believes that the development and implementation of industry best practices for spyware would be extremely useful.¹⁸⁶ Creating models for notice and consent to the installation of software would allow the high tech industry to use its expertise to identify various alternative means that distributors could use to effectively disclose information about software programs. Developing a common definition of spyware would help clarify what software anti-spyware programs should target and users should delete or block. Finally, given the difficulties that most consumers have in evaluating the relative merits of anti-spyware software, industry certification could prove helpful.

C. Consumer Education

Several panelists noted that the private sector can play an important role in educating consumers about spyware and anti-spyware tools.¹⁸⁷ One panelist described educating consumers about spyware as the greatest challenge that industry faces, in part because technology is evolving at a rate far faster than industry can educate consumers.¹⁸⁸ According to this panelist, there are 800 million computers in use worldwide, of which 50% do not have even basic protections against virus attacks, despite years of consumer education about viruses.¹⁸⁹ However, the other 50% – or 400 million computer users – have installed anti-virus protection, and industry can build on that base in addressing spyware.¹⁹⁰ Consumer education may be particularly useful with teens, because it is often the teens in a household who are engaging in the online activities that lead to installation of spyware.¹⁹¹

Participants also addressed what consumers need to learn about spyware. Consumers need to be able to make an informed decision prior to installation.¹⁹² Panelists suggested that creating commonality in the program installation screens or the notice and consent part of the program installation process might help consumers know what to expect.¹⁹³ It might also provide them with the information needed to assess different types of software programs. Another panelist suggested that consumers should be taught how to determine whether or not to trust a website that wants to install a software program.¹⁹⁴

Some industry participants have already initiated consumer education programs. For example, Dell reported that spyware-related calls to its tech support declined by about a third after it undertook consumer education efforts in early 2004. This suggests that industry-sponsored consumer education can be useful in combating spyware.¹⁹⁵ A panelist also mentioned the role corporations can play in training their employees, and the extensive consumer information provided by media news stories and online anti-spyware, security and privacy websites.¹⁹⁶

FTC staff supports industry efforts to educate consumers about spyware, because consumer awareness is an important means of decreasing the dissemination of spyware and its associated problems. FTC staff believes that consumers would benefit if these efforts were expanded, especially in conjunction with similar governmental efforts to provide information to consumers about the risks related to spyware.

D. Assistance to Government Law Enforcement

As described above, computer manufacturers, operating system manufacturers, ISPs, and others in the high tech industry receive many calls from consumers to their tech support centers relating to spyware. As a result of these calls and their technical expertise, industry appears to have developed a substantial amount of knowledge relating to spyware, how it operates, and who distributes it. FTC staff believes it would be very beneficial if industry were to share such knowledge with criminal and civil law enforcement officials.

FTC staff also believes it would be useful if industry would provide direct assistance in government law enforcement efforts. For example, in *Seismic Entertainment*, a recent FTC spyware case discussed below, Microsoft filed an affidavit explaining the technical aspects of how the defendants exploited a security vulnerability in the Internet Explorer browser to distribute their software.

V. GOVERNMENT RESPONSES TO SPYWARE

In addition to private sector measures, government action also can play an important role in protecting consumers from the risks associated with spyware. Possible government action includes law enforcement, legislation, and consumer education.

A. Law Enforcement

One topic panelists discussed was the substantial law enforcement challenges posed by investigating and prosecuting acts and practices related to spyware – particularly the more pernicious programs.¹⁹⁷ First, given the surreptitious nature of spyware, it often is difficult to ascertain from whom, from where, and how spyware has been disseminated. Second, consumer complaints are less likely to lead directly to targets than in other law enforcement investigations, because consumers often do not know that spyware has caused the problems or, even if they do, they may not know the source of the spyware. Third, identifying the source of spyware is especially difficult when it has been installed by drive-by methods, given that consumers likely were not even aware that the spyware was being installed. Finally, once the distributor is identified, it may be located in a foreign jurisdiction, which can significantly complicate law enforcement efforts.

1. FTC Law Enforcement

Despite these challenges, panelists from FTC staff and Department of Justice staff stated that their current statutory authority was sufficient to prosecute spyware distributors. Section 5 of the FTC Act gives the agency the authority to challenge acts and practices in or affecting commerce that are “deceptive” or “unfair.” The Commission will find that an act or practice is “unfair” if it causes or is likely to cause substantial injury to consumers, that injury is not outweighed by any countervailing benefits to consumers and competition, and consumers could not have reasonably avoided the injury.¹⁹⁸

The Commission will find deception if there is a material representation, omission, or practice that is likely to mislead consumers acting reasonably in the circumstances, to their detriment.¹⁹⁹ For example, if a software distributor represented that spyware bundled with primary software would not affect the operation of a computer, this representation would be deceptive if the spyware used so much memory that it substantially slowed down the computer’s performance or otherwise significantly impaired the computer’s performance.²⁰⁰

It is also deceptive for a seller to tell a half-truth, *i.e.*, to fail to disclose information necessary to prevent some other statement from creating a misleading impression. So, if a software distributor expressly or impliedly represented that downloading its primary software would not cause a computer to crash, it might be deceptive to fail to disclose that accompanying spyware would substantially slow it down.²⁰¹

Even assuming that the amount and type of information provided about the spyware is adequate, as explained above, software distributors often present it through fine print disclosures buried deep in a lengthy document. FTC law is clear, however, that disclosures must be clear and prominent if consumers are to be able to notice, read, and comprehend them.²⁰² The FTC has issued a guidance document providing sellers with information on how to present such information in an online environment.²⁰³

The FTC has substantial experience challenging unfair or deceptive acts and practices on the Internet as violating Section 5 of the FTC Act. Over the past decade, the Commission has brought over 300 law enforcement actions related to the Internet. In these cases, the FTC has obtained injunctive relief, and often, monetary relief. Specifically, the defendants in these cases have been ordered to pay more than \$1 billion to redress harm to consumers.

Over the past decade, the FTC has brought 14 Internet-related cases challenging conduct that caused harms similar to those associated with spyware.²⁰⁴ The Commission, for example, has challenged: (1) hijacking computer modems for use in placing unauthorized telephone calls; (2) hijacking web pages or “copy catting” website domain names to trap consumers and subject them to a barrage of pop-up ads; and (3) using information obtained from consumers who purchased an anti-spam product to send them spam.

Drawing on its experience in challenging unfair or deceptive acts and practices on the Internet, the Commission recently sued an alleged spyware distributor. The FTC filed a complaint in federal district court alleging that Seismic Entertainment Productions, Inc., SmartBot.Net, Inc., and Sanford Wallace engaged in unfair acts and practices in violation of Section 5 of the FTC Act. The defendants allegedly operated numerous websites and used a

variety of tactics, including pop-up ads, to get consumers to visit these websites. Defendants then allegedly exploited a known vulnerability in the Internet Explorer web browser to download spyware to users' computers without the users' knowledge or authorization.

According to the complaint, the spyware caused many different harms. Allegedly, it:

- modified the features of consumers' web browsers and hijacked their Internet searches;
- caused consumers to receive an incessant stream of pop-up ads;
- secretly installed a number of additional software programs, including programs that could monitor users' Internet activity and capture information they entered into online forms; and
- caused computers to malfunction, slow down, or even crash.

Furthermore, the complaint alleges that after the defendants had infected consumers' computers with spyware, they began to aggressively advertise to these same consumers purported "anti-spyware" programs called "Spy Deleter" or "Spy Wiper." The ads claimed that consumers must purchase these products to remove spyware from their computers. The defendants allegedly received a sizeable commission from the anti-spyware vendors based on the number of sales attributable to the ads displayed by the defendants. On October 21, 2004, the court granted a temporary injunction against the defendants. The defendants subsequently stipulated to a preliminary injunction.

2. Criminal Law Enforcement

In addition to the FTC's ability to bring Section 5 cases like *Seismic Entertainment*, the Department of Justice (DOJ) has statutory authority to prosecute distributors of software products, such as spyware, in cases where consumers' privacy or security is compromised. The Computer Fraud and Abuse Act of 1984, for example, prohibits the unauthorized acquisition of data from a protected computer that results in damage.²⁰⁵

The DOJ also has authority, under a variety of statutes that regulate communications, to pursue actions against entities that acquire information fraudulently, such as through the use of a keylogger program.²⁰⁶ For example, the DOJ recently indicted an individual who installed a keylogger on a computer at his place of employment, and also prosecuted a defendant who had installed a keylogger on several public computers located in a Kinko's store.²⁰⁷

As explained above, federal officials believe that they have adequate authority under their existing criminal and civil statutes to take law enforcement action against those who disseminate spyware. Spyware is a serious and growing problem, and it has the potential to cause substantial harm to consumers and businesses. Notwithstanding the challenges posed by investigating acts and practices related to spyware, FTC staff believes that law enforcement officials should increase criminal and civil prosecution under existing laws of those who distribute spyware.

B. Legislation

Panelists and commenters disagreed about the need for spyware legislation. One panelist stated that in addition to industry self-regulation and law enforcement, legislation requiring the provision of specific information to consumers would provide another tool in the effort to protect consumers from some of the dangers associated with spyware.²⁰⁸ On the other hand, DOJ and FTC staff panelists explained that their law enforcement efforts had not been stymied by a lack of federal legislation but rather by the inherent difficulties in investigating and prosecuting spyware cases.²⁰⁹

1. Proposed Federal Legislation

A number of legislative proposals focusing on spyware were introduced in the 108th Congress. The Securely Protect Yourself Against Cyber Trespass Act (SPY ACT), passed by the House of Representatives on October 5, 2004, would prohibit deceptive practices in connection with certain specified acts, such as browser hijacking, changing computer security settings, operating modem dialers or keystroke loggers, or using a consumer's computer to send spam email.²¹⁰ The SPY ACT also would require software programs that collect and transmit personally identifiable information to provide notice and obtain the consumer's consent. The Senate took no action on the SPY ACT during the 108th Congress. The bill was re-introduced in the 109th Congress in the House of Representatives on January 4, 2005, and referred to the Committee on Energy and Commerce.²¹¹

On October 7, 2004, the House also passed the Internet Spyware Prevention Act of 2004 (I-SPY Act), which would amend the Computer Fraud and Abuse Act of 1984. This bill would provide criminal sanctions for unauthorized installation and use of software on a protected computer: (i) in furtherance of another federal crime; (ii) to intentionally obtain or transmit personal information with the intent to defraud or injure a person or cause damage to a computer; or (iii) to intentionally impair the security protections of the protected computer.²¹² The Senate took no action on the I-SPY Act during the 108th Congress.

The Senate Committee on Commerce, Science and Transportation reported out the Software Principles Yielding Better Levels of Consumer Knowledge (SPY BLOCK Act) on September 22, 2004. This bill would prohibit many of the same specified acts as the SPY ACT, when those acts are done knowingly and without authorization, and would require certain disclosures for software that collects and transmits information. In addition, it would prohibit surreptitious installation of software, misleading inducements to install software, and installation of software that cannot be uninstalled through reasonable means. The SPY BLOCK Act also would establish criminal penalties for unauthorized installation and use of software in furtherance of another federal crime or to intentionally impair the security protections of a protected computer.²¹³ The Senate took no action on the SPY BLOCK Act during the 108th Congress.

2. State Legislation

Various states have also proposed or passed spyware legislation. In March 2004, Utah passed the Spyware Control Act, which among other things, prohibits computer software from delivering advertisements to a computer under certain circumstances and requires that

such software provide procedures for removal by the consumer.²¹⁴ The Utah legislation was preliminarily enjoined in June 2004 on grounds that it was likely to violate the Commerce Clause of the United States Constitution.²¹⁵ In October 2004, California enacted spyware legislation.²¹⁶ Several other states are considering legislation to address spyware.²¹⁷ Because of the global nature of the Internet, some support has been expressed for a federal, rather than a state-by-state, response to spyware.²¹⁸

C. Consumer Education

The FTC, Department of Commerce, and US-CERT each have worked to inform and educate the general public about the issues related to spyware. In addition to hosting its workshop, the FTC has encouraged a public dialogue about the distribution, installation, and use of software programs such as spyware and adware. In conjunction with the announcement of its case against Seismic Entertainment on October 12, 2004, the FTC published a consumer education piece on spyware. The FTC is distributing this piece widely, including by posting it on the FTC's website.²¹⁹

The FTC will continue to join with the private sector to encourage consumer education efforts by industry, as well as the development of best practices and robust self-regulation.²²⁰ For example, on October 15, 2004, the FTC participated in a joint media event for the national press to publicize the FTC's consumer education efforts and launch the Consumer Spyware Initiative, undertaken jointly by Dell, Inc. and the Internet Education Foundation, which operates the website www.GetNetWise.org.

The Department of Commerce has focused its spyware education efforts on facilitating communication between the private sector and consumer and privacy advocacy groups. The Department, like other government agencies, seeks to balance the need to protect the privacy of consumers and businesses while preserving innovation and legitimate business practices.²²¹

US-CERT is charged with improving computer security preparedness and response to cyber attacks in the United States. It analyzes cyber threats and vulnerabilities, and then interacts with federal agencies, private industry, the research community, state and local governments, and others to disseminate this cyber security information to the general public.²²² US-CERT publishes both cyber security alerts and cyber security tips. This information is available in versions for home users and technical users.²²³

FTC staff concludes that government-sponsored consumer education programs are vital to informing consumers and small businesses about spyware, and the public would benefit if these efforts were increased.

D. International Cooperation

As discussed above, a number of panelists noted that many distributors of spyware appeared to be located abroad, which poses difficult law enforcement challenges. As federal and state law enforcement actions against spyware distributors increase, more distributors may move their operations off-shore. Improved cooperation and coordination between U.S. and foreign law enforcement officials would increase the ability of countries to take action against spyware

distributors located outside of their national boundaries. The FTC testified before Congress in support of legislation that would enhance the Commission's ability to take action against foreign businesses whose acts and practices harm American consumers.²²⁴ FTC staff is working and will continue to work with foreign governments to enhance the FTC's law enforcement and other efforts related to spyware.

VI. CONCLUSION

The FTC workshop provided valuable insight into the nature of spyware, the problems it causes, and potential solutions for those problems. Addressing the problems associated with spyware will require a coordinated and sustained effort by the private sector and government officials. FTC staff is confident that the private sector and the government will undertake the measures necessary to protect consumers from the serious and growing problems associated with spyware.

ENDNOTES

1. This report was prepared by FTC staff and does not necessarily reflect the views of the Commission nor of any individual Commissioner.
2. The workshop agenda, transcript, panelist presentations, and public comments received by the Commission are available at: <http://www.ftc.gov/bcp/workshops/spyware/index.htm>.
3. Beales, Workshop Transcript, pp. 11-13 (hereinafter Tr. 11-13).
4. In connection with the workshop, the Commission received 768 public comments.
5. Sharon Wienbar, *The Spyware Inferno*, C/Net News.com (Aug. 13, 2004), available at http://news.com.com/The+spyware+inferno/2010-1032_3-5307831.html.
6. *Id.*
7. Steve Gibson, Gibson Research Corporation, *OptOut*, available at <http://www.grc.com/optout.htm>.
8. See, e.g., PCWorld.com, *Business Strike[s] Back at Spyware* (Aug. 16, 2004) (“[S]pyware is said to encompass everything from marketing cookies, pop-ups and adware downloaded with peer-to-peer file-sharing programs to malicious Trojans and keystroke loggers designed to steal personal data.”), available at <http://www.pcworld.com>; anti-spyware-software.net, *Definition of the term Spyware*, (July 12, 2004) (“If you ask 10 experts what the term Spyware describes[,] you will get 10 very different answers.”), available at <http://www.anti-spyware-software.net>.
9. See generally Panel 1 discussion, Tr. 15-62.
10. Black, Tr. 19; Bohannon, Tr. 38.
11. See, e.g., Schwartz, Tr. 17; Lafferty, Tr. 21; Naider, Tr. 32-33. Some definitions of spyware, however, apparently do not require that the software be downloaded or installed without the consent of the user. See, e.g., US-CERT Security Tips, *National Cyber Alert System: Recognizing and Avoiding Spyware* (Aug. 25, 2004) (“[Spyware] refers to a category of software that, when installed on your computer, may send you pop-up ads, redirect your browser to certain websites, or monitor the websites that you visit.”), available at <http://www.us-cert.gov/cas/tips/ST04-016.html>; Webopedia Computer Dictionary, *Spyware* (Spyware is “[a]ny software that covertly gathers user information through the user’s Internet connection, with or without his knowledge, usually for advertising purposes.”), available at <http://www.webopedia.com/TERMS/spyware.html>. See also Hoofnagle, Tr. 133-34 (suggesting that notice and consent may not be sufficient because many highly invasive programs provide notice and consent).
12. FTC staff has published *Dot Com Disclosures: Information About Online Advertising* (2000), available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html>, to provide guidance to businesses about clearly and conspicuously disclosing information (including information about software to be installed) in an online context. As described *infra* in Section V.A.1, the failure to disclose information or to do so inadequately may be a violation of Section 5 of the FTC Act.
13. See, e.g., Everett-Church Tr. 139-40; Howes, Comment 59; Association of Shareware Professionals-2 (hereinafter “ASP”), Comment 352.
14. See, e.g., SEARCHCRM.com Definitions, *Spyware* (“Spyware is any technology that aids in gathering information about a person or organization without their knowledge.”), available at <http://searchcrm.techtarget.com>; SpywareSurerBeware.com, *Spyware FAQs*, (“Spyware is the term given to applications or software that “spies” or sends information to the distributor of the spyware about your surfing habits, usually for marketing purposes.”), available at <http://spyware.surferbeware.com/spyware-faqs.htm>; Spywareinfo.com, (“Spyware is software or hardware installed on a computer without the user’s knowledge which gathers information about that user for later retrieval by whomever controls the spyware.”), available at <http://www.spywareinfo.com/articles/spyware>.

15. Howes, Comment 59 (describing the history of spyware).
16. See, e.g., Center for Democracy and Technology (hereinafter “CDT”), *Ghosts in Our Machines: Background and Policy Proposals on the ‘Spyware’ Problem* (November 2003), submitted as an attachment to Comment 10 (hereinafter “Ghosts attachment”); Sharon Wienbar, *The Spyware Inferno*, *supra* n. 4 (“Some in Congress call [spyware] ‘cyber trespass’”); James L. Gattuso, *Locking the Door Against Internet Trespass: Are New Laws Needed?*, Heritage Foundation (Sept. 27, 2004) (spyware described as “trespassers on your PC”), available at <http://www.heritage.org/Research/Regulation/wm575.cfm>. Cf. Turner, Comment 184.
17. For example, even if an individual software program might not significantly impair the operation of a user’s computer, the cumulative effect of several similar programs could be debilitating. Hill, Tr. 110-111; ASP-2, Comment 352.
18. A related issue is to what extent “cookies” are spyware. Cookies are text files (not software) that a web server places on a user’s hard drive. The text files may contain a user’s preferences or log-in information for a website. Whenever the user returns to that website, the cookie file is sent to the website so that the information in that file can be used to customize and facilitate the user’s interaction with the website. Other cookies, known as “tracking cookies,” record information about a user’s interaction with multiple websites. For example, advertising networks may place tracking cookies on a user’s hard drive to record which other websites within the network a user visits. Cookies are usually placed without any notice to users, although most Internet browsers can be set to alert users when a cookie is about to be placed and give them the option of blocking the cookie. See FTC Statement, *Online Profiling: Benefits and Concerns* (before the Senate Committee on Commerce, Science and Transportation, June 13, 2000) available at <http://www.ftc.gov/os/2000/06/onlineprofile.htm> and *Online Profiling: A Report to Congress* (FTC June 2000) (discussing the role of tracking cookies in the development of online user profiles used to target advertising), available at <http://www.ftc.gov/os/2000/06/onlineprofilingreportjune2000.pdf>.
19. Naider, Tr. 32-33; Lafferty, Tr. 33-34. See also ASP, Comment 68 (discussing the history of adware).
20. These non-targeted ads may be displayed via pop-up windows, but also by changing the user’s home page or redirecting the user’s search requests. See Section III.B, *infra* and McLaughlin, Tr. 164-66 and Presentation, Slide 6.
21. Naider, Tr. 32; Lafferty, Tr. 34.
22. Howes, Comment 59.
23. See, e.g., Electronic Privacy Information Center (hereinafter “EPIC”), Comment 199; Howes, Comment 59; ASP, Comment 68 and ASP-2, Comment 352; Turner, Comment 184.
24. See, e.g., Bohannon, Tr. 24; Plessner, Tr. 125; Consumer Software Working Group (hereinafter “CSWG”), Comment 197; ASP, Comment 68 at 1; AWS Convergence Technologies (hereinafter “AWS”), Comment 354.
25. Bohannon, Tr. 25.
26. See Spyware Control Act, Utah Code Ann. §13-39-101, *et seq.* (1953). In June 2004, the Utah statute was preliminarily enjoined on the grounds that it was likely to violate the Commerce Clause of the United States Constitution. See *WhenU.com, Inc. v. Utah*, Civ. Act. No. 040907578 (3d Judicial Dist. Ct. Utah June 22, 2004).
27. Bohannon, Tr. 24-25. Bohannon described the Utah statute as defining spyware, in part, as “any software that monitors usage of the Internet and transmits information back” to a remote computer. *Id.* He also pointed out that this definition might apply to various benign Internet communications, including the underlying software for instant messaging, and that although the Utah law attempted to address only pop-up advertising, he believes there is a serious risk that it also affects non-advertising pop-up windows.
28. See, e.g., Black, Tr. 19; Naider, Tr. 22-23; Bohannon, Tr. 24 and 52. See also Distributing Computing Industry Ass’n (hereinafter “DCIA”), Comment 32; AWS, Comment 354; Lavasoft, Comment 351 (stating that it bases

- its decision whether to include a program in its spyware detection tool on the program's behavior and the perceived intent of the developer).
29. See, e.g., Bohannon, Tr. 19; Lafferty, Tr. 20; Naider, Tr. 21. The Consumer Software Working Group (CSWG), an organization composed of high-technology companies, trade associations, and consumer groups, issued a report at the time of the workshop stating that there is a consensus that three types of software-related practices (hijacking, surreptitious surveillance, and inhibiting termination) are unfair or deceptive. See CSWG, Comment 197. Another comment would add to this list programs that, without notice, set themselves to run automatically at start-up. ASP, Comment 68.
 30. See, e.g., CSWG, Comment 197.
 31. Federal Trade Commission, Public Workshop: Monitoring Software on Your PC: Spyware, Adware, and Other Software, 69 Fed. Reg. 8538 (Feb. 24, 2004). Available at: <http://www.ftc.gov/os/2004/02/040217spywareworkshopfrn.pdf>.
 32. See, e.g., Naider, Tr. 22-23; Plesser, Tr. 124-25.
 33. See, e.g., Lafferty, Tr. 20-21; Naider, Tr. 21-22; EPIC, Comment 199; Howes, Comment 59.
 34. See, e.g., Cushman, Tr. 70-71; Gordon, Tr. 72-75 and Presentation, Slides 1-3; Thompson, Tr. 76; Wood, Tr. 76.
 35. For example, one recent study by Earthlink and Webroot counted both software programs and tracking cookies as spyware. See *Earthlink Spyware Audit Report* (Oct. 4, 2004), available at <http://www.earthlink.net/spyaudit/press> (finding an average of 26 instances of spyware or adware on participants' computers). In contrast, another recent study counted software, but not cookies, as spyware. See America Online and National Cyber Security Alliance, *The AOL/NCSA Online Safety Study* (Oct. 2004), available at http://www.staysafeonline.info/news/safety_study_v04.pdf (finding that 80% of study participants had spyware or adware on their computers).
 36. Participants focused primarily on spyware as it relates to computers with Microsoft Windows operating systems. Accordingly, most of the information summarized in this report relates to Windows-based computers. It has been reported that spyware is less prevalent on computers with other operating systems, such as the Apple operating system. See, e.g., John C. Dvorak, *Panic Over Spyware*, PC Magazine (Dec. 20, 2004), available at <http://www.pcmag.com>.
 37. See, e.g., ASP, Comment 68.
 38. Schwartz, Tr. 45. One panelist cautioned, however, that the widespread use of P2P file-sharing programs and the large numbers of files shared over P2P file-sharing networks may have created the impression that P2P file-sharing plays a larger role in disseminating spyware than it actually does. Black, Tr. 44. See also CDT, *Ghosts* attachment, Comment 10; Internet Privacy Conservation Council, Comment 29; Howes, Comment 59; EPIC, Comment 199.
 39. ASP, Comment 68.
 40. Thompson, Tr. 83-84; Gordon, Tr. 84-85.
 41. ASP, Comment 68.
 42. See, e.g., Friedberg, Tr. 201-02; Howes, Comment 59.
 43. Friedberg, Tr. 202.
 44. For an example of this dialogue box, see Friedberg Presentation, Slide 4, attached hereto as Appendix B.
 45. Friedberg, Tr. 202-03.
 46. Friedberg, Tr. 207 and Presentation, Slide 10; Lavasoft, Comment 351 at 4. Certain programs may require the lower security settings in order to install, and users may simply forget to change the settings back to the Medium security level. Friedberg, Tr. 207.
 47. Friedberg, Tr. 207-08; ASP-2, Comment 352.

48. Although spyware can be installed by any type of website, it is often installed by pornographic websites. Gordon, Tr. 107-08. Spyware is also frequently installed from sites attractive to children, such as game-related websites that offer game hints and “cheat codes” for the latest video or computer games. *Id.* at 108. (Cheat codes tell computer game players how to change a game to their advantage, for example, which keystroke sequence will gain them access to an endless supply of weapons.)
49. Schwartz, Tr. 46; Black, Tr. 49; CDT, Comment 10; CSWG, Comment 197.
50. Schwartz, Tr. 46; CSWG, Comment 197; Lavasoft, Comment 351.
51. Friedberg, Tr. 203 and Presentation, Slide 6.
52. Friedberg, Tr. 204 and Presentation, Slide 7.
53. Often, these fake messages are formatted using a blue screen and simple text formatting or a grey pop-up window. The message may falsely claim that the spyware program is a “System Update” needed to protect one’s privacy, or it may take the form of a “Security Alert” warning that one’s computer is being attacked by spyware and claiming that the program is needed to get rid of the spyware. Friedberg, Presentation, Slides 8 and 9, attached hereto as Appendices C and D. Similarly, users may visit a website and be told that certain software is needed to view the site, when in fact the software is not necessary and is actually spyware. Schwartz, Tr. 45; ASP, Comment 68.
54. Friedberg, Tr. 205 and Presentation, Slides 8 & 9, attached hereto as Appendices C and D.
55. FTC staff notes that instead of clicking on the X, users should “close” such fake “windows” by closing the website that contains the image. In many cases, users can check whether the “pop-up window” is really an image by moving the mouse cursor to the upper left corner of the “window.” If the “window” is an image, a toolbar will appear, with icons to save the image, print the image, etc.
56. Schwartz, Tr. 45.
57. In most Windows operating systems, the Add/Remove feature can be reached by clicking on Start, then on Control Panel, and then on Add/Remove. Use of this tool is the standard method on Windows machines for uninstalling programs from the computer.
58. *See, e.g.*, CDT, *Ghosts* attachment, Comment 10.
59. Thompson, Tr. 93; Wood, Tr. 103-05.
60. In contrast, a virus may install itself in only a couple of directory locations and make just a few changes to the Registry file, making it fairly simple to remove once it has been detected. Thompson, Tr. 95.
61. Gilroy, Tr. 104; Wood, Tr. 105.
62. Thompson, Tr. 102; Wood, Tr. 103-04.
63. Wood, Tr. 105.
64. Thompson, Tr. 102-03. *See also* Naider, Tr. 57; Black, Tr. 58.
65. Thompson, Tr. 103.
66. Thompson, Tr. 91 and 102; Lavasoft, Comment 351 at 2. This self-defending technology – running multiple processes and when one goes down, the other activates – was borrowed from the virus arena. Gordon, Tr. 103.
67. Cushman, Tr. 71.
68. Arbogast, Tr. 161-62.
69. Cushman, Tr. 71; Gilroy, Tr. 79-80.
70. Wood, Tr. 112. When a software program is activated, it causes at least one, if not multiple, operations to start.

71. Hill, Tr. 110-111; ASP-2, Comment 352.
72. Cushman, Tr. 71; Gordon, Tr. 72.
73. Thompson, Tr. 105. Several panelists stated that adware can cause functionality problems similar to those that spyware causes. Gordon, Tr. 75; Thompson, Tr. 110; Cushman, Tr. 110.
74. One commenter stated that his charges for fixing a spyware-afflicted computer average \$220, and have gone as high as \$480. ASP-2, Comment 352 at 3. Spyware imposes costs on businesses because of the downtime required to repair computers that are not functioning properly. Gordon, Tr. 77; Wood, Tr. 80. Small companies lacking in-house computer staffs may also have to pay a professional to fix spyware-infected machines. Wood, Tr. 80.
75. Hill, Tr. 109 (five days).
76. Patten, Comment 274.
77. Gilroy, Tr. 79.
78. Hill, Tr. 95-96.
79. Wood, Tr. 83.
80. CSWG, Comment 197 at 2.
81. Gilroy, Tr. 82-83.
82. Turner, Comment 184.
83. McLaughlin, Tr. 164-66 and Presentation, Slide 6.
84. McLaughlin, Tr. 164 and Presentation, Slide 2. Another spyware program secretly substitutes its own search toolbar for Google's toolbar. McLaughlin, Tr. 165 and Presentation, Slide 4.
85. Gordon, Tr. 74; Lavasoft, Comment 351.
86. Gordon, Tr. 74.
87. Hoofnagle, Tr. 118-19; Plesser, Tr. 125.
88. Everett-Church, Tr. 122; Gordon, Tr. 74.
89. Everett-Church, Tr. 122.
90. *Id.*; Gordon, Tr. 74.
91. Lafferty, Tr. 34; Everett-Church, Tr. 120 (noting, however, that the use of deceptive tactics to gain installation would raise doubts about the truth of claims that a program only collects information in the aggregate).
92. Hoofnagle, Tr. 117-18 (would also view collection of non-sensitive data as raising privacy concerns); *cf.* Hendricks, Tr. 119.
93. Everett-Church, Tr. 123; Plesser, Tr. 124-25.
94. Koenig, Tr. 126.
95. *Id.*
96. Hendricks, Tr. 128.
97. Gordon, Tr. 82; Wood, Tr. 83. One method of doing this is to change the local Host file, which can be used to translate a domain name into the IP number assigned to its Web server that is actually used to find that site. If, for example, www.mcafee.com is deliberately mistranslated to the wrong IP number, users will not be able to reach McAfee's website.

98. Turner, Comment 184. *See also* ASP-2, Comment 352 (Some spyware will detect and halt, or even damage, some anti-spyware programs).
99. Porter, Tr. 248-49. This panelist described a similar situation in which a couple purchased remote monitoring software to enable them to track their children's online activities. However, the program had a security flaw that could easily be exploited to allow hackers to also remotely track their children's activities. Thus, by purchasing software to protect their children, they actually exposed them to additional risks. *Id.*
100. Thompson, Tr. 89; Gordon, Tr. 89-90; CDT, Comment 10.
101. Thompson, Tr. 84. Although none of the panelists were aware to date of hackers actually having been able to use update mechanisms to gain such unauthorized access, several expressed the view that it was only a matter of time before hackers succeeded. Thompson, Tr. 89; Gordon, Tr. 89-90.
102. Gilroy, Tr. 87. In one instance, this panelist found a hidden three-gigabyte file (*i.e.*, 3,000,000,000 bytes) on a consumer's spyware-infected hard drive, and the origin and purpose of the file could not be determined. *Id.* *Cf.* CDT, Comment 10 (once installed, spyware may secretly download and install other applications).
103. Thompson, Tr. 83-84; Lavasoft, Comment 351. Another panelist stated that if a consumer's computer does not have P2P file-sharing software, some spyware will install a file-sharing program on its own. Gordon, Tr. 85.
104. Thompson Tr. 85-86. A denial-of-service (DoS) attack occurs when a network or server is deliberately overloaded with useless information to the point that it cannot handle legitimate traffic. For example, a DoS attack may direct so many requests for access to a website that no legitimate requests can get through, thereby "denying service" to other persons trying to access that website server. Such attacks launched from multiple computers, as "bot farms" do, are known as distributed denial-of-service (DDoS) attacks.
105. ASP, Comment 68.
106. Gordon, Tr. 88. One panelist said that his ISP threatened to terminate his account because, unbeknownst to him, someone had breached the security of his computer and was using it to distribute spam. Hughes, Tr. 175; *see also* CSWG, Comment 197.
107. Cushman, Tr. 77; Thompson, Tr. 77; Gordon, Tr. 92.
108. Wood, Tr. 92. In fact, such a breach reportedly occurred when a keystroke logger deposited on a game developer's computer led to the game's source code being posted on the Internet and caused the company to forego a pre-Christmas launching of the new game. Moll, Tr. 248.
109. The *AOL/NCSA Online Safety Study* (October 2004) conducted by America Online ("AOL") and the National Cyber Security Alliance ("NCSA") found that while 47% of study participants said they did not have spyware or adware on their computers, a scan of their computers showed that 80% of them did. Of those that did have spyware or adware on their computers, 89% were not aware of all of the programs found.
110. Gordon, Tr. 72-73; Hill, Tr. 95-96; Sarrel, Tr. 283-84.
111. Cushman, Tr. 70.
112. Gordon, Tr. 72.
113. Cushman, Tr. 70; Gordon, Tr. 73. According to McAfee, adware is the biggest single issue it is facing. From August 2003 through March 2004, McAfee's software detected just under 40 million adware programs on its customers' computers, with 11.4 million being detected in March 2004 alone, accounting for 86% of all unknown programs installed on these computers. Gordon, Tr. 73 and Presentation, Slides 2 and 3.
114. *See, e.g.*, Hill, Tr. 95-96.
115. Cushman, Tr. 71; Hill, Tr. 111.
116. Hill, Tr. 95.
117. Hill, Tr. 97.

118. Cushman, Tr. 72. *Cf.* Plesser, Tr. 127; Hendricks, Tr. 128.
119. Mondera, Comment 353; InterContinental Hotels Group, Comment 355.
120. *Id.*
121. Koenig, Tr. 147.
122. Lafferty, Tr. 34.
123. Everett-Church, Tr. 148; Naider, Tr. 32-33.
124. Maier, Tr. 173; Hughes, Tr. 174-76; Schwartz, Tr. 182; McLaughlin, Tr. 191; Polonetsky, Tr. 186; Plesser, Tr. 131.
125. Microsoft Windows XP comes with a basic firewall that must be turned on to begin operating. In the 2004 update for XP, the firewall is turned on by default.
126. Bellovin, Tr. 214.
127. Bellovin, Tr. 214.
128. Hoofnagle, Tr. 130.
129. In June 2004, the United States Computer Emergency Readiness Team ("US-CERT") issued an alert detailing various security vulnerabilities in Internet Explorer. The alert stated that "IE is integrated into Windows to such an extent that vulnerabilities in IE frequently provide an attacker significant access" to the Windows operating system. It also suggested that using a different browser would decrease these security risks. US-CERT Vulnerability Note VU#713878 (first published June 9, 2004). US-CERT is a private-public partnership between the Department of Homeland Security and the CERT Coordination Center at Carnegie Mellon University.
130. *See, e.g.,* Marty Sems, *Go, Go, Mozilla*, Smart Computing (Dec 2003), available at <http://www.smartcomputing.com>.
131. Porter, Tr. 222. *See* Part II.B.3, *supra*, for an explanation of the ActiveX technology and how it works.
132. Each ActiveX control or program code has a unique number, known as the Class ID, or CLSID. Porter, Tr. 222.
133. *Id.*
134. FTC staff notes that information on how to obtain free versions of ActiveX blockers, anti-spyware scanners and other anti-spyware tools can be found at non-commercial websites, such as <https://netfiles.uiuc.edu/ehowes/www/main.htm> or www.spywareinfo.com, or at commercial websites, such as www.lavasoft.de, security.kolla.de, www.pestpatrol.com, www.spywareguide.com or www.webroot.com.
135. Moll, Tr. 216. Disabling the spyware obviates the need to delete thousands of files or Registry entries associated with the spyware. Moll, Tr. 216.
136. Moll, Tr. 216. The analysis may look at such items as Registry entries, the unique ID associated with an ActiveX control, specific files or directories, window titles, file size and hidden attributes, and specific programming code. Porter, Tr. 216-17 and Presentation, Slide 2.
137. Moll, Tr. 218.
138. Moll, Tr. 221. To minimize this lag time, anti-spyware companies are attempting to develop a more behavior-based detection mechanism that would allow them to identify certain computer actions as being associated with spyware, and then look for those actions in a program, as opposed to examining the filenames or file locations it uses. This would enable spyware programs to be detected without having to wait to analyze an actual copy of each program. Moll, Tr. 218, 221.

139. Hughes, Tr. 175-176.
140. Porter, Tr. 219. One panelist suggested that the use of spyware program scanners might have the side effect of encouraging best practices on the part of software distributors. If a distributor wants to avoid having its software disabled or removed, it will have to provide sufficient information at the time of installation to ensure that when the consumer is viewing the results of the subsequent spyware scan, he or she recalls the program and what it does. Polonetsky, Tr. 171.
141. Moll, Tr. 216.
142. Porter, Tr. 219. This program can be used on publicly accessible computers, such as those at public libraries, to detect spyware.
143. Another category of software that does not directly address spyware but can be useful as a last resort in removing it are system restorers or reverters. These programs take "snapshots" of a consumer's computer system and settings at various points in time; some also take "snapshots" for all software programs and files installed on the computer. Friedberg, Tr. 243. Subsequently, if a new program installation adversely affects the computer, the consumer can "roll back" his system to a previous point in time before the new program was installed. One drawback, however, of "rolling back" a system is that this may also eliminate any files or programs installed or created in the interim. *Id.*
144. Consumers seeking anti-spyware protection may benefit from the use of anti-virus software; the line between viruses and spyware is blurring, so spyware might be detected by an anti-virus program but not an anti-spyware program, and vice versa. Gordon, Tr. 72 and 84.
145. Hill, Tr. 99 (noting that if it were equally difficult to drive a car, there would not be an oil crisis because no one would drive); Hoofnagle, Tr. 129-30; Howes, Comment 59.
146. Schwartz, Tr. 172.
147. Polonetsky, Tr. 169-170; Moll, Tr. 223-24, 226.
148. Polonetsky, Tr. 169-170.
149. Moll, Tr. 223; Bellovin, Tr. 224-25; Friedberg, Tr. 227.
150. Bellovin, Tr. 224-25.
151. Weitzner, Tr. 226; Moll, Tr. 227.
152. Moll, Tr. 227-28 (speculating that spyware companies would stop targeting the credit card accounts of individual consumers, and instead, start targeting the bank that issued the credit card).
153. Friedberg, Tr. 209.
154. Friedberg, Tr. 209-10 (noting that web pages will usually indicate where they need a particular ActiveX control).
155. *Id.*
156. Friedberg, Tr. 211.
157. Friedberg, Tr. 212.
158. Weitzner, Tr. 234. A similar system for privacy policies, called P3P, or Platform for Privacy Preferences, automatically compares a consumer's privacy preferences with a website's privacy policy and alerts the consumer to any discrepancies. As a result, users do not have to actually read the individual privacy statements for each P3P-enabled website. Weitzner, Tr. 228-231.
159. Developers of operating systems and browsers could be particularly useful in developing such a labeling system. Weitzner, Tr. 234. Similarly, industry could develop a community rating system, in which consumers relied on the ratings of a trusted source to decide whether to install a program. Arbogast, Tr. 191-92.

160. Weitzner, Tr. 232-34 (noting that a labeling system could be valuable primarily for those spyware/adware programs that some consumers might want and others might not).
161. Bellovin, Tr. 237.
162. Friedberg, Tr. 238.
163. Bellovin, Tr. 237.
164. Bellovin, Tr. 237.
165. Moll, Tr. 239-40.
166. Panelists disagreed on the difficulty of drafting alert messages that would convey necessary information to users without confusing them. Moll, Tr. 243; Friedberg, Tr. 243; Hoofnagle, Tr. 130; ASP, Comment 68.
167. Friedberg, Tr. 243. The result would be not only wasted time, but perhaps also to lull users into mechanically clicking “Yes” to a spyware request to install.
168. Friedberg, Tr. 241-43; Hoofnagle, Tr. 130; ASP, Comment 68. *Cf.* Plessner, Tr. 132.
169. Hughes, Tr. 175-76; Maier, Tr. 180; Schwartz, Tr. 181-82; Kelly, Tr. 167, 183, 197.
170. Maier, Tr. 180; Schwartz, Tr. 181-82; Kelly, Tr. 183-84; Friedberg, Tr. 220-21. A common definitional structure for spyware would also assist companies trying to provide consumers with empowering anti-spyware tools, because companies are currently at risk for lawsuits when they identify a program as spyware. Weitzner, Tr. 219-220; Friedberg, Tr. 220-21.
171. Friedberg, Tr. 221.
172. Maier, Tr. 180; Arbogast, Tr. 191; Kelly, Tr. 197; Friedberg, Tr. 220; Kelly, Tr. 197.
173. Friedberg, Tr. 220-21.
174. Maier, Tr. 193-94. Maier also suggested that any such group should work with the FTC to get feedback, and may also want to conduct consumer research to determine what consumers think about spyware issues. *Id.*
175. Maier, Tr. 193; Schwartz, Tr. 193; Kelly, Tr. 197.
176. Hughes, Tr. 184; Polonetsky, Tr. 185.
177. Maier, Tr. 173.
178. Friedberg, Tr. 236-37. One possibility is that the “Always install software from X” option in the Windows Security Alert dialogue box could be adapted to allow consumers to choose to install software only from those following a set of best practices. Friedberg, Tr. 235.
179. Schwartz, Tr. 181; Maier, Tr. 173; Friedberg, Tr. 235; AWS, Comment 354.
180. Arbogast, Tr. 178; Maier, Tr. 180-81; Kelly, Tr. 183. One panelist stated that best practice guidelines might also need to define notice, consent, and the ability to uninstall differently depending on the type of program involved. Maier, Tr. 174, 180. For example, there might be different requirements, depending on whether the program to be installed was adware, a keylogger, or a parental control program. *Id.* In addition, several panelists suggested it might be better to establish privacy standards for all programs and not just spyware. Hoofnagle, Tr. 132-33 and EPIC, Comment 199 (stating that Digital Rights Management software is often privacy-invasive and resembles spyware); Hendricks at 136-37; Shaker, Comment 194.
181. Everett-Church, Tr. 139-40. *See also* ASP-2, Comment 352.
182. Everett-Church, Tr. 140, 144-45.
183. Gilroy, Tr. 94; ASP-2, Comment 352.
184. Moll, Tr. 244.

185. Moll, Tr. 245; Bellovin, Tr. 246.
186. FTC staff recognizes that bad actors would be unlikely to comply with best practice guidelines that industry develops. Law enforcement action likely would be necessary against such bad actors.
187. Arbogast, Tr. 178; Kelly, Tr. 183.
188. Schwartz, Tr. 171-72, 181. Another panelist observed that consumers do not fully understand the risks to personal information associated with installing free programs bundled with spyware, and that they will not be receptive to consumer education efforts until they do have a better understanding of these risks. Sarrel, Tr. 281, 283. *See also* Cushman, Tr. 110 (need for consumer education about the ramifications of installing the software they are being offered).
189. Schwartz, Tr. 171.
190. Schwartz, Tr. 198.
191. Maier, Tr. 194-95.
192. Schwartz, Tr. 181; Arbogast, Tr. 197.
193. Koenig, Tr. 134-35, 141-42; Plessner, Tr. 142. On the other hand, the install screens for a spyware program are identical to those for installing applications needed to view or play certain content. Consumers may be so accustomed to clicking "Yes" quickly to install the program needed to view the content they want, that they may click "Yes" automatically in response to a spyware installation request. Everett-Church, Tr. 139.
194. Arbogast, Tr. 179.
195. Cushman, Tr. 71.
196. Sarrel, Tr. 282. This panelist also suggested that software retailers maintain kiosks, subsidized by software vendors, to provide information about spyware. Sarrel, Tr. 283.
197. Engle, Tr. 258.
198. Section 5(n) of the FTC Act, 15 U.S.C. § 45(n).
199. Engle, Tr. 257-58. *See Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Assocs.*, 103 F.T.C. 110, 174-83 (1984).
200. Engle, Tr. 257-58.
201. It is also deceptive for a seller to remain silent in circumstances that convey to consumers an implied but misleading message. *See Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Assocs.*, 103 F.T.C. 110, 174-83 (1984). For instance, even if a software distributor says nothing at all about the fitness of bundled software, consumers may still take away from its silence that the software is reasonably fit for its intended purpose. If the spyware included in the bundle creates substantial security risks, such as exposing computers to hackers, the failure to inform consumers of such risks might be deceptive.
202. Engle, Tr. 291-92.
203. *See Dot Com Disclosures: Information about Online Advertising* (2000), available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html>.
204. *See In re Bonzi Software, Inc.*, FTC Dkt. No. C- 4126 (Oct. 6, 2004); *FTC v. BTV Industries, Inc.*, Civ. Act. No. CV-S-02-0437-LRH-PAL (D. Nev. Feb. 11, 2004); *FTC v. Baith*, Civ. Act. No. CV S-03-1306-LRH-RJJ (D. Nev. Feb. 11, 2004); *FTC v. D-Squared Solutions, LLC*, Civ. Act. No. AMD 03-CV310 (D. Md. Nov. 6, 2003); *FTC v. Alyon Technologies, Inc.*, Civ. Act. No. 1: 03-CV-1297 (N.D. Ga. May 15, 2003) *FTC v. Verity Int'l Ltd.*, Civ. Act. No. 00-Civ. 7422 (LAK) (S.D.N.Y. Nov. 21, 2002); *FTC v. NetSource One*, Civ. Act. No. 022-3077 (W.D. Ky. Nov. 2, 2002); *FTC v. John Zuccarini*, Civ. Act. No. 01-CV-4854 (E.D. Pa. May 24, 2002); *FTC v. RJB Telecom, Inc.*, Civ. Act. No. 00201-7 (Phx) (D. Az. Sept. 26, 2001); *FTC v. Hillary Sheinkin*, Civ. Act. No. 2-00-3636-18 (D.S.C. Aug. 29, 2001); *FTC v. Ty Anderson*, Civ. Act. No. C00-1843P

- (W.D. Wash. Aug. 29, 2001); *FTC v. Carlos Pereira d/b/a atariz.com*, Civ. Act. No. 99-1367-A (N.D. Va. Feb. 12, 2001) *FTC v. Audiotext Communications*, Civ. Act. No. Cv-97 0726 (DRH) (E.D.N.Y. Nov. 4, 1997); *In re Beylen Telecom, Ltd.*, 125 F.T.C. 276 (1998).
205. 18 U.S.C § 1030(a).
206. Eckenwiler, Tr. 260-61. *See also* Fraud and Related Activity in Connection with Access Devices, 18 U.S.C. § 1029, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22, and Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-11.
207. Eckenwiler, Tr. 261-62.
208. Baird, Tr. 265-67.
209. Eckenwiler, Tr. 259-62, 290-91; Engle, Tr. 258, 263, 291-92.
210. H.R. 2929, 108th Cong. (2004). The bill, originally named Safeguards Against Privacy Invasions Act (SPI Act), was introduced by Rep. Mary Bono on July 25, 2003.
211. H.R. 29, 109th Cong. (2005). The bill again was introduced by Rep. Mary Bono.
212. H.R. 4661, 108th Cong. (2004), was introduced by Rep. Jim Goodlatte on June 23, 2004.
213. S. 2145, 108th Cong. (2004), was introduced by Senators Conrad Burns, Ron Wyden and Barbara Boxer on February 27, 2004.
214. Utah Code Ann. §13-39-101, *et seq.* (1953).
215. *WhenU.com, Inc. v. Utah*, Civ. Act. No. 040907578 (3d Judicial Dist. Ct. Utah June 22, 2004).
216. California Consumer Protection Against Computer Spyware Act, S.B. 1436, to be codified as Chapter 32 to Division 8 of the California Business and Professions Code.
217. These states include: Iowa (S.F. 2200), Michigan (S.B. 1315 and S.B. 1316), New York (S.B. 7141), Pennsylvania (H.B. 2788), and Virginia (H.B. 1304).
218. Urquhart, Tr. 275, 288.
219. The FTC's consumer education brochure concerning spyware is available at <http://www.ftc.gov/bcp/online/pubs/alerts/spywarealrt.htm>.
220. Engle, Tr. 257.
221. Prostic, Tr. 276-77.
222. *See generally* <http://www.us-cert.gov/aboutus.html>.
223. *See* <http://www.us-cert.gov/cas/alerts/index.html> and <http://www.us-cert.gov/cas/techalerts/index.html>. CERT also makes available articles aimed at home users that explain security-related issues in general. *See* <http://www.cert.org/homeusers>.
224. *Prepared Statement of The Federal Trade Commission Before the Subcommittee on Competition, Foreign Commerce, and Infrastructure of the Committee on Commerce, Science and Transportation, United States Senate* (June 11, 2003). The legislation, the International Consumer Protection Act, H.R. 3143, was reported out of the House Judiciary Committee during the last session of Congress, but the House took no action on the bill. The Senate Commerce Committee voted out a similar bill, S. 1234, which passed the Senate by unanimous consent.

Appendix A: Workshop Agenda

AGENDA

APRIL 19, 2004



Monitoring Software
on Your PC:
Spyware, Adware,
and Other Software

Monitoring Software on Your PC: Spyware, Adware, and Other Software

9:00 Opening Remarks – **Chairman Muris**

9:15 Panel One: Defining, Understanding, and Disseminating Spyware

Panelists:

Ed Black, President & Chief Executive Officer, Computer & Communications Industry Association

Mark Bohannon, General Counsel & Senior Vice President Public Policy, Software & Information Industry Association

Marty Lafferty, Chief Executive Officer, Distributed Computing Industry Association

Avi Naider, President & Chief Executive Officer, WhenU.com, Inc.

Ari Schwartz, Associate Director, Center for Democracy and Technology

10:15 Break

10:30 Remarks Concerning Risks of Spyware – **Commissioner Swindle**

10:45 Panel Two: Security Risks and PC Functionality

Panelists:

Maureen Cushman, Legal Counsel, U.S. Consumers, Dell

John Gilroy, Technology Contributor for *The Washington Post* and Co-Host of WAMU's "The Computer Guys" program

Bryson Gordon, Senior Manager, Product Management Group, McAfee Security, Consumer Division

Austin Hill, Co-Founder and Chief Privacy Expert, Zero-Knowledge Systems

Roger Thompson, Vice President, Product Development, Pest Patrol

Michael Wood, Vice President of Sales, USA and Canada, Lavasoft

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11:45 Panel Three: Privacy Risks

Panelists:

Ray Everett-Church, Chief Privacy Officer, TurnTide, Inc.

Evan Hendricks, Editor-Publisher, "Privacy Times"

Chris Jay Hoofnagle, Associate Director, Electronic Privacy Information Center

James H. Koenig, Esq., Chief Practice Co-Leader, Privacy Strategy and Compliance,
PricewaterhouseCoopers, LLP

Ronald Plessner, Esq., Piper Rudnick LLP

12:45 Remarks Concerning Possible Responses to Spyware – **Commissioner Thompson**

1:00 Lunch

2:30 Panel Four: Industry Responses to Spyware – Industry Best Practices and Working
with the Government

Panelists:

Brian Arbogast, Corporate Vice President, Identity, Mobile and Partner Services
Group, MSN and Personal Services Division, Microsoft Corporation

J. Trevor Hughes, Executive Director, Network Advertising Initiative

Chris Kelly, Chief Privacy Officer and General Counsel, Spoke Software

Fran Maier, Executive Director & President, TRUSTe

Andrew McLaughlin, Senior Policy Counsel, Google

Jules Polonetsky, Vice President, Integrity Assurance, AmericaOnline, Inc.

John Schwarz, President and Chief Operating Officer, Symantec Corp.

3:30 Break



**Monitoring Software
on Your PC:
Spyware, Adware,
and Other Software**

3:45 Panel Five: Technological Responses to Spyware

Panelists:

Steven Bellovin, AT&T Fellow with AT&T Labs-Research

Jeffrey Friedberg, Director of Windows Privacy, Microsoft

David Moll, President, WebRoot (maker of SpySweeper)

Wayne Porter, Co-Founder and Primary Editor, SpywareGuide.com (distributor of X-Cleaner)

Daniel Weitzner, Technology & Society Domain Leader, World Wide Web Consortium; Researcher at MIT

4:45 Panel Six: Government Responses to Spyware – Law Enforcement, Consumer Education, and Coordinating with Industry

Panelists:

Jennifer Baird, Legislative Counsel, Office of Rep. Mary Bono

Mark Eckenwiler, Deputy Chief, Computer Crime and Intellectual Property Section, Department of Justice

Mary Engle, Associate Director, Division of Advertising Practices, Federal Trade Commission

Elizabeth Prostic, Chief Privacy Officer, U.S. Department of Commerce

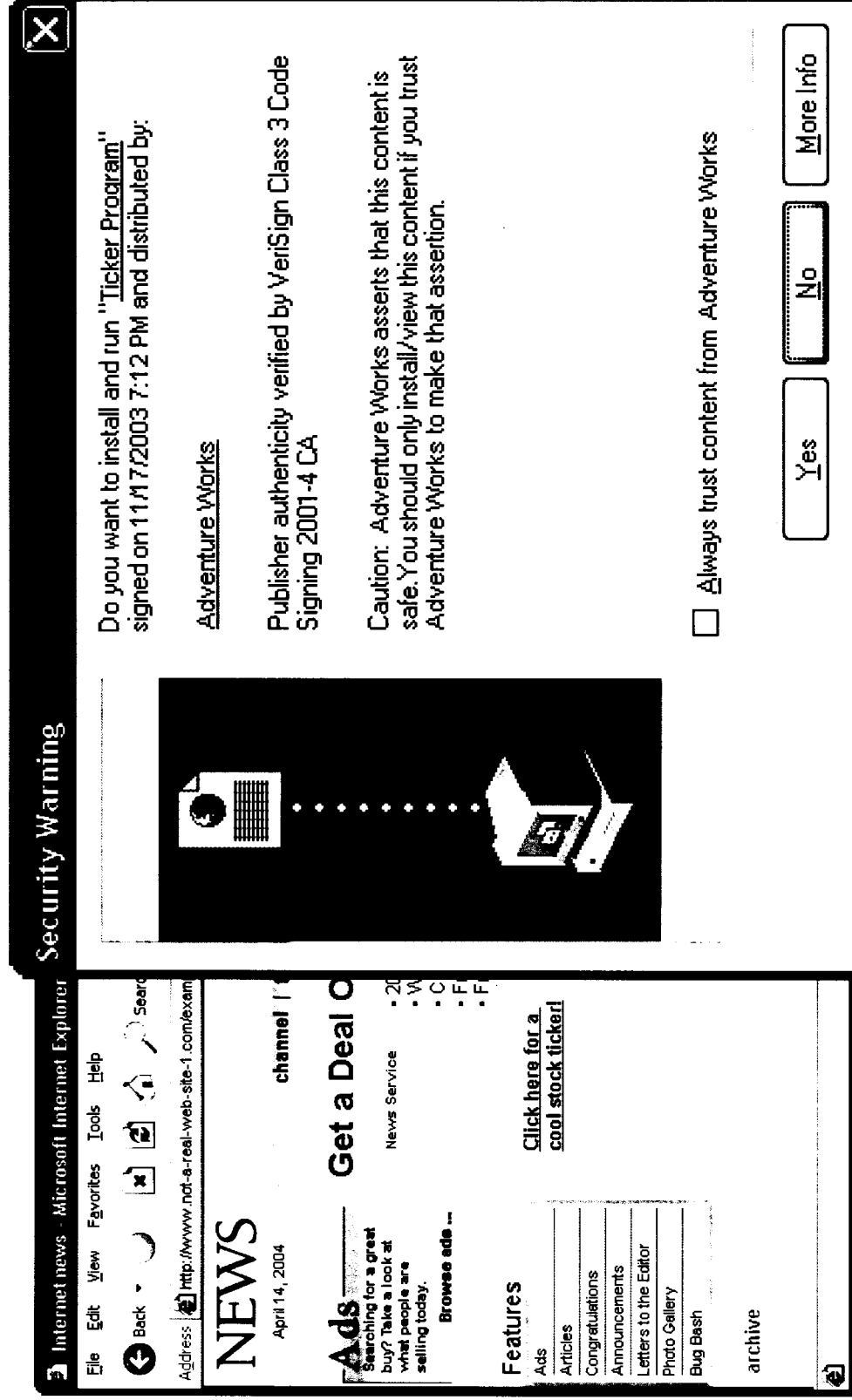
Matthew Sarrel, Technical Director, PC Magazine

Stephen Urquhart, State Representative, Utah House of Representatives

5:45 Closing Remarks – Howard Beales, Director, Bureau of Consumer Protection, Federal Trade Commission

Appendix B: Security Warning Displayed

Security Warning Displayed

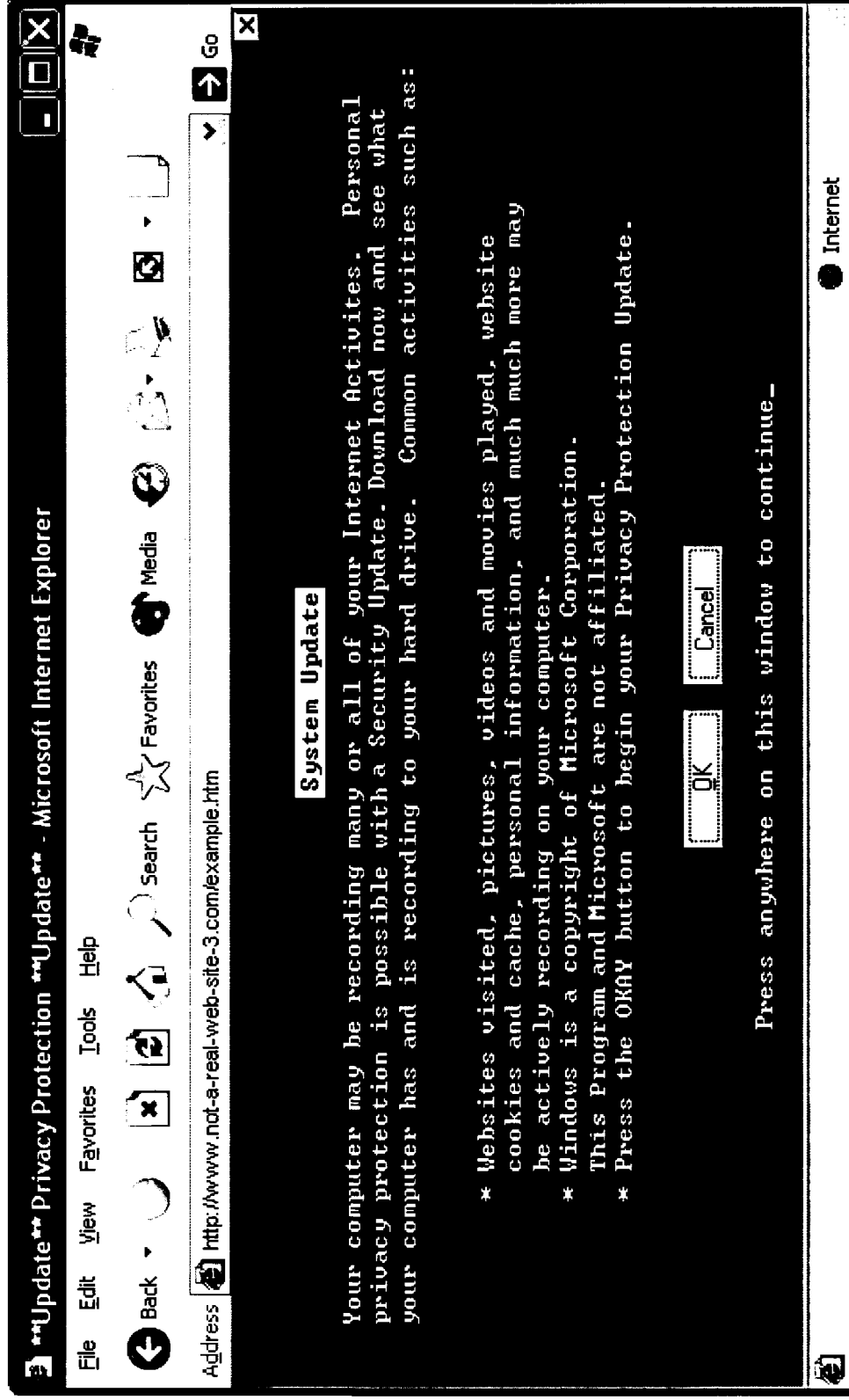


April 19, 2004

Microsoft Corporation

Appendix C: "Cancel" Means "Yes"

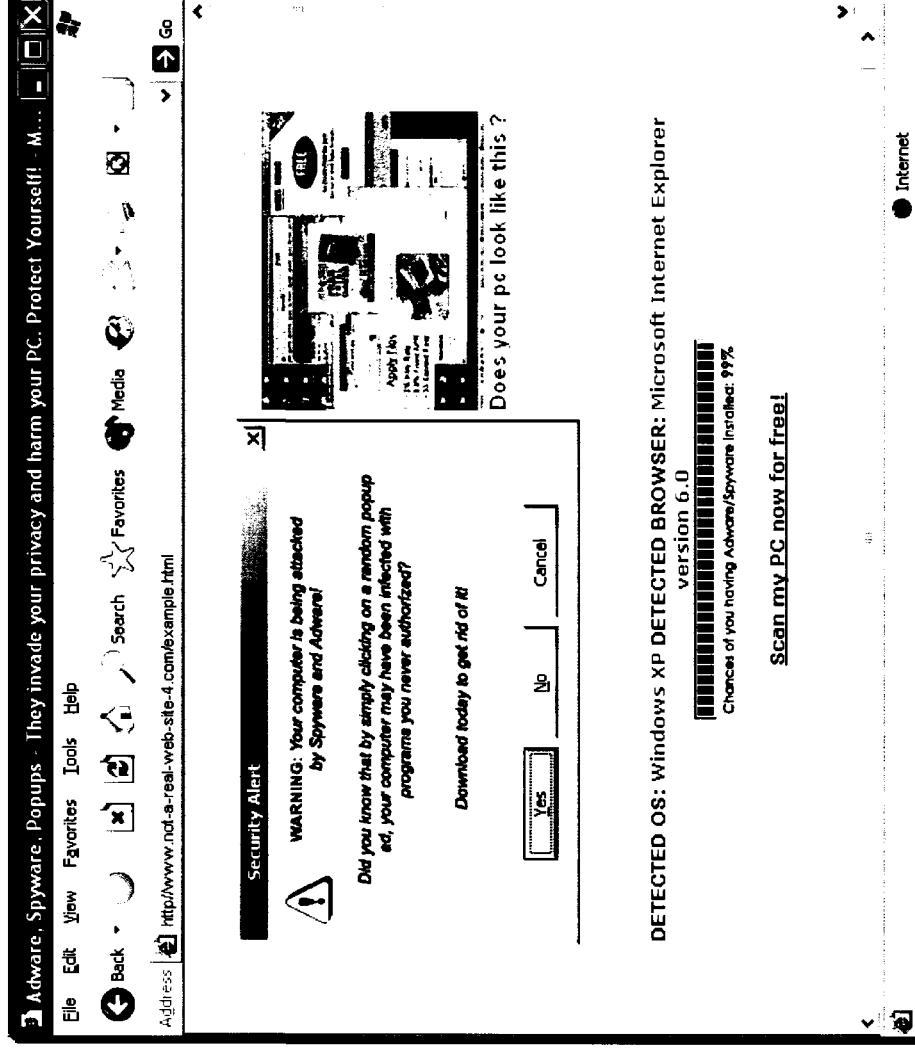
“Cancel” Means “Yes”



Appendix D: Faux Security Alert

Faux Security Alert

(really just a picture)



FEDERAL TRADE COMMISSION

ftc.gov

1-877-FTC-HELP

FOR THE CONSUMER
