AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2929
OFFERED BY MR. STEARNS

Strike all after the enacting clause and insert the following:

1 **SECTION 1. SHORT TITLE.**

2   This Act may be cited as the "Securely Protect Your-

3 self Against Cyber Trespass Act" or the "SPY ACT".

4 **SEC. 2. PROHIBITION OF DECEPTIVE ACTS OR PRACTICES**

5   **RELATING TO SPYWARE.**

6   (a) PROHIBITION.—It is unlawful for any person,

7 who is not the owner or authorized user of a protected

8 computer, to engage in deceptive acts or practices in con-

9 nection with any of the following conduct with respect to

10 the protected computer:

11   (1) Taking control of the computer, including—

12   (A) utilizing such computer or computing

13   services to send unsolicited information or ma-

14   terial to others;

15   (B) diverting the Internet browser of the

16   computer, or similar program of the computer

17   used to access and navigate the Internet, to one
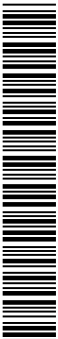
1   or more Web pages not of the owner or author-

2   ized user's choosing;

3   (C) accessing or using the modem, or

4   Internet connection or service, for the computer

5   and thereby causing damage to the computer or

6   causing the owner or authorized user to incur

7   unauthorized financial charges;

8   (D) using the computer as part of an ac-

9   tivity performed by a group of computers that

10   cause damages to another computer; and

11   (E) delivering advertisements that a user

12   of the computer cannot close without turning

13   off the computer or closing all sessions of the

14   Internet browser for the computer.

15   (2) Modifying settings related to the computer's

16   access to or use of the Internet, including by

17   altering—

18   (A) the Web page that appears when the

19   owner or authorized user launches an Internet

20   browser or similar program used to access and

21   navigate the Internet;

22   (B) the default provider used to access or

23   search the Internet, or other existing Internet

24   connections settings;

3

1   (C) a list of bookmarks used by the com-
2   puter to access Web pages; or

3   (D) security or other settings of the com-
4   puter that protect information about the owner
5   or authorized user.

6   (3) Collecting personally identifiable informa-
7 tion through the use of a keystroke logging function
8 or similar function and transferring such informa-
9 tion from the computer to another person.

10   (4) Monitoring, or analyzing the content of, the
11 Web pages or other online locations accessed using
12 the computer.

13   (5) Inducing the owner or authorized user to
14 install a computer software component onto the
15 computer, or preventing reasonable efforts to block
16 the installation or execution of, or to disable, a com-
17 puter software component, including by—

18   (A) presenting the owner or authorized
19   user with an option to decline installation of a
20   software component such that, when the option
21   is selected by the owner or authorized user, the
22   installation nevertheless proceeds; or

23   (B) causing a computer software compo-
24   nent that the owner or authorized user has re-

4
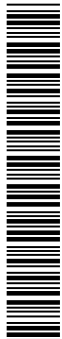
1   moved or disabled to automatically reinstall or

2   reactivate on the computer.

3   (6) Representing that installing a separate soft-

4   ware component or providing log-in and password

5   information is necessary for security or privacy rea-

6   sons, or that installing a separate software compo-

7   nent is necessary to open, view, or play a particular

8   type of content.

9   (7) Installing or executing computer software

10   on the computer, without the permission of the party

11   named as the provider of the software, to deceive the

12   owner or authorized user about the identity of the

13   person or service responsible for the functions per-

14   formed or the content displayed by such computer

15   software.

16   (8) Installing or executing on the computer one

17   or more additional computer software components

18   with the intent of causing a person to use such com-

19   ponents in a way that violates any other provision of

20   this section.

21   (9) Removing, disabling, or rendering inoper-

22   ative a security, anti-spyware, or anti-virus tech-

23   nology for the computer.

24   (b) EFFECTIVE DATE.—This section shall take effect

25   on the date of the enactment of this Act.

1 **SEC. 3. PROHIBITION OF COLLECTION OF CERTAIN INFOR-**

2   **MATION WITHOUT NOTICE AND CONSENT.**

3   (a) OPT-IN REQUIREMENT.—Except as provided in

4 subsection (e), it is unlawful for any person—

5   (1) to transmit to a protected computer, which

6   is not owned by such person and for which such per-

7   son is not an authorized user, any information col-

8   lection program, or

9   (2) to enable the operation of any information

10   collection program with respect to such a protected

11   computer,

12 unless, before such transmission or enabling, the owner

13 or an authorized user of the protected computer has con-

14 sented to such transmission or enabling pursuant to notice

15 in accordance with subsection (c) and such information

16 collection program includes the functions required under

17 subsection (d).

18   (b) INFORMATION COLLECTION PROGRAM.—For pur-

19 poses of this section, the term "information collection pro-

20 gram" means computer software that—

21   (1)(A) collects personally identifiable informa-

22   tion; and

23   (B)(i) sends such information to a person other

24   than the owner or authorized user of the computer,

25   or (ii) uses such information to deliver advertising

26   to, or display advertising, on the computer; or

1   (2)(A) collects information regarding the Web

2 pages accessed using the computer; and

3   (B) uses such information to deliver advertising

4 to, or display advertising on, the computer.

5 (c) NOTICE AND CONSENT.—

6   (1) IN GENERAL.—Notice in accordance with

7 this subsection with respect to an information collec-

8 tion program is clear and conspicuous notice in plain

9 English, set forth in a form and manner as the

10 Commission shall provide, that—

11   (A) clearly distinguishes such notice from

12   any other information visually presented con-

13   temporaneously on the protected computer;

14   (B) states as follows: "This program will

15   collect and transmit information about you and

16   your computer use. Do you accept?";

17   (C) provides for the user to grant or deny

18   consent referred to in subsection (a) by select-

19   ing a "Yes" or "No" option;

20   (D) provides an option for the user to se-

21   lect to display on the computer, before granting

22   or denying consent using the option required

23   under subparagraph (C), a clear description

24   of—

1   (i) the types of information to be col-
2   lected and sent (if any) by the information
3   collection program; and
4   (ii) the purpose for which such infor-
5   mation is to be collected and sent.
6   (E) provides for concurrent display of the
7 information required under subparagraphs (B)
8 and (C) and the option required under subpara-
9 graph (D) until the user grants or denies con-
10 sent using the option required under subpara-
11 graph (C) (or selects the option required under
12 subparagraph (D)).
13   (2) CHANGE IN INFORMATION COLLECTED.—
14 The Commission shall provide that the owner or au-
15 thorized user of a protected computer shall not be
16 considered to have consented to transmission to, or
17 enabling with respect to, the protected computer of
18 an information collection program for purposes of
19 subsection (a) if after granting consent pursuant to
20 a notice in accordance with this subsection—
21   (A) the description required under para-
22   graph (1)(D) to be included in the notice does
23   not include—
24   (i) information of a type that the pro-
25   gram collects or sends; or

8

1   (ii) a purpose for which such informa-

2   tion is collected or sent; and

3   (B) the owner has not previously been pro-

4   vided further notice in accordance with this

5   subsection that includes, in such description,

6   such type of information or purpose for collec-

7   tion or sending, respectively.

8   (3) REGULATIONS.—The Commission shall

9   issue regulations to carry out this subsection.

10   (d) REQUIRED FUNCTIONS.—The functions required

11   under this subsection to be included in an information col-

12   lection program transmitted to, or enabled with respect

13   to, a protected computer are as follows:

14   (1) DISABLING FUNCTION.—With respect to

15   each information collection program, a function of

16   the program, as the Commission shall, by regulation

17   provide, that allows a user of the program to remove

18   the program or disable operation of the program

19   with respect to such protected computer by a func-

20   tion that—

21   (A) is easily identifiable to a user of the

22   computer; and

23   (B) can be performed without undue effort

24   or knowledge by the user of the protected com-

25   puter.

9
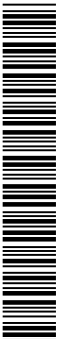
1   (2) IDENTITY FUNCTION.—With respect only to

2   an information collection program that uses informa-

3   tion collected in the manner described in paragraph

4   (1)(B)(ii) or (2)(B) of subsection (b), a function of

5   the program that provides that each display of an

6   advertisement directed or displayed using such infor-

7   mation is accompanied by a statement that clearly

8   identifies the information collection program.

9   (e) LAW ENFORCEMENT AUTHORITY.—Subsection

10   (a) shall not apply in the case of the transmission or ena-

11   bling of an information collection program in compliance

12   with a law enforcement, investigatory, national security,

13   or regulatory agency or department of the United States

14   in response to a request or demand made under authority

15   granted to that agency or department, including a warrant

16   issued under the Federal Rules of Criminal Procedure, an

17   equivalent State warrant, a court order, or a compulsory

18   administrative process.

19   (f) LIMITATION ON LIABILITY.—A telecommuni-

20   cations carrier (as such term is defined in section 3 of

21   the Communications Act of 1934 (47 U.S.C. 153), infor-

22   mation service provider (as such term is defined in such

23   section), or other provider of underlying transmission ca-

24   pability shall not be liable under this section solely

25   because—

10
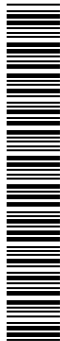
1   (1) the carrier or provider transmitted, routed,

2   stored, or provided connections for an information

3   collection program through a system or network con-

4   trolled or operated by or for the carrier or provider;

5   or

6   (2) of the intermediate and transient storage of

7   such a program in the course of such transmission,

8   routing, storing, or provision of connections.

9   **SEC. 4. ENFORCEMENT.**

10   (a) UNFAIR OR DECEPTIVE ACT OR PRACTICE.—

11   This Act shall be enforced by the Commission under the

12   Federal Trade Commission Act (15 U.S.C. 41 et seq.).

13   A violation of any provision of this Act or of a regulation

14   issued under this Act shall be treated as an unfair or de-

15   ceptive act or practice violating a rule promulgated under

16   section 18 of the Federal Trade Commission Act (15

17   U.S.C. 57a), except that the maximum civil penalty for

18   a violation of this Act shall be one of the following

19   amounts, as the Commission, in its discretion, applies to

20   such a violation:

21   (1) $33,000 for each violation, except that in

22   applying this subparagraph each separate protected

23   computer to which an information collection pro-

24   gram is transmitted, or with respect to which such

11
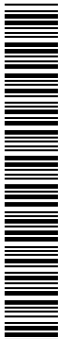
1   a program is enabled, in violation of this Act shall

2   be treated as a separate violation.

3   (2) In the case of a violation of—

4   (A) section 2(a), $3,000,000; and

5   (B) section 3(a), $1,000,000, except that

6   in applying this subparagraph in the case of

7   violation of this Act involving transmitting an

8   information collection program to protected

9   computers, a single transmission directed to

10   multiple protected computers shall be treated as

11   a single violation regardless of the number of

12   protected computers to which such transmission

13   is made.

14   (b) ACTIONS BY FTC.—The Commission shall pre-

15   vent any person from violating this Act in the same man-

16   ner, by the same means, and with the same jurisdiction,

17   powers, and duties as though all applicable terms and pro-

18   visions of the Federal Trade Commission Act (15 U.S.C.

19   41 et seq.) were incorporated into and made a part of this

20   Act. Any entity that violates any provision of this Act is

21   subject to the penalties (except as modified by subsection

22   (a)) and entitled to the privileges and immunities provided

23   in the Federal Trade Commission Act in the same manner,

24   by the same means, and with the same jurisdiction, power,

25   and duties as though all applicable terms and provisions

12
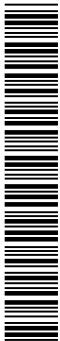
1 of the Federal Trade Commission Act were incorporated

2 into and made a part of this Act.

3   (c) EXCLUSIVENESS OF REMEDIES.—The remedies

4 in this section are the exclusive remedies for violations of

5 this Act.

6   (d) EFFECTIVE DATE.—This section shall take effect

7 on the date of the enactment of this Act, but only to the

8 extent that this section applies to violations of section

9 2(a).

10 **SEC. 5. EFFECT ON OTHER LAWS.**

11   (a) PREEMPTION OF STATE LAW.—

12   (1) PREEMPTION.—This Act supersedes any

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

14   subdivision of a State that expressly regulates—

15   (A) deceptive or misrepresentative conduct

16   with respect to computers similar to that de-

17   scribed in section 2(a); or

18   (B) the transmission or enabling of a com-

19   puter program similar to that described in sec-

20   tion 3.

21   (2) PROTECTION OF CERTAIN STATE LAWS.—

22   This Act shall not be construed to preempt the ap-

23   plicability of—

24   (A) State trespass, contract, or tort law; or
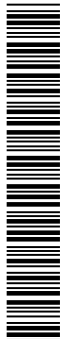
1   (B) other State laws to the extent that

2   those laws relate to acts of fraud.

3   (b) PRESERVATION OF FTC AUTHORITY.—Nothing

4 in this Act may be construed in any way to limit or affect

5 the Commission's authority under any other provision of

6 law.

SEC. 6. ANNUAL FTC REPORT.

8   For the 12-month period that begins upon the effec-

9 tive date under section 9(a) and for each 12-month period

10 thereafter, the Commission shall submit a report to the

11 Congress that—

12   (1) specifies the number and types of actions

13   taken during such period to enforce sections 2(a)

14   and 3, the disposition of each such action, any pen-

15   alties levied in connection with such actions, and any

16   penalties collected in connection with such actions;

17   and

18   (2) describes the administrative structure and

19   personnel and other resources committed by the

20   Commission for enforcement of this Act during such

21   period.

22 Each report under this subsection for a 12-month period

23 shall be submitted not later than 90 days after the expira-

24 tion of such period.

14
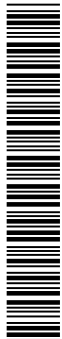
1 **SEC. 7. REGULATIONS.**

2   Any regulations issued pursuant to this Act shall be

3 issued in accordance with section 553 of title 5, United

4 States Code.

5 **SEC. 8. DEFINITIONS.**

6   For purposes of this Act:

7   (1) COMPUTER; PROTECTED COMPUTER.—The

8 terms "computer" and "protected computer" have

9 the meanings given such terms in section 1030(e) of

10 title 18, United States Code.

11   (2) COMPUTER SOFTWARE.—

12   (A) IN GENERAL.—Except as provided in

13   subparagraph (B), the term "computer soft-

14   ware" means a set of statements or instructions

15   to be used directly or indirectly by a computer

16   to bring about a certain result.

17   (B) EXCEPTION FOR COOKIES.—Such term

18   does not include a cookie, or other text file,

19   placed on the computer system of a user by an

20   Internet service provider, interactive computer

21   service, or Internet website to return informa-

22   tion to the Internet service provider, interactive

23   computer service, Internet website, or third

24   party if the user subsequently uses the Internet

25   service provider or interactive computer service,

26   or accesses the Internet website.
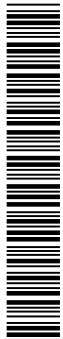
1 (3) COMMISSION.—The term "Commission"

2 means the Federal Trade Commission.

3 (4) DAMAGE.—The term "damage" has the

4 meaning given such term in section 1030(e) of title

5 18, United States Code.

6 (5) DECEPTIVE ACTS OR PRACTICES.—The

7 term "deceptive acts or practices" has the meaning

8 applicable to such term for purposes of section 5 of

9 the Federal Trade Commission Act (15 U.S.C. 45).

10 (6) DISABLE.—The term 'disable' means, with

11 respect to an information collection program, to per-

12 manently prevent such program from executing any

13 of the functions described in section 3(b) that such

14 program is otherwise capable of executing, unless

15 the owner or operator of a protected computer takes

16 a subsequent affirmative action to enable the execu-

17 tion of such functions.

18 (7) ENABLE.—The term "enable" means, with

19 respect to an information collection program, to take

20 such actions as are necessary to make the program

21 operational with respect to carrying out the func-

22 tions described in section 3(b) that the program is

23 capable of executing.

24 (8) INTERNET.—The term "Internet" means

25 collectively the myriad of computer and tele-

16
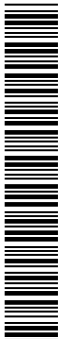
1   communications facilities, including equipment and

2   operating software, which comprise the inter-

3   connected world-wide network of networks that em-

4   ploy the Transmission Control Protocol/Internet

5   Protocol, or any predecessor or successor protocols

6   to such protocol, to communicate information of all

7   kinds by wire or radio.

8   (9) PERSONALLY IDENTIFIABLE INFORMA-

9   TION.—

10   (A) IN GENERAL.—The term "personally

11   identifiable information" means:

12   (i) First and last name of an indi-

13   vidual.

14   (ii) A home or other physical address

15   of an individual, including street name,

16   name of a city or town, and zip code, but

17   not including solely the name of a city or

18   town or a zip code, individually or to-

19   gether.

20   (iii) An electronic mail address.

21   (iv) A telephone number.

22   (v) A social security number, tax iden-

23   tification number, passport number, driv-

24   er's license number, or any other govern-

25   ment-issued identification number.

17
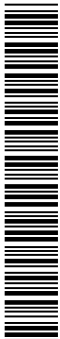
1   (vi) A credit card number.

2   (vii) An account number.

3   (viii) Any access code or password,

4   other than an access code or password that

5   is transferred by an owner or authorized

6   user of a protected computer to the in-

7   tended third party.

8   (ix) Date of birth, birth certificate

9   number, or place of birth of an individual,

10   except in the case of a date of birth re-

11   quired by law to be transmitted or col-

12   lected.

13   (B) RULEMAKING.—The Commission may,

14   by regulation, add to the types of information

15   specified under paragraph (1) that shall be con-

16   sidered personally identifiable information for

17   purposes of this Act, except that such informa-

18   tion may not include any record of aggregate

19   data that does not identify particular persons,

20   particular computers, particular users of com-

21   puters, or particular email addresses or other

22   locations of computers with respect to the

23   Internet.

24   (10) TRANSMIT.—The term ''transmit'' means,

25   with respect to an information collection program,
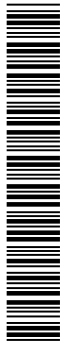
1 transmission by any means, but does not include in-
2 stallation on a computer before the computer is de-
3 livered to a user pursuant to first retail sale of the
4 computer.

5 (11) WEB PAGE.—The term "Web page" means
6 a location, with respect to the World Wide Web, that
7 has a single Uniform Resource Locator or another
8 single location with respect to the Internet, as the
9 Federal Trade Commission may prescribe.

10 SEC. 9. EFFECTIVE DATE AND SUNSET.

11 (a) EFFECTIVE DATE.—Except as specifically pro-
12 vided otherwise in this Act, this Act shall take effect upon
13 the expiration of the 180-day period that begins on the
14 date of the enactment of this Act.

15 (b) SUNSET.—This Act shall not apply after Decem-
16 ber 31, 2008.