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SENATE BILL NO. 221

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on March 4, 2002)

(Patron Prior to Substitute—Senator Stolle)

A BILL to amend and reenact §§ 18.2-187.1, 18.2-190.1 through 18.2-190.4 of the Code of Virginia and to amend the Code of Virginia by adding in Article 5.1 of Chapter 6 of Title 18.2 sections numbered 18.2-190.5 through 18.2-190.8, relating to offenses involving telecommunication devices; penalty.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-187.1, 18.2-190.1 through 18.2-190.4 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Article 5.1 of Chapter 6 of Title 18.2 sections numbered 18.2-190.5 through 18.2-190.8 as follows:

§ 18.2-187.1. Obtaining or attempting to obtain oil, electric, gas, water, telephone, telegraph; cable television or telecommunication service without payment; penalty; civil liability.

A. It shall be unlawful for any person knowingly, with the intent to defraud, to obtain or attempt to obtain, for himself or for another, oil, electric, gas, water, telephone, telegraph ~~or~~, cable television *or telecommunication* service by the use of any false information, or in any case where such service has been disconnected by the supplier and notice of disconnection has been given.

B. It shall be unlawful for any person to obtain or attempt to obtain oil, electric, gas, water, telephone, telegraph, ~~or~~ cable television *or telecommunication* service by the use of any scheme, device, means or method, or by a false application for service with intent to avoid payment of lawful charges therefor.

B1. It shall be unlawful for any person to obtain, or attempt to obtain, telecommunication service as defined in § 18.2-190.1 by the use of an unlawful telecommunication device as defined in § 18.2-190.1.

C. The word "notice" as used in subsection A ~~hereof~~ shall be notice given in writing to the person to whom the service was assigned. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last known address, requiring delivery to the addressee only with return receipt requested, and the actual signing of the receipt for ~~said~~ *such* mail by the addressee, shall be prima facie evidence that such notice was duly received.

D. Any person who violates any provisions of this section, if the value of service, credit or benefit procured is \$200 or more, shall be guilty of a Class 6 felony; or if the value is less than \$200, shall be guilty of a Class 1 misdemeanor. In addition, the court may order restitution for the value of the services unlawfully used and for all costs. Such costs shall be limited to actual expenses, including the base wages of employees acting as witnesses for the Commonwealth, and suit costs. However, the total amount of allowable costs granted hereunder shall not exceed \$250, excluding the value of the service.

E. Any party providing oil, electric, gas, water, telephone, telegraph, cable television *or telecommunication service who is aggrieved by a violation of this section may, in a civil proceeding in any court of competent jurisdiction, seek both injunctive and equitable relief, and an award of damages, including attorney's fees and costs. In addition to any other remedy provided by law, the party aggrieved may recover an award of actual damages or \$500 whichever is greater for each action.*

§ 18.2-190.1. Definitions.

As used in this article, unless the context requires a different meaning:

"Equipment or materials used to manufacture an unlawful telecommunication device" means (i) a scanner capable of intercepting the electronic serial number or mobile identification number of a cellular or other wireless telephone; (ii) electronic software or hardware capable of altering or changing the factory-installed electronic serial number of a cellular or other wireless telephone or a computer containing such software; ~~or~~ (iii) a list of cellular or other wireless telephone electronic serial numbers with their associated mobile identification numbers ~~possessed without the consent of the telecommunication service provider;~~ or (iv) a part, accessory or component of an unlawful telecommunication device possessed or used in the manufacture of such device including any electronic serial number, computer software, mobile identification number, service access card, account number, or personal identification number used to acquire, receive, use, decrypt or transmit a telecommunication service without the actual consent or knowledge of the telecommunication service provider.

"Manufacture of an unlawful telecommunication device" means to make, produce or assemble an unlawful telecommunication device, or to modify, alter, program or reprogram a telecommunication device to be capable of ~~acquiring or facilitating the acquisition of performing any of the illegal functions of an unlawful telecommunication service without the consent of the telecommunication service provider~~ device as that term is defined in this section.

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60 "Sell" means to sell, exchange, *lease*, give or dispose of to another or to offer or agree to do the
61 same.

62 "Telecommunication device" means (i) any type of instrument, device, machine or equipment which
63 is capable of transmitting or receiving telephonic, electronic or radio communications ~~or~~, (ii) any part
64 of such an instrument, device, machine or equipment, or any computer circuit, computer chip, electronic
65 mechanism, or other component, which is capable of facilitating the transmission or reception of
66 telephonic or electronic communications *or (iii) any type of instrument, device, machine, equipment or*
67 *software that is capable of transmitting, acquiring, encrypting, decrypting or receiving any telephonic,*
68 *electronic, data, Internet access, audio, video, microwave or radio transmissions, signals,*
69 *communications, or services, including the receipt, acquisition, transmission, encryption or decryption of*
70 *all such telecommunication services over any cable television, fiber optic, telephone, satellite,*
71 *microwave, data transmission, radio, Internet-based, or wireless distribution system, network, or facility,*
72 *or any part, accessory or component thereof, including any computer circuit, security module, smart*
73 *card, software, computer chip, electronic mechanism or other component, accessory or part of any*
74 *telecommunication device that is capable of facilitating the transmission, decryption, encryption,*
75 *acquisition, or reception of telecommunication services.*

76 "Telecommunication service" ~~includes~~ *means* any service provided for a charge or compensation to
77 facilitate the *lawful* origination, transmission, emission or reception of signs, signals, writings, images
78 and sounds or intelligence of any nature ~~by telephone, including cellular or other wireless telephones,~~
79 ~~wire, radio, television optical or other electromagnetic system through the use of a telecommunication~~
80 ~~device as that term is defined in this section.~~

81 "Telecommunication service provider" means ~~a~~ any person or entity providing any
82 telecommunication service including, ~~but not limited to, a cellular or other wireless telephone or paging~~
83 ~~company or other person or entity which,~~ (i) any person or entity owning or operating any cable
84 television, satellite, Internet-based, telephone, wireless, microwave, fiber optic, data transmission or
85 radio distribution network, system or facility; (ii) any person or entity who for a fee, supplies ~~the~~
86 facility, cell site, mobile telephone switching office, ~~or other~~ equipment or services to a
87 telecommunication service provider; and (iii) any person or entity providing a telecommunication
88 service directly or indirectly using any of the systems, networks, or facilities described in clause (i).

89 "Unlawful telecommunication device" means any telecommunication device that is ~~capable, or~~ has
90 been *manufactured, designed, developed,* altered, modified, programmed or reprogrammed, *alone or in*
91 *conjunction with another telecommunication device,* so as to be capable, of ~~acquiring, or~~ facilitating the
92 disruption, acquisition, receipt, transmission, retransmission or decryption of, a telecommunication
93 service without the actual consent or knowledge of the telecommunication service provider. Such
94 unlawful devices include, but are not limited to, ~~tumbler phones, clone phones, tumbler microchips,~~
95 ~~clone microchips and other instruments capable of disguising their identity or location or of gaining~~
96 ~~access to a communications system operated by a telecommunication service provider~~ (i) any device,
97 technology, product, service, equipment, computer software, or any component or part thereof, primarily
98 distributed, sold, designed, assembled, developed, manufactured, modified, programmed, reprogrammed
99 or used for the purpose of facilitating the unauthorized receipt of, transmission of, disruption of,
100 decryption of, access to, or acquisition of any telecommunication service provided by any
101 telecommunication service provider; and (ii) any type of instrument, device, machine, equipment,
102 technology, or software that is primarily designed, assembled, manufactured, developed, sold,
103 distributed, possessed, used or offered, promoted or advertised for the purpose of defeating or
104 circumventing any technology, device or software, or any component or part thereof, used by the
105 provider, owner or licensee of any telecommunication service or of any data, audio or video programs
106 or transmissions, to protect any such telecommunication, data, audio or video services, programs or
107 transmissions from unauthorized receipt, acquisition, access, decryption, disclosure, communication,
108 transmission or retransmission.

109 § 18.2-190.2. Possession of an unlawful telecommunication device or equipment etc., used to
110 manufacture such device; penalty.

111 A person who knowingly possesses (i) an unlawful telecommunication device or (ii) equipment or
112 materials used to manufacture an unlawful telecommunication device as defined in § 18.2-190.1 with the
113 intent to manufacture an unlawful telecommunication device ~~shall be~~ *is* guilty of a Class 6 felony
114 unless such possession is by a telecommunication equipment manufacturer *while lawfully acting in that*
115 *capacity,* or a facilities-based telecommunication service provider licensed by the Federal
116 Communications Commission or by a law-enforcement agency.

117 § 18.2-190.3. Sale of an unlawful telecommunication device; penalty.

118 A person who (i) *knowingly* sells ~~(+)~~ an unlawful telecommunication device or (ii) *sells* material,
119 including hardware, data, computer software or other information or equipment, knowing, *or having*
120 *reason to know,* that the purchaser or a third person intends to use such material in the manufacture of
121 an unlawful telecommunication device, ~~shall be~~ *is* guilty of a Class 6 felony.

§ 18.2-190.4. Manufacture of an unlawful telecommunication device; penalty.
A person who knowingly manufactures an unlawful telecommunication device shall be is guilty of a Class 6 felony.

§ 18.2-190.5. Separate offenses; penalty.
For purposes of imposing criminal penalties for violations of §§ 18.2-190.3 and 18.2-190.4, the commission of the prohibited activity regarding each unlawful telecommunication device shall be deemed a separate offense.

§ 18.2-190.6. Restitution.
The court may, in addition to any other sentence authorized by law, require a person convicted of violating §§ 18.2-190.3 or 18.2-190.4 to make restitution in the manner provided in § 19.2-305.1.

§ 18.2-190.7. Forfeiture of unlawful telecommunication devices.
Any unlawful telecommunication device possessed, manufactured or sold in violation of §§ 18.2-190.2, 18.2-190.3 or 18.2-190.4 may be seized and forfeited to the Commonwealth, and turned over to the circuit court in the city or county in which it was seized and such property shall be disposed of as provided by law.

§ 18.2-190.8. Civil relief; damages.
Any telecommunication service provider aggrieved by a violation of this article may seek both injunctive and equitable relief and an award of damages including attorney's fees and costs. In addition to any other remedy provided by law, the party aggrieved may recover an award of actual damages or \$500, whichever is greater, for each unlawful telecommunications device involved in the action. In any case in which the court finds that the violation was committed for purposes of commercial advantage or financial gain, the award shall be increased by an amount not to exceed three times the actual damages sustained or \$1,500 for each unlawful telecommunications device involved, whichever is greater.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities and \$0 for periods of commitment to the custody of the Department of Juvenile Justice.