

INFORMED P2P USER ACT

DECEMBER 8, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WAXMAN, from the Committee on Energy and Commerce, submitted the following

R E P O R T

[To accompany H.R. 1319]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 1319) to prevent the inadvertent disclosure of information on a computer through the use of certain “peer-to-peer” file sharing software without first providing notice and obtaining consent from the owner or authorized user of the computer, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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AMENDMENT

The amendments are as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Informed P2P User Act”.

SEC. 2. CONDUCT PROHIBITED.

(a) NOTICE AND CONSENT REQUIRED FOR FILE-SHARING SOFTWARE.—

(1) NOTICE AND CONSENT REQUIRED PRIOR TO INSTALLATION.—It is unlawful for any covered entity to install on a protected computer or offer or make available for installation or download on a protected computer a covered file-sharing program unless such program—

(A) immediately prior to the installation or downloading of such program—

(i) provides clear and conspicuous notice that such program allows files on the protected computer to be made available for searching and copying to one or more other computers; and

(ii) obtains the informed consent to the installation of such program from an owner or authorized user of the protected computer; and

(B) immediately prior to initial activation of a file-sharing function of such program—

(i) provides clear and conspicuous notice of which files on the protected computer are to be made available for searching and copying to another computer; and

(ii) obtains the informed consent from an owner or authorized user of the protected computer for such files to be made available for searching and copying to another computer.

(2) NON-APPLICATION TO PRE-INSTALLED SOFTWARE.—Nothing in subparagraph (A) shall apply to the installation of a covered file-sharing program on a computer prior to the first sale of such computer to an end user, provided that notice is provided to the end user who first purchases the computer that such a program has been installed on the computer.

(b) PREVENTING THE DISABLING OR REMOVAL OF CERTAIN SOFTWARE.—It is unlawful for any covered entity—

(1) to prevent the reasonable efforts of an owner or authorized user of a protected computer from blocking the installation of a covered file-sharing program or file-sharing function thereof; or

(2) to prevent an owner or authorized user of a protected computer from having a reasonable means to either—

(A) disable from the protected computer any covered file-sharing program;

or

(B) remove from the protected computer any covered file-sharing program that the covered entity caused to be installed on that computer or induced another individual to install.

SEC. 3. ENFORCEMENT.

(a) UNFAIR AND DECEPTIVE ACTS AND PRACTICES.—A violation of section 2 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(b) FEDERAL TRADE COMMISSION ENFORCEMENT.—The Federal Trade Commission shall enforce this Act in the same manner, by the same means, and with the same jurisdiction as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act.

(c) PRESERVATION OF FEDERAL AND STATE AUTHORITY.—Nothing in this Act shall be construed to limit or supersede any other Federal or State law.

SEC. 4. DEFINITIONS.

As used in this Act—

(1) the term “commercial entity” means an entity engaged in acts or practices in or affecting commerce, as such term is defined in section 4 of the Federal Trade Commission Act (15 U.S.C. 44);

(2) the term “covered entity” means—

(A) a commercial entity that develops a covered file-sharing program; and

(B) a commercial entity that disseminates or distributes a covered file-sharing program and is owned or operated by the commercial entity that developed the covered file-sharing program;

(3) the term “protected computer” has the meaning given such term in section 1030(e)(2) of title 18, United States Code; and

(4) the term “covered file-sharing program”—

(A) means a program, application, or software that is commercially marketed or distributed to the public and that enables—

(i) a file or files on the computer on which such program is installed to be designated as available for searching and copying to one or more other computers;

(ii) the searching of files on the computer on which such program is installed and the copying of any such file to another computer—

(I) at the initiative of such other computer and without requiring any action by an owner or authorized user of the computer on which such program is installed; and

(II) without requiring an owner or authorized user of the computer on which such program is installed to have selected or designated another computer as the recipient of any such file; and

(iii) an owner or authorized user of the computer on which such program is installed to search files on one or more other computers using the same or a compatible program, application, or software, and copy such files to such owner or user’s computer; and

(B) does not include a program, application, or software designed primarily to—

(i) operate as a server that is accessible over the Internet using the Internet Domain Name system;

(ii) transmit or receive email messages, instant messaging, real-time audio or video communications, or real-time voice communications; or

(iii) provide network or computer security, network management, maintenance, diagnostics, technical support or repair, or to detect or prevent fraudulent activities.

SEC. 5. RULEMAKING.

The Federal Trade Commission may promulgate regulations under section 553 of title 5, United States Code to accomplish the purposes of this Act. In promulgating rules under this Act, the Federal Trade Commission shall not require the deployment or use of any specific products or technologies.

SEC. 6. NONAPPLICATION TO GOVERNMENT.

The prohibition in section 2 of this Act shall not apply to the Federal Government or any instrumentality of the Federal Government, nor to any State government or government of a subdivision of a State.

Amend the title so as to read:

A bill to prevent the inadvertent disclosure of information on a computer through certain “peer-to-peer” file sharing programs without first providing notice and obtaining consent from an owner or authorized user of the computer.

PURPOSE AND SUMMARY

H.R. 1319, the “Informed P2P User Act”, was introduced on March 5, 2009, by Rep. Mary Bono Mack (R-CA), along with Rep. Joe Barton (R-TX), the Ranking Member of the Committee on Energy and Commerce, and Rep. John Barrow (D-GA). The purpose of the bill is to reduce inadvertent disclosures of sensitive information by making users of certain file-sharing programs more aware of how such programs work, how files are shared, and the potential risks involved with the use of such programs.

The bill prohibits developers of covered file-sharing programs from installing, or making available for installation or downloading, a covered-file sharing program without first providing consumers with notice that the program allows files on the consumer’s computer to be searched and copied. The developer must then obtain the informed consent of the consumer.

Under H.R. 1319, any covered file-sharing program must provide notice and obtain consent twice: when the program is first installed or downloaded and again immediately before the file-sharing func-

tion is activated for the first time. The bill also makes it unlawful to prevent the reasonable efforts of a consumer to block the installation of a file-sharing program. Finally, the program must provide a reasonable means to disable or remove the program.

BACKGROUND AND NEED FOR LEGISLATION

File-sharing software enables consumers to share files over the Internet by accessing each other's computer hard drives. To share files, consumers download and install software from the Internet, which enables them both to designate files on their computer for others to copy, as well as search for and copy files on other computers that are running the same or similar file-sharing program. Once the files have been designated for sharing, either intentionally or otherwise, any other person on the file-sharing network can copy those files. People can share any kind of file, from spreadsheets to movies. Currently, one of the most common and well-known uses of such software is commercial file-sharing programs used by millions of consumers to lawfully share music, videos, pictures, and other files. Lawful applications of file-sharing technology provide enormous benefits to business, academia, and consumers.

The use of file-sharing software, however, also presents significant risks for consumers. For example, recent news reports and studies highlight the danger of inadvertent sharing of sensitive information, such as Social Security numbers, tax returns, and health records.¹ Sensitive government documents have been discovered on file-sharing networks, including engineering and communications information about the President's helicopter, Marine One.²

Inadvertent file sharing can occur for several reasons. In some cases, users simply do not understand which folders are available to other users on the network. In other cases, users mistakenly place sensitive documents in shared folders. Some consumers, focused on exchanging specific types of files such as music or videos, fail to appreciate that the software can be used to share any file on their computer. Different types of file-sharing software operate differently, and the risk of inadvertent sharing varies from program to program. File-sharing software users must understand the risk of inadvertent file sharing, properly configure their software, and know what files are designated for sharing on their computer.

Reports of users inadvertently sharing sensitive files date back to the beginning of this decade, when file-sharing software and certain peer-to-peer (P2P) applications first became popular on the Internet.³ Over the past few years, certain distributors of file-sharing software have made efforts to improve disclosures and implement protections to reduce the risk of the inadvertent disclosure of sensitive information. Despite these efforts, the problem persists.

¹File-Sharing Breach at Investment Firm Highlights Dangers of P2P Networks—Again, Computer World (July 9, 2008) (online at www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9108418); M. Eric Johnson, Dan McGuire, and Nicholas D. Wiley, Why File Sharing Networks Are Dangerous?, Communications of the ACM (Feb. 2009); and Academic Claims to Find Sensitive Medical Info Exposed on Peer-to-Peer Networks, Wired.com (Mar. 2, 2009) (online at www.wired.com/threatlevel/2009/03/p2p-networks-le/).

²Report: Obama Helicopter Security Breached, MSNBC (Mar. 1, 2009) (online at www.msnbc.msn.com/id/29447088/).

³See, e.g., Nathaniel S. Good and Aaron Krekelberg, Usability and Privacy: A Study of Kazaa P2P File-Sharing, Conference on Human Factors in Computing Systems (Apr. 2003).

H.R. 1319, the Informed P2P User Act, is intended to reduce inadvertent disclosures of sensitive information by making users of file-sharing programs more aware of the risks involved. H.R. 1319 focuses on a particular type of file-sharing application that can expose its users to a specific risk: inadvertently exposing their personal or sensitive data to downloading by users of the same or compatible file-sharing software without their specific knowledge or permission.

LEGISLATIVE HISTORY

On March 5, 2009, Rep. Bono Mack, with Ranking Member Barton and Rep. Barrow, introduced H.R. 1319, the Informed P2P User Act. Rep. Bono Mack introduced similar legislation, H.R. 7176, in the 110th Congress. H.R. 1319 was referred to the Subcommittee on Commerce, Trade, and Consumer Protection on March 6, 2009. The Subcommittee held a legislative hearing on H.R. 1319 on May 5, 2009. Testimony was heard from witnesses representing the Bureau of Consumer Protection of the Federal Trade Commission (FTC); the Center for Democracy and Technology; the Business Software Alliance; the Distributed Computing Data Industry Association; the Electronic Privacy Information Center; Tiversa, Inc.; and the Center for the Study of Digital Property of the Progress & Freedom Foundation. There was no Subcommittee markup held on the legislation, as it was taken up directly in the full Committee.

COMMITTEE CONSIDERATION

The Committee on Energy and Commerce met in open markup session on September 30, 2009, and considered H.R. 1319, as introduced on March 5, 2009. The Committee adopted by a voice vote a manager's amendment offered by Mr. Waxman to the bill. The full Committee subsequently agreed to order H.R. 1319 favorably reported to the House, amended, by a voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. A motion by Mr. Waxman to order H.R. 1319 favorably reported to the House, amended, was agreed to by a voice vote. There were no recorded votes taken during consideration and passage of H.R. 1319.

STATEMENT OF COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the oversight findings and recommendations of the Committee are reflected in the descriptive portions of this report.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of budget authority and revenues regarding H.R. 1319 prepared by the Director of the Congressional Budget Office pursuant to section

402 of the Congressional Budget Act of 1974. The Committee finds that H.R. 1319 would result in no new or increased entitlement authority, or tax expenditures or revenues.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of the Committee are reflected in the descriptive portions of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 1319. Article I, section 8, clauses 3 and 18 of the Constitution of the United States grants the Congress the power to enact this law.

EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 1319 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

FEDERAL ADVISORY COMMITTEE STATEMENT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., section 5(b) of the Federal Advisory Committee Act.

APPLICABILITY OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations.

H.R. 1319 prohibits developers of covered file-sharing programs from installing, or making available for installation or downloading, a covered-file sharing program without first providing consumers with notice that the program allows files on the consumer's computer to be searched and copied. This bill does not relate to employment or access to public services and accommodations in the legislative branch.

FEDERAL MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104-4) requires a statement on whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee adopts as its own the estimated of federal mandates prepared by the Director of the Congressional Budget Office.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the cost esti-

mate of H.R. 1319 prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1319 from the Director of Congressional Budget Office:

OCTOBER 19, 2009.

Hon. HENRY A. WAXMAN,
*Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1319, the Informed P2P User Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1319—Informed P2P User Act

H.R. 1319 would place new notification requirements on companies that develop or distribute software that allows files to be shared between computers. Specifically, the bill would require such companies to provide clear notice that file-sharing capability is being installed on a computer. Further, prior to activation of the file-sharing function, the bill would require companies to specify which files would be made available for sharing and obtain the user's consent before the files would be made available to be shared. The bill also would make it unlawful to prevent a user of the software from disabling or removing the file-sharing capability. The Federal Trade Commission (FTC) would be required to develop regulations to impose those requirements and to enforce the new restrictions.

Based on information from the FTC, CBO estimates that implementing H.R. 1319 would cost about \$1 million annually over the 2010–2014 period, assuming availability of the necessary amounts. The additional costs would be incurred to develop and enforce the notification requirements. CBO estimates that enacting H.R. 1319 could increase federal revenues from additional civil penalties assessed for violations of the new regulations. We estimate that any additional revenues would not be significant because of the relatively small number of cases expected to be involved. Enacting the bill would not affect direct spending.

H.R. 1319 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

The bill would impose private-sector mandates as defined in UMRA. It would require companies that develop or distribute soft-

ware that allows files to be shared between computers to provide certain features that give the user control over various functions of the software.

Based on information from industry sources, CBO expects the mandates in the bill would require only marginal changes in such software, which would impose minimal costs. Consequently, CBO estimates that the cost of the mandates would fall well below the annual threshold established in UMRA for private-sector mandates (\$139 million in 2009, adjusted annually for inflation).

The CBO staff contacts for this estimate are Susan Willie (for federal costs) and Sam Wice (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 provides that the short title of H.R. 1319 is the “Informed P2P User Act”

Section 2. Conduct prohibited

Subparagraph 2(a)(1)(A) requires that if a covered entity installs a covered file-sharing program, or makes that program available for installation or downloading, that file-sharing program must provide clear and conspicuous notice prior to installation or downloading that the program allows files on the computer to be made available for searching and copying to other computers. Subparagraph (A) further requires that following such notice, the file-sharing program must then obtain the owner or authorized user’s informed consent to the installation or downloading of the program.

Subparagraph 2(a)(1)(B) requires notice to be provided and consent obtained a second time. Specifically, the file-sharing program must provide clear and conspicuous notice of which files on the user’s computer are to be made available for searching and copying prior to the initial activation of a file-sharing function of the program. The program must then obtain the informed consent from the owner or authorized user of the computer for such files to be made available for searching and copying to another computer. Pursuant to this subparagraph, notice must be provided, and consent must be obtained, only the first time the file-sharing function of a covered file-sharing program is activated on a protected computer; and does not include subsequent uses of the program on that protected computer.

Paragraph 2(a)(2) provides that the requirement for notice and consent prior to initial installation or downloading of a covered file-sharing program does not apply to the installation of a covered file-sharing program on a computer prior to the first sale of such computer to an end user. Notice must, however, be provided to the end user who first purchases the computer that a covered file-sharing program has been installed on the computer. This notice should be clear and conspicuous and serve the purpose of alerting the consumer that covered file-sharing software already is installed on the computer and such software may make files on that computer available for searching and copying by other computers. The notice and consent requirements of Subparagraph 2(a)(1)(B) that apply

prior to the initial activation of a file-sharing function, however, still apply to such software. This paragraph acknowledges the fact that for preinstalled software the consumer does not take any affirmative step to install or download the software, thus there is no reasonable opportunity for the covered entity to provide notice and obtain consent prior to installation.

Subparagraph 2(b)(1) prohibits a covered entity from preventing a consumer's reasonable efforts to block the installation of a covered file-sharing program or file-sharing function thereof. Thus, it would be unlawful for a covered entity to install a covered file-sharing program on a consumer's computer through any practice or mechanism that is designed to circumvent security or other settings enabled by the consumer.

Subparagraph 2(b)(2) prohibits a covered entity from preventing a consumer from having a reasonable means to either (A) disable from the consumer's computer any covered file-sharing program or (B) remove from the consumer's computer any covered file-sharing program that is installed on that computer. This provision is intended to prohibit covered entities from employing tactics that make their programs difficult to remove. For example, practices such as installing multiple copies of a program to avoid permanent deletion, constantly changing file name or file location to escape detection, or reinstalling automatically without the user's intervention after a program has been removed would violate this provision.

The Committee recognizes that software development is a highly innovative field, and does not seek to impose specific design requirements on software that may prove to be inappropriate in some circumstances or unduly burdensome. Rather, paragraph (2) is intended to prohibit those practices designed to frustrate a consumer's effort to prevent a covered file-sharing program from being installed in the first place or from easily disabling or removing such a program after it has been installed.

Section 3. Enforcement

Section 3 provides for enforcement by the FTC and establishes that a violation of section 2 shall be treated as an unfair act or practice in violation of a regulation under section 18 of the FTC Act.

Section 4. Definitions

Paragraph (1) defines the term "commercial entity" to mean an entity engaged in acts or practices in commerce, as commerce is defined in section 4 of the Federal Trade Commission Act.

Paragraph (2) defines a "covered entity" to include a commercial entity that develops a covered file-sharing program and a commercial entity that disseminates or distributes a covered file-sharing program and is owned or operated by the commercial entity that developed the program. Entities that merely disseminate, distribute, or otherwise make covered file-sharing software available to the public, but are not owned or operated by the entity that developed the program, are not required to comply with the provisions of this Act. In addition, individuals who develop or modify a covered file-sharing program for personal use or who do not profit from such activities also are not covered, as they are not commercial entities.

Paragraph (3) defines the term “protected computer” to have the same meaning as the term in section 1030(e)(2) of title 18, United States Code.

Paragraph (4) defines the term “covered file-sharing program” to mean a program, application, or software commercially marketed or distributed to the public that satisfies all the requirements set forth in clauses (i), (ii), and (iii).

Pursuant to clause (i), the program must enable files on the computer on which it is installed to be designated as available for searching and copying to one or more other computers. This is satisfied if the user of the computer takes an affirmative action to designate files for searching and copying or if the program automatically initiates some action to designate files or folders for searching and copying by other computers.

Clause (ii) requires that the program enables files on the computer on which the program is installed to be searched and copied by other computers. In this case, the searching and copying is done at the initiative of the other computer without requiring any action by the owner of the computer on which the program is installed.

Finally, clause (iii) provides that the program allows the owner of the computer on which the program is installed to search files on other computers using the same or compatible file-sharing program.

Paragraph (4)(B) specifically excludes certain programs, applications, and software from the definition. There are many kinds of distributed computing applications that are not intended to be covered by H.R. 1319, ranging from peer-to-peer technologies used internal to a corporate enterprise to cloud computing.

EXPLANATION OF AMENDMENTS

During markup by the full Committee, Chairman Waxman offered a manager’s amendment in the nature of a substitute. The manager’s amendment narrows the definition of a covered file-sharing program to avoid sweeping in legitimate technologies that are unrelated to the problem of inadvertent file-sharing, such as Web servers, e-mail, instant messaging, and computer security software. The manager’s amendment also adds a new definition for “covered entity” that limits liability under the bill only to those commercial entities that develop a covered file-sharing program or distribute a covered file-sharing program and are owned or operated by a developer.

The manager’s amendment clarifies that it is unlawful for a covered entity to “install on a protected computer or offer or make available for installation or download” a covered file-sharing program unless the program makes the required disclosures. Under the manager’s amendment, the requirement for notice prior to installation does not apply to software installed prior to the initial sale of a computer if notice that a covered file-sharing program has been installed is otherwise provided in some form.

Finally, the manager’s amendment provides the FTC with discretionary rulemaking authority and clarifies that the bill does not apply to the federal government.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

There are no changes in existing federal law made by the bill,
as reported.

