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SENATE BILL NO. 767

Offered January 26, 2000

A BILL to amend the Code of Virginia by adding a section numbered 12.1-12.1 and by adding in Title 59.1 a chapter numbered 43, consisting of sections numbered 59.1-479 through 59.1-493, relating to the Virginia Website Protection Act.

Patrons—Ticer, Barry, Edwards, Hawkins, Lucas and Puller; Delegates: Darner and Scott

Consent to introduce

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 12.1-12.1 and by adding in Title 59.1 a chapter numbered 43, consisting of sections numbered 59.1-479 through 59.1-493, as follows:

§ 12.1-12.1. Commission to administer Virginia Website Registry.

The Commission shall establish and administer the Virginia Website Registry established pursuant to Chapter 43 (§ 59.1-479 et seq.) of Title 59.1.

CHAPTER 43.**VIRGINIA WEBSITE PROTECTION ACT.**

§ 59.1-479. Short title.

This chapter shall be known and may be cited as the "Virginia Website Protection Act."

§ 59.1-480. Findings and purposes.

A. The General Assembly finds that the legal status of a website is elusive because of its ephemeral nature. Whereas a shareholder's interest in a corporation, a membership interest in a limited liability company, and a partner's interest in a partnership have corporeal existences by virtue of legislative fiat, an interest in a website has no corporeal existence. Furthermore, tangible property such as a work of art has a concrete physical existence whereas a website has a primordial physical existence uncharacteristic of tangible property. Finally an interest in a website falls outside the scope of intangible property such as patent and copyright, which emanate from constitutional mandates and legislative enactments, are usually present within a website.

B. The purpose of this chapter is to remove the legal uncertainty of a website and to establish a statutory framework to protect the interests of the website owners and, in furtherance of such purposes:

1. To give legal recognition to the existing and future conventions and protocols that comprise the World Wide Web by establishing that a website is personal property;

2. To create new tort claims and remedies to redress wrongful conduct injurious to website owners; and

3. To affirm that the World Wide Web and future electronic networks that supplement or supersede the World Wide Web will enhance the health, safety, and welfare of Virginians.

§ 59.1-481. Definitions.

As used in this chapter:

"Access agreement" or "user agreement" means (i) a contract that contains the terms by which a person may obtain access electronically to information or material made available on or through a website or (ii) other contract in a generic computer information transaction between a website owner and a user.

"Certificate of good standing" means a document issued by the Commission certifying that the website owner listed therein has properly filed or renewed, or both, his application to domesticate his website and that such website is domesticated in Virginia.

"Commission" means the State Corporation Commission.

"Domesticated website" means a website for which the website owner has satisfied the requirements for domesticating websites as provided in this chapter, and the Commission has enrolled the website in the Registry.

"Electronic filing" means any electronic information processing system that conforms to a protocol sanctioned under Virginia law and required by the Commission.

"File" means stored data or information identified by an assigned filename. Files on a website include data files, text files, program files, and directory files.

"Generic computer information transaction" means transfers or exchanges of computer information or material pursuant to standard licensing or access agreements. The term refers to information or

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60 material that allows for some user choices that are offered over a website. The term shall exclude
61 individually discrete contracts.

62 "Home page" means the first webpage a visitor sees upon entering a website that identifies the
63 website owner and usually contains an index or a map that provides a visitor with information about
64 navigating within the website.

65 "Hyperlink" means an elemental feature of the World Wide Web that connects an electronic
66 document to another part of the same webpage or to an entirely different webpage or file. The use of a
67 cursor to click on a link actuates this transfer from one part of a webpage to another part of the
68 webpage or to another webpage or file.

69 "Hypertext transfer protocol" or "HTTP" refers to the electronic information processing system that
70 gives hyperlinks and hypertexts functionality.

71 "Individually discrete contracts" means bargained for contracts in which the exchange deals with
72 specific parties and their unique needs and expectations.

73 "Injury" encompasses mental anguish, damage to reputation, lost profits, and diminution in value of
74 a website.

75 "Legal page" means the next page after the home page and contains the access agreement and the
76 website's privacy policies.

77 "Person" shall have the same meaning as defined in § 1-13.19.

78 "Registry" means the Virginia Website Registry as established by this chapter.

79 "User" means a party, other than the person who owns the website, who visits the website or any
80 webpage within the website.

81 "Webpage" means an electronic document that a user sees upon visiting a website and may include
82 other files within the website.

83 "Website" means an aggregation of files and webpages organized and maintained by the website
84 owner or his designee that has (i) discrete electronic addresses known as the Uniform Resource Locator
85 and the Internet Protocol address and (ii) a home page identifying the website.

86 "Website owner" means the person who holds legal or equitable title in and to a website.

87 "World Wide Web" means a communication system of the Internet that allows users to search for
88 and retrieve information stored in remote computers as well as, in some cases, to communicate back to
89 designated websites. It consists of a set of protocols, conventions, and electronic networks.

90 § 59.1-482. Scope; exclusions.

91 A. The provisions of this chapter shall apply to websites domesticated pursuant to provisions of this
92 chapter, the website owners of such domesticated websites, and the users of such domesticated websites.

93 B. The provisions of this chapter shall not apply to (i) transactions involving goods or tangible
94 personal property, (ii) transactions expressly subject to other laws that conflict with this chapter, and
95 (iii) transactions expressly subject to a federal law that preempts provisions of this chapter.

96 § 59.1-483. Commission's powers and duties.

97 A. As applicable to this chapter, the Commission shall have the following powers and duties:

98 1. To establish and maintain the Virginia Website Registry, which consists of materials required to
99 be filed with the Commission under § 59.1-486;

100 2. Upon the request of the website owner, to issue a certified copy of the access agreement or
101 certificate of good standing, or both; and

102 3. Subject to the Administrative Process Act (§ 9-6.14:1 et seq.), to promulgate regulations that are
103 necessary or desirable to carry out the provisions of this chapter. At a minimum, the regulations shall
104 include the following: (i) procedures for filing and renewing, electronically and otherwise; (ii) a
105 schedule of fees for initial filing, renewing, amending, modifying, certifying, and copying; and (iii)
106 procedures for requesting certified copies of domesticated access agreements and certificates of good
107 standing.

108 B. The Commission shall have no duty or authority to (i) enforce the provisions of the access
109 agreements, (ii) interpret or validate the access agreements, or (iii) hear any case or controversy arising
110 from the access agreements.

111 § 59.1-484. Domestication; requirements.

112 In order to be a domesticated website, a website shall meet the following requirements:

113 1. The website's home page shall identify the website owner.

114 2. The website's legal page shall contain privacy policies and an access agreement.

115 3. The access agreement shall provide that Virginia law, without regard to choice of law, applies to
116 the validity, interpretation and enforcement of each of the provisions contained in the access agreement.

117 4. The website owner shall appoint a Virginia website agent who meets the qualifications set forth in
118 § 59.1-485 and who maintains a registered office located in Virginia.

119 5. The website owner shall file the required materials with the Commission as set forth in
120 § 59.1-486.

121 § 59.1-485. Virginia website agent; qualifications; functions; notice of change.

A. To qualify as a Virginia website agent, the candidate shall (i) reside in the Commonwealth or be a member of the Virginia State Bar, (ii) maintain a registered office in the Commonwealth, and (iii) have the same business office as the registered office.

B. A registered Virginia website agent shall accept any service of process, notices, and other such matters served upon a website owner and forward them to the website owner.

C. If a website owner changes the person designated as the website agent or the registered office of the website agent, or both, the website owner shall notify the Commission within ten days of such change.

D. A registered Virginia website agent shall notify the website owner and the Commission at least thirty days prior to his resignation as a website agent to the extent such advance notice is possible.

§ 59.1-486. Filings.

A. In order to have a website domesticated in Virginia, a website owner shall file the required material with the Commission.

B. The initial application for domesticating a website in Virginia shall include the following:

1. Payment of the applicable fee as established by the Commission;

2. The name of the website owner;

3. The legal status of the website owner, which shall include the following:

a. If an individual owns the website: the domicile of the individual, the applicant's principal business address and telephone number, and the applicant's electronic mail address; or

b. If an entity owns the website: the type of the entity, the state under which the entity was organized, the address and telephone number of the principal office of the entity, and the name of the website agent designated by the website owner as the person authorized to accept service in Virginia;

4. The Uniform Resource Locator and the Internet Protocol address of the website;

5. The domain name of the website; and

6. A copy of the most current home page and legal page, including the access agreement and privacy policies currently in effect or that will be in effect as of the date of the filing.

C. To maintain its status as a website domesticated in Virginia, the owner of such website shall annually file the following with the Commission:

1. Payment of the applicable renewal fee as established by the Commission;

2. The name of the website owner;

3. The domain name of the website;

4. The Uniform Resource Locator and the Internet Protocol address; and

5. A copy of the home page, legal page, access agreement, and privacy policies that will be in effect as of the date of the renewal.

§ 59.1-487. Website as personal property; tax implications.

A website is a personal property that is not taxable by the Commonwealth or any public body, as defined in § 2.1-341, of the Commonwealth. A website owner shall not incur any tax liability because he domesticates a website.

§ 59.1-488. Permissive provisions.

To the extent consistent with the public policies of the Commonwealth, an access agreement may contain the following contractual provisions:

1. The home page or the legal page may set forth prohibited conducts as provided in § 59.1-491.

2. An access agreement may disclaim express warranties, implied warranties, warranties of fitness for a particular purpose, or any other warranties concerning the content of information contained with the website.

3. An access agreement may disclaim liability for direct, indirect, and consequential damages for injury that another party to the transaction sustains either directly or indirectly from errors or omissions pertaining to the content of a generic computer information transaction.

4. An access agreement may limit remedies available to the other party in the generic computer information transaction for injuries resulting directly or indirectly from an error or omission concerning the content of a generic computer information transaction.

5. An access or user agreement may provide that the circuit courts of the Commonwealth or the federal courts sitting in the Commonwealth shall have exclusive jurisdiction over any controversy concerning the validity, interpretation, or enforcement of such agreement.

6. An access agreement may provide that the other party to the agreement waives the right to a jury trial.

7. An access agreement may provide that the other party agrees to seek arbitration or mediation prior to seeking adjudication in a court of law or equity in the event a controversy arises.

§ 59.1-489. Suggested language of permissible provisions in an access agreement.

The following statements contain suggested language for permissible provisions in an access agreement:

183 1. The website owner makes no express or implied warranties with respect to the accuracy,
184 timeliness, and completeness of the material found on this website.

185 2. The website owner assumes no liability for errors and omissions with respect to the accuracy,
186 timeliness, and completeness of information made available to users for errors or omissions of material
187 on this website or other websites linked to this website.

188 3. The website owner shall have no liability for damages arising from a party's reliance on the data
189 published on this website.

190 4. The website owner shall have no liability to a third party for injuries that a third party sustained
191 attributable in whole or in part to information contained on this website.

192 5. The information and opinions contained on this website are not a substitute for the advice and
193 counsel of your licensed lawyer, physician, personal investment or financial advisor, or other
194 professionals.

195 6. For any error or omission in the accuracy, timeliness, or completeness of the content on this
196 website, the website owner will refund the user any fees paid in connection with the defective material.
197 The refund constitutes the sole remedy for any injury arising directly or indirectly from the error or
198 omission. The user waives any right to recover direct, indirect, and consequential damages for the
199 injury the user sustained as a result of the defective information.

200 7. A circuit court in the Commonwealth of Virginia or a federal court sitting in the Commonwealth
201 of Virginia will have exclusive jurisdiction over any controversy concerning the validity, interpretation,
202 or enforcement of this agreement.

203 8. In the event a controversy arises from this access agreement, the parties agree to seek mediation
204 or arbitration prior to seeking adjudication in a court of law or equity.

205 § 59.1-490. Unenforceable provisions.

206 A. If a provision in an access agreement is inherently unconscionable, would under the
207 circumstances be unconscionable, or would violate due process, such provision is void and
208 unenforceable.

209 B. If a transaction involves intentional wrongdoing by the website owner, to the extent any provision
210 in the access agreement facilitates, aids, or furthers the intentional wrongdoing, such provision is void
211 and unenforceable.

212 § 59.1-491. Prohibited conducts.

213 A. To the extent a website's home page or legal page contains a notice prohibiting such acts, the
214 following acts shall constitute violation of the access agreement:

215 1. Knowingly and intentionally bypassing the website's home page thereby accessing the files or
216 webpages within the website without first visiting the website's home page for the purpose of (i)
217 converting all or part of the website to the third party's benefit; (ii) deriving unfair competitive
218 advantage over the website owner; (iii) intimidating, harassing, embarrassing, or defaming the website
219 owner; or (iv) injuring the website owner or his properties; or

220 2. Knowingly and intentionally linking to a website, including any files or webpages therein, without
221 first obtaining the website owner's consent for the purpose of (i) deriving unjust economic gain from
222 such unauthorized link; (ii) intimidating, harassing, embarrassing, or defaming the website owner; or
223 (iii) injuring the website owner or his properties.

224 In the event a website owner becomes aware of a violation of this subsection, the website owner
225 shall notify the violator of such violation and afford him an opportunity to correct such violation prior
226 to seeking civil relief as provided in § 59.1-493.

227 B. It shall be unlawful to knowingly and intentionally create a website that falsely portrays that
228 website as a website of another person without such person's knowledge and consent for the purpose of
229 intimidating, harassing, embarrassing, or defaming that person or unlawfully deriving economic
230 advantage.

231 § 59.1-492. Prima facie evidence; affirmative defense.

232 A. In any adjudication proceeding in which a particular version of an access agreement is at issue, a
233 certified copy of the access agreement constitutes prima facie evidence that the certified copy is in fact
234 the version of the access agreement at issue.

235 B. In any adjudication proceeding, a showing that a third party gained access to a website by
236 circumventing a home page that had a notice prohibiting that manner of access shall establish a prima
237 facie case of such unauthorized use as prohibited under subdivision A 1 of § 59.1-491. A showing by a
238 clear and convincing evidence that the third party inadvertently bypassed the home page, intentionally
239 did so for just cause, or had no proscribed motive to harm the aggrieved website owner establishes an
240 affirmative defense to subdivision A 1 of § 59.1-491.

241 C. In any adjudication proceeding, a showing that (i) another website contains a link to any part of
242 the aggrieved website owner's website; (ii) the aggrieved website owner's home page or legal page
243 contains provisions prohibiting such link; (iii) the aggrieved website owner did not consent to such link;
244 and (iv) the owner of the other website has been notified and given the opportunity to cure such

violation shall establish a prima facie case of such unauthorized link as prohibited under subdivision A 2 of § 59.1-491. A showing by a clear and convincing evidence that the other website owner did so for just cause or had no proscribed motive to harm the aggrieved website owner establishes an affirmative defense to subdivision A 2 of § 59.1-491.

D. In any adjudication proceeding, a showing that a third party created a website and falsely portrayed that website as a website of another person, without that person's knowledge and consent, establishes a prima facie case under subsection B of § 59.1-491. A showing by a clear and convincing evidence that the third party did so for just cause or had no proscribed motive to harm the aggrieved website owner establishes an affirmative defense to subsection B of § 59.1-491.

§ 59.1-493. Civil relief.

Any person, including a new business without regard to the fact that it is a new business, whose property or person was injured or who was intimidated, harassed, embarrassed, or defamed by reason of a violation of any provision of this chapter may sue therefor and recover three-fold the damages sustained, punitive damages, and the costs of suit including reasonable attorney's fees. Without limiting the generality of the term, "damages sustained" shall include loss of profits, compensatory damages, and presumed damages. In addition to or in lieu of any damages, any person who is entitled to civil relief under this chapter may obtain appropriate equitable remedies, including injunctive relief.

2. That the State Corporation Commission shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment. #