

AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: To propose a substitute.

**IN THE SENATE OF THE UNITED STATES—108th Cong., 2d Sess.**

**S. 2145**

To regulate the unauthorized installation of computer software, to require clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for other purposes.

Referred to the Committee on \_\_\_\_\_  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. BURNS (for himself, Mr. WYDEN, and Mrs. BOXER)

Viz:

- 1 Strike all after the enacting clause, and insert the
- 2 following:
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the “Software Principles
- 5 Yielding Better Levels of Consumer Knowledge Act” or
- 6 the “SPY BLOCK Act”.

1 **SEC. 2. PROHIBITED PRACTICES IN RELATION TO SOFT-**  
2 **WARE INSTALLATION IN GENERAL.**

3 (a) SURREPTITIOUS INSTALLATION.—

4 (1) IN GENERAL.—It shall be unlawful for a  
5 person who is not an authorized user of a protected  
6 computer to cause the installation of software on the  
7 computer in a manner designed to—

8 (A) conceal from the user of the computer  
9 the fact that the software is being installed; or

10 (B) prevent the user of the computer from  
11 having an opportunity to knowingly grant or  
12 withhold consent to the installation.

13 (2) EXCEPTION.—This subsection shall not  
14 apply to—

15 (A) the installation of software that falls  
16 within the scope of a previous grant of author-  
17 ization by an authorized user;

18 (B) the installation of an upgrade to a  
19 software program that has already been in-  
20 stalled on the computer with the authorization  
21 of an authorized user; or

22 (C) the installation of software before the  
23 first retail sale of the computer.

24 (b) MISLEADING INDUCEMENTS TO INSTALL.—It  
25 shall be unlawful for a person who is not an authorized  
26 user of a protected computer to induce an authorized user

1 of the computer to consent to the installation of software  
2 on the computer by means of a materially false or mis-  
3 leading representation concerning—

4 (1) the identity of an operator of an Internet  
5 website or online service at which the software is  
6 made available for download from the Internet;

7 (2) the identity of the author or publisher of  
8 the software;

9 (3) the nature or function of the software; or

10 (4) the consequences of not installing the soft-  
11 ware.

12 (c) PREVENTING REASONABLE EFFORTS TO  
13 UNINSTALL.—

14 (1) IN GENERAL.—It shall be unlawful for a  
15 person who is not an authorized user of a protected  
16 computer to authorize or cause the installation of  
17 software on the computer if the software is designed  
18 to prevent reasonable efforts by an authorized user  
19 of the computer to uninstall or disable the software  
20 once it has been installed.

21 (2) LIMITATIONS.—

22 (A) AUTHORITY TO UNINSTALL.—Software  
23 that enables 1 authorized user of a computer,  
24 such as a parent or system administrator, to  
25 choose to prevent another user of the same

1 computer from uninstalling or disabling the  
2 software shall not be considered to prevent rea-  
3 sonable efforts to uninstall or disable the soft-  
4 ware within the meaning of this subsection, pro-  
5 vided that at least 1 authorized user retains the  
6 ability to uninstall or disable the software.

7 (B) CONSTRUCTION.—This subsection  
8 shall not be construed to require individual fea-  
9 tures or functions of a software program, up-  
10 dates to a previously installed software pro-  
11 gram, or software programs that were installed  
12 on a bundled basis to be capable of being  
13 uninstalled or disabled on an individual basis.

14 **SEC. 3. INSTALLING SURREPTITIOUS INFORMATION COL-**  
15 **LECTION FEATURES ON A USER'S COMPUTER.**

16 (a) IN GENERAL.—It shall be unlawful for a person  
17 who is not an authorized user of a protected computer to  
18 authorize or cause the installation on that computer of  
19 software that collects information about the user of the  
20 computer or about the user's Internet browsing behavior  
21 or other use of the computer and transmits such informa-  
22 tion to any other person on an automatic basis or at the  
23 direction of a person other than an authorized user of the  
24 computer, if—

1           (1) the software's collection and transmission of  
2 such information is not functionally related to or in  
3 support of a software capability or function that an  
4 authorized user of the computer has chosen or con-  
5 sented to execute or enable; and

6           (2) either—

7                 (A) there has been no notification to an  
8 authorized user of the computer, prior to the  
9 software beginning to collect and transmit such  
10 information, explaining the type of information  
11 the software will collect and transmit and the  
12 types of ways the information may be used and  
13 distributed;

14                 (B) notification pursuant to subparagraph  
15 (A) was not provided in a manner reasonably  
16 calculated to provide actual notice to an author-  
17 ized user of the computer; or

18                 (C) notification pursuant to subparagraph  
19 (A) occurred at a time or in a manner that did  
20 not enable an authorized user of the computer  
21 to consider the information contained in the no-  
22 tification before choosing whether to permit the  
23 collection or transmission of information.

24           (b) **AUTHORIZATION STATUS.**—This section shall not  
25 be interpreted to prohibit a person from authorizing or

1 causing the installation of software that collects and trans-  
2 mits information that is reasonably needed to determine  
3 whether or not the user of a protected computer is licensed  
4 or authorized to use the software.

5 (c) INTENTIONAL TRANSMISSION OF INFORMATION  
6 BY USER.—Information shall not be construed to have  
7 been collected and transmitted on an automatic basis or  
8 at the direction of a person other than a user of the pro-  
9 tected computer, within the meaning of this section, if the  
10 collection or transmission of the information is inten-  
11 tionally initiated by an authorized user for the purpose  
12 of allowing the direct or indirect access to the information  
13 by an intended recipient.

14 **SEC. 4. ADWARE THAT CONCEALS ITS OPERATION.**

15 It shall be unlawful for a person who is not an au-  
16 thorized user of a protected computer to authorize or  
17 cause the installation on that computer of software if—

18 (1) the software causes advertisements to be  
19 displayed to the user—

20 (A) at a time when the user is not access-  
21 ing an Internet website or online service oper-  
22 ated by the publisher of the software; and

23 (B) in a manner or at a time such that a  
24 reasonable user would not understand that the

1 software is responsible for delivering the adver-  
2 tisements; and

3 (2) the advertisements referred to in paragraph  
4 (1) do not contain a label or other reasonable means  
5 of identifying to the user of the computer, each time  
6 such an advertisement is displayed, which software  
7 is responsible for the advertisements' delivery.

8 **SEC. 5. OTHER PRACTICES THAT THWART USER CONTROL**  
9 **OF COMPUTER.**

10 It shall be unlawful for a person who is not an au-  
11 thorized user of a protected computer to knowingly and  
12 without authorization of an authorized user of the  
13 computer—

14 (1) utilize the computer to send unsolicited in-  
15 formation or material from the user's computer to  
16 other computers;

17 (2) divert an authorized user's Internet browser  
18 away from the Internet website the user intended to  
19 view to 1 or more other websites, unless such diver-  
20 sion has been authorized by the website the user in-  
21 tended to view;

22 (3) display an advertisement, series of adver-  
23 tisements, or other content on the computer through  
24 windows in an Internet browser, in such a manner  
25 that the user of the computer cannot end the display

1 of such advertisements or content without turning  
2 off the computer or terminating all sessions of the  
3 Internet browser, provided that this paragraph shall  
4 not apply to the display of content related to the  
5 functionality or identity of the Internet browser;

6 (4) covertly modify settings relating to the use  
7 of the computer or to the computer's access to or  
8 use of the Internet, including—

9 (A) altering the default Web page that ini-  
10 tially appears when a user of the computer  
11 launches an Internet browser;

12 (B) altering the default provider or Web  
13 proxy used to access or search the Internet;

14 (C) altering bookmarks used to store fa-  
15 vorite Internet website addresses; or

16 (D) altering settings relating to security  
17 measures that protect the computer and the in-  
18 formation stored on the computer against unau-  
19 thorized access or use;

20 provided that this paragraph shall not apply to any  
21 modification that restores settings previously  
22 changed without user consent;

23 (5) use software installed in violation of section  
24 3 to collect information about the user or the user's  
25 Internet browsing behavior; or

1           (6) remove, disable, or render inoperative a se-  
2           curity or privacy protection technology installed on  
3           the computer.

4 **SEC. 6. LIMITATIONS ON LIABILITY.**

5           (a) **PASSIVE TRANSMISSION, HOSTING, OR LINK-**  
6 **ING.**—A person shall not be deemed to have violated any  
7 provision of this Act solely because the person provided—

8           (1) the Internet connection, telephone connec-  
9           tion, or other transmission or routing function  
10           through which software was delivered to a protected  
11           computer for installation;

12           (2) the storage or hosting of software or of an  
13           Internet website through which software was made  
14           available for installation to a protected computer; or

15           (3) an information location tool, such as a di-  
16           rectory, index, reference, pointer, or hypertext link,  
17           through which a user of a protected computer lo-  
18           cated software available for installation.

19           (b) **NETWORK SECURITY.**—A provider of a network  
20 or online service that an authorized user of a protected  
21 computer uses or subscribes to shall not be deemed to have  
22 violated section 3 or 5 for any monitoring of, interaction  
23 with, or installation of software for the purposes of—

24           (1) protecting the security of the network, serv-  
25           ice, or computer;

1           (2) facilitating diagnostics, technical support,  
2 maintenance, network management, or repair; or

3           (3) preventing or detecting unauthorized, fraud-  
4 ulent, or otherwise unlawful uses of the network or  
5 service.

6 **SEC. 7. ADMINISTRATION AND ENFORCEMENT.**

7           (a) IN GENERAL.—Except as provided in subsection  
8 (b), this Act shall be enforced by the Commission as if  
9 the violation of this Act were an unfair or deceptive act  
10 or practice proscribed under section 18(a)(1)(B) of the  
11 Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

12           (b) ENFORCEMENT BY CERTAIN OTHER AGEN-  
13 CIES.—Compliance with this Act shall be enforced  
14 under—

15           (1) section 8 of the Federal Deposit Insurance  
16 Act (12 U.S.C. 1818), in the case of—

17           (A) national banks, and Federal branches  
18 and Federal agencies of foreign banks, by the  
19 Office of the Comptroller of the Currency;

20           (B) member banks of the Federal Reserve  
21 System (other than national banks), branches  
22 and agencies of foreign banks (other than Fed-  
23 eral branches, Federal agencies, and insured  
24 State branches of foreign banks), commercial  
25 lending companies owned or controlled by for-

1           eign banks, and organizations operating under  
2           section 25 or 25A of the Federal Reserve Act  
3           (12 U.S.C. 601 and 611), by the Board; and

4           (C) banks insured by the Federal Deposit  
5           Insurance Corporation (other than members of  
6           the Federal Reserve System) and insured State  
7           branches of foreign banks, by the Board of Di-  
8           rectors of the Federal Deposit Insurance Cor-  
9           poration;

10          (2) section 8 of the Federal Deposit Insurance  
11         Act (12 U.S.C. 1818), by the Director of the Office  
12         of Thrift Supervision, in the case of a savings asso-  
13         ciation the deposits of which are insured by the Fed-  
14         eral Deposit Insurance Corporation;

15          (3) the Federal Credit Union Act (12 U.S.C.  
16         1751 et seq.) by the National Credit Union Adminis-  
17         tration Board with respect to any Federal credit  
18         union;

19          (4) part A of subtitle VII of title 49, United  
20         States Code, by the Secretary of Transportation  
21         with respect to any air carrier or foreign air carrier  
22         subject to that part;

23          (5) the Packers and Stockyards Act, 1921 (7  
24         U.S.C. 181 et seq.) (except as provided in section  
25         406 of that Act (7 U.S.C. 226, 227)), by the Sec-

1       retary of Agriculture with respect to any activities  
2       subject to that Act; and

3               (6) the Farm Credit Act of 1971 (12 U.S.C.  
4       2001 et seq.) by the Farm Credit Administration  
5       with respect to any Federal land bank, Federal land  
6       bank association, Federal intermediate credit bank,  
7       or production credit association.

8       (c) EXERCISE OF CERTAIN POWERS.—For the pur-  
9       pose of the exercise by any agency referred to in sub-  
10      section (b) of its powers under any Act referred to in that  
11      subsection, a violation of this Act is deemed to be a viola-  
12      tion of a requirement imposed under that Act. In addition  
13      to its powers under any provision of law specifically re-  
14      ferred to in subsection (b), each of the agencies referred  
15      to in that subsection may exercise, for the purpose of en-  
16      forcing compliance with any requirement imposed under  
17      this Act, any other authority conferred on it by law.

18      (d) ACTIONS BY THE COMMISSION.—The Commis-  
19      sion shall prevent any person from violating this Act in  
20      the same manner, by the same means, and with the same  
21      jurisdiction, powers, and duties as though all applicable  
22      terms and provisions of the Federal Trade Commission  
23      Act (15 U.S.C. 41 et seq.) were incorporated into and  
24      made a part of this Act. Any entity that violates any provi-  
25      sion of that section is subject to the penalties and entitled

1 to the privileges and immunities provided in the Federal  
2 Trade Commission Act in the same manner, by the same  
3 means, and with the same jurisdiction, power, and duties  
4 as though all applicable terms and provisions of the Fed-  
5 eral Trade Commission Act were incorporated into and  
6 made a part of that section.

7 **SEC. 8. ACTIONS BY STATES.**

8 (a) IN GENERAL.—

9 (1) CIVIL ACTIONS.—In any case in which the  
10 attorney general of a State has reason to believe  
11 that an interest of the residents of that State has  
12 been or is threatened or adversely affected by the  
13 engagement of any person in a practice that this Act  
14 prohibits, the State, as *parens patriae*, may bring a  
15 civil action on behalf of the residents of the State in  
16 a district court of the United States of appropriate  
17 jurisdiction—

18 (A) to enjoin that practice;

19 (B) to enforce compliance with the rule;

20 (C) to obtain damage, restitution, or other  
21 compensation on behalf of residents of the  
22 State; or

23 (D) to obtain such other relief as the court  
24 may consider to be appropriate.

25 (2) NOTICE.—

1 (A) IN GENERAL.—Before filing an action  
2 under paragraph (1), the attorney general of  
3 the State involved shall provide to the  
4 Commission—

5 (i) written notice of that action; and

6 (ii) a copy of the complaint for that  
7 action.

8 (B) EXEMPTION.—

9 (i) IN GENERAL.—Subparagraph (A)  
10 shall not apply with respect to the filing of  
11 an action by an attorney general of a State  
12 under this subsection, if the attorney gen-  
13 eral determines that it is not feasible to  
14 provide the notice described in that sub-  
15 paragraph before the filing of the action.

16 (ii) NOTIFICATION.—In an action de-  
17 scribed in clause (i), the attorney general  
18 of a State shall provide notice and a copy  
19 of the complaint to the Commission at the  
20 same time as the attorney general files the  
21 action.

22 (b) INTERVENTION.—

23 (1) IN GENERAL.—On receiving notice under  
24 subsection (a)(2), the Commission shall have the

1 right to intervene in the action that is the subject  
2 of the notice.

3 (2) EFFECT OF INTERVENTION.—If the Com-  
4 mission intervenes in an action under subsection (a),  
5 it shall have the right—

6 (A) to be heard with respect to any matter  
7 that arises in that action; and

8 (B) to file a petition for appeal.

9 (c) CONSTRUCTION.—For purposes of bringing any  
10 civil action under subsection (a), nothing in this subtitle  
11 shall be construed to prevent an attorney general of a  
12 State from exercising the powers conferred on the attorney  
13 general by the laws of that State to—

14 (1) conduct investigations;

15 (2) administer oaths or affirmations; or

16 (3) compel the attendance of witnesses or the  
17 production of documentary and other evidence.

18 (d) ACTIONS BY THE COMMISSION.—In any case in  
19 which an action is instituted by or on behalf of the Com-  
20 mission for violation of section 2, no State may, during  
21 the pendency of that action, institute an action under sub-  
22 section (a) against any defendant named in the complaint  
23 in that action for violation of that section.

24 (e) VENUE; SERVICE OF PROCESS.—

1           (1) VENUE.—Any action brought under sub-  
2           section (a) may be brought in the district court of  
3           the United States that meets applicable require-  
4           ments relating to venue under section 1391 of title  
5           28, United States Code.

6           (2) SERVICE OF PROCESS.—In an action  
7           brought under subsection (a), process may be served  
8           in any district in which the defendant—

9                       (A) is an inhabitant; or

10                      (B) may be found.

11 **SEC. 9. EFFECT ON OTHER LAWS.**

12           (a) FEDERAL LAW.—Nothing in this Act shall be  
13           construed to limit or affect in any way the Commission's  
14           authority to bring enforcement actions or take any other  
15           measures under the Federal Trade Commission Act or any  
16           other provision of law.

17           (b) STATE LAW.—

18                       (1) STATE LAW CONCERNING INFORMATION  
19           COLLECTION SOFTWARE OR ADWARE.—This Act su-  
20           persedes any statute, regulation, or rule of a State  
21           or political subdivision of a State that expressly lim-  
22           its or restricts the installation or use of software on  
23           a protected computer to—

1 (A) collect information about the user of  
2 the computer or the user's Internet browsing  
3 behavior or other use of the computer; or

4 (B) cause advertisements to be delivered to  
5 the user of the computer,

6 except to the extent that any such statute, regula-  
7 tion, or rule prohibits deception in connection with  
8 the installation or use of such software.

9 (2) STATE LAW NOT SPECIFIC TO SOFTWARE.—

10 This Act shall not be construed to preempt the ap-  
11 plicability of State trespass, contract, tort, or anti-  
12 fraud law.

13 **SEC. 10. DEFINITIONS.**

14 In this Act:

15 (1) AUTHORIZED USER.—The term “authorized  
16 user”, when used with respect to a computer, means  
17 the owner or lessee of a computer, or someone using  
18 or accessing a computer with the actual or apparent  
19 authorization of the owner or lessee.

20 (2) CAUSE THE INSTALLATION.—The term  
21 “cause the installation” when used with respect to  
22 particular software, means to knowingly provide the  
23 technical means by which the software is installed,  
24 or to knowingly pay or provide other consideration  
25 to, or induce, another person to do so.

1           (3) COMMISSION.—The term “Commission”  
2 means the Federal Trade Commission.

3           (4) COOKIE.—The term “cookie” means a text  
4 file—

5                 (A) that is placed on a computer by an  
6 Internet service provider, interactive computer  
7 service, or Internet website; and

8                 (B) the sole function of which is to record  
9 information that can be read or recognized  
10 when the user of the computer subsequently ac-  
11 cesses particular websites or online locations or  
12 services.

13           (5) FIRST RETAIL SALE.—The term “first retail  
14 sale” means the first sale of a computer, for a pur-  
15 pose other than resale, after the manufacture, pro-  
16 duction, or importation of the computer. For pur-  
17 poses of this paragraph, the lease of a computer  
18 shall be considered a sale of the computer at retail.

19           (6) INSTALL.—The term “install” means—

20                 (A) to write computer software to a com-  
21 puter’s persistent storage medium, such as the  
22 computer’s hard disk, in such a way that the  
23 computer software is retained on the computer  
24 after the computer is turned off and subse-  
25 quently restarted; or

1 (B) to write computer software to a com-  
2 puter's temporary memory, such as random ac-  
3 cess memory, in such a way that the software  
4 is retained and continues to operate after the  
5 user of the computer turns off or exits the  
6 Internet service, interactive computer service, or  
7 Internet website from which the computer soft-  
8 ware was obtained.

9 (7) PERSON.—The term “person” has the  
10 meaning given that term in section 3(32) of the  
11 Communications Act of 1934 (47 U.S.C. 153(32)).

12 (8) PROTECTED COMPUTER.—The term “pro-  
13 tected computer” has the meaning given that term  
14 in section 1030(e)(2)(B) of title 18, United States  
15 Code.

16 (9) SOFTWARE.—The term “software” means  
17 any program designed to cause a computer to per-  
18 form a desired function or functions. Such term does  
19 not include any cookie.

20 (10) UPGRADE.—The term “upgrade”, when  
21 used with respect to a previously installed software  
22 program, means additional software that is issued by  
23 the publisher or any successor to the publisher of  
24 the software program to improve, correct, repair, en-

1       hance, supplement, or otherwise modify the software  
2       program.

3       **SEC. 11. EFFECTIVE DATE.**

4       This Act shall take effect 180 days after the date of  
5       enactment of this Act.