

Hon. Joe Barton, Chairman  
Committee on Energy and Commerce  
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Hon. John Dingell, Ranking Member  
Committee on Energy and Commerce  
2322 Rayburn House Office Building  
Washington, DC 20515

September 24, 2004

Dear Chairman Barton and Ranking Member Dingell:

We write to thank you for your hard work on behalf of consumers to address the threat of spyware. As you know, spyware is a growing epidemic endangering the privacy of Internet users, their ability to control their own computers, and the health of the Internet as whole. We appreciate the deliberative and open process that the Committee has maintained in working to craft an appropriate legislative remedy to this complicated problem.

As you know, the Center for Democracy and Technology (CDT) previously raised concerns regarding the effectiveness of earlier versions of the spyware bill approved by your Committee, H.R. 2929. As a result of the admirable work of the Committee, we are now pleased to say that the latest drafts of the bill appear to have answered many of our largest concerns, and we believe it would represent a helpful first step toward combating spyware. We continue to believe that baseline privacy legislation is needed to address a range of underlying privacy issues, many of which are implicated by spyware, but which could not be taken up in this bill. We hope to continue to work with the Committee to address these issues in future legislation.

CDT has supported Section 2 of H.R. 2929 since it was added to the bill, and we continue to believe this section will help increase prosecution of deceptive activity related to spyware. While many of the acts described in this Section are already prohibited under the FTC Act, H.R. 2929 will give the Federal Trade Commission the clear authority and explicit mandate to pursue such behavior. As the Chairman pointed out in the hearing on H.R. 2929, the FTC has done little to date to punish purveyors of spyware, even when CDT brought cases of clearly deceptive and unfair activity to the Commission. CDT also strongly supports the reporting requirement under Section 7, which will further pressure the FTC to more actively pursue spyware purveyors.

As H.R. 2929 moves forward, we would strongly encourage the Committee to work closely with your colleagues in the Judiciary Committee on punishing spyware related

behaviors. They have also shown great leadership on this issue and have developed an important bill to help address this pernicious problem.

Section 3 of HR 2929, which creates notice requirements for information collection programs, is substantially improved over previous versions. CDT's primary concern with earlier drafts was that the notice requirement was not limited to software that would be of concern to users, and therefore would not help users distinguish problematic programs. Adjustments to the definition of "collect" in the most recent bill, which effectively eliminate the need for duplicate notices where information is transmitted to a party intended by the user, ameliorate several of our earlier concerns.

We note, however, that as a result of the way the collection exception is drafted, Section 3 does not provide for notice to consumers if an intended recipient of consumer information later shares that information with third parties for purposes beyond those for which the information was initially sent. CDT had earlier proposed alternative language for the notice section based on a "primary purposes" standard to help address this issue. We recognize that the current construction focuses on the initial transmission of information in order to target narrowly the practices now used most commonly by spyware makers. Spyware makers may simply shift their practices in the future, however, to negotiate around requirements in the bill.

We believe these and other outstanding issues point to the continued need to address online privacy in a long-term and coherent way. We hope that the current effort on spyware can provide a jumping off point for efforts to craft baseline standards for online privacy, now that many companies have expressed their support for such a goal. We have very much appreciated the Committee's hard work and openness to comment in the spyware process, and we look forward to continuing to work with you on digital privacy issues in the future.

Sincerely

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