

September 21, 2011

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senators Leahy and Grassley:

The undersigned individuals and organizations wrote last month in support of making changes to the Computer Fraud and Abuse Act to ensure that it is both strong and properly focused. We mentioned that while the CFAA is an important tool in the fight against cybercrime, its current language is both overbroad and vague. It can be read to encompass not only the hackers and identity thieves the law was intended to cover, but also actors who have not engaged in any activity that can or should be considered a “computer crime.” We write again today to express our appreciation for recent action taken by the Committee on the Judiciary to address our concerns.

Last week, at a markup of Chairman Leahy’s Personal Data Privacy and Security Act of 2011 (S. 1151), Senator Grassley, with the co-sponsorship of Senators Franken and Lee, introduced an amendment that would fix a large part of the overbreadth problem in the CFAA. In particular, the amendment would remove the possibility that the statute could be interpreted to allow felony prosecutions of “access in violation of a contractual obligation or agreement, such as an acceptable use policy or terms of service agreement, with an Internet service provider, Internet website, or non-government employer, if such violation constitutes the sole basis for determining that access to a protected computer is unauthorized.” The amendment passed with bipartisan support, including that of Chairman Leahy himself.

As we noted in our previous letter, our concerns about overbroad interpretations of the existing language are far from hypothetical. Three federal circuit courts have agreed that an employee who exceeds an employer’s network acceptable use policies can be prosecuted under the CFAA. At least one federal prosecutor has brought criminal charges against a user of a social network who signed up under a pseudonym in violation of terms of service.

These activities should not be “computer crimes” any more than they are crimes in the physical world. If, for example, an employee photocopies an employer’s document to give to a friend without that employer’s permission, there is no federal crime (though there may be, for example, a contractual violation). However, if an employee emails that document, there may be a CFAA violation. If a person assumes a fictitious identity at a party, there is no federal crime. Yet if they assume that imaginary identity on a social network that prohibits pseudonyms, there may again be a CFAA violation. This is a gross misuse of federal criminal law. The CFAA should focus on malicious hacking and identity theft and not on criminalizing any behavior that happens to take place online in violation of terms of service or an acceptable use policy.

We believe that the Grassley/Franken/Lee amendment is an important step forward for both security and civil liberties. We commend the Ranking Member for introducing the amendment and the Chairman for supporting it. We would also support further changes to the language in the bill to ensure that government employees are given the same protections from criminal prosecution as their private sector counterparts. Changes such as these will strengthen the law and focus the justice system on the malicious hackers and online criminals who invade others' computers and networks to steal sensitive information and undermine the privacy of those whose information is stolen.

Sincerely,

Laura W. Murphy, Director, Washington Legislative Office
American Civil Liberties Union

Kelly William Cobb, Executive Director
Americans for Tax Reform's Digital Liberty

Leslie Harris, President and CEO
Center for Democracy & Technology

Fred L. Smith, President
Competitive Enterprise Institute

Marcia Hofmann, Senior Staff Attorney
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Wayne T. Brough, Ph.D., Chief Economist and Vice President, Research
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Orin S. Kerr, Professor of Law
George Washington University*

Paul Rosenzweig, Visiting Fellow
The Heritage Foundation*

Berin Szoka, President
TechFreedom

*(Affiliation listed for identification purposes only)

cc: Members of the Judiciary Committee
James A. Baker, Associate Deputy Attorney General, USDOJ