

024719536

SENATE BILL NO. 221

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on January 16, 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:

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, obtain appropriate civil relief, including preliminary and final injunctions, other equitable or declaratory relief and compensatory damages. A service provider prevailing in such proceeding shall also be entitled to recover from the defendant, upon application to the court, costs of suit, and attorney's fees. Compensatory damages awarded by a court pursuant to this section shall be computed in accordance with either of the following provisions, which may be elected by the service provider at any time before final judgment is entered:

1. The service provider may recover the actual damages suffered as a result of the violation and any profits of the violator attributable to the violation that are not taken into account in computing actual damages. In determining actual damages, the court shall consider the value of all services obtained unlawfully by the violator, and where the use of an unlawful telecommunication device is involved, the value of all services available to the violator including the value of monthly services and all pay-for-view services offered during the relevant time period. In determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

2. The party aggrieved may recover an award of statutory damages for each violation involved in the action, in a sum of not less than \$250 or more than \$10,000. In cases involving the use of an unlawful telecommunication device, each device shall be considered a separate violation. In any case in which the court finds that the violation was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, as set forth above, by an amount not more than \$50,000 for the use of each unlawful

60 *telecommunications device.*

61 § 18.2-190.1. Definitions.

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

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

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

79 "Sell" means to sell, exchange, lease, give or dispose of to another or to offer or agree to do the
80 same.

81 "Telecommunication device" means (i) any type of instrument, device, machine or equipment which
82 is capable of transmitting or receiving telephonic, electronic or radio communications ~~or~~, (ii) any part
83 of such an instrument, device, machine or equipment, or any computer circuit, computer chip, electronic
84 mechanism, or other component, which is capable of facilitating the transmission or reception of
85 telephonic or electronic communications or (iii) ~~any type of instrument, device, machine, equipment or~~
86 ~~software that is capable of transmitting, acquiring, encrypting, decrypting or receiving any telephonic,~~
87 ~~electronic, data, Internet access, audio, video, microwave or radio transmissions, signals,~~
88 ~~communications, or services, including the receipt, acquisition, transmission, encryption or decryption of~~
89 ~~all such telecommunication services over any cable television, fiber optic, telephone, satellite,~~
90 ~~microwave, data transmission, radio, Internet-based, or wireless distribution system, network, or facility,~~
91 ~~or any part, accessory or component thereof, including any computer circuit, security module, smart~~
92 ~~card, software, computer chip, electronic mechanism or other component, accessory or part of any~~
93 ~~telecommunication device that is capable of facilitating the transmission, decryption, encryption,~~
94 ~~acquisition, or reception of telecommunication services.~~

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

100 "Telecommunication service provider" means ~~a~~ any person or entity providing any
101 telecommunication service including, ~~but not limited to, a cellular or other wireless telephone or paging~~
102 ~~company or other person or entity which,~~ (i) any person or entity owning or operating any cable
103 television, satellite, Internet-based, telephone, wireless, microwave, data transmission or radio
104 distribution photo-optical network, system or facility; (ii) any person or entity who for a fee, supplies
105 the facility, cell site, mobile telephone switching office, ~~or~~ other equipment or services to a
106 telecommunication service provider; and (iii) any person or entity providing a telecommunication
107 service directly or indirectly using any of the systems, networks, or facilities described in clause (i).

108 "Unlawful telecommunication device" means any telecommunication device that is ~~capable, or~~ has
109 been ~~manufactured, designed, developed,~~ altered, modified, programmed or reprogrammed, ~~alone or in~~
110 ~~conjunction with another telecommunication device,~~ so as to be capable, of ~~acquiring, or~~ facilitating the
111 ~~disruption, acquisition, receipt, transmission, retransmission or decryption of,~~ a telecommunication
112 service without the actual consent or knowledge of the telecommunication service provider. Such
113 unlawful devices include, but are not limited to, ~~tumbler phones, clone phones, tumbler microchips,~~
114 ~~clone microchips and other instruments capable of disguising their identity or location or of gaining~~
115 ~~access to a communications system operated by a telecommunication service provider~~ (i) any device,
116 technology, product, service, equipment, computer software, or any component or part thereof, primarily
117 distributed, sold, designed, assembled, developed, manufactured, modified, programmed, reprogrammed
118 or used for the purpose of facilitating the unauthorized receipt of, transmission of, disruption of,
119 decryption of, access to, or acquisition of any telecommunication service provided by any
120 telecommunication service provider; and (ii) any type of instrument, device, machine, equipment,
121 technology, or software that is primarily designed, assembled, manufactured, developed, sold,

distributed, possessed, used or offered, promoted or advertised for the purpose of defeating or circumventing any technology, device or software, or any component or part thereof, used by the provider, owner or licensee of any telecommunication service or of any data, audio or video programs or transmissions, to protect any such telecommunication, data, audio or video services, programs or transmissions from unauthorized receipt, acquisition, access, decryption, disclosure, communication, transmission or retransmission.

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

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

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

A person who (i) *knowingly* sells ~~(i)~~ an unlawful telecommunication device or (ii) *sells* material, including hardware, data, computer software or other information or equipment, knowing, *or having reason to know*, that the purchaser or a third person intends to use such material in the manufacture of 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.*

A. Any telecommunication service provider aggrieved by a violation of this article may, in a civil action in a court of competent jurisdiction, seek both equitable relief and an award of damages.

B. A telecommunication service provider aggrieved by a violation of this article may seek appropriate equitable relief, including preliminary and final injunctions, pretrial impoundment of any unlawful telecommunication devices, and post-verdict remedial modification or destruction of any impounded unlawful telecommunication devices.

C. A telecommunication service provider aggrieved by a violation of this article may, in a civil action in a court of competent jurisdiction, seek an award of damages. Upon election by the aggrieved telecommunication service provider at any time before final judgment is entered, damages awarded under this subsection shall be computed in accordance with the following provisions:

1. The party aggrieved may recover the actual damages suffered as a result of the violation and any profits of the violator attributable to the violation that are not taken into account in computing actual damages. The court shall consider the value of all services available to the violator from the use of an unlawful telecommunications device including the value of monthly service and all pay-for-view services offered during the relevant time period. In determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

2. The party aggrieved may recover an award of statutory damages in a sum of not less than \$250 or more than \$10,000 for each unlawful telecommunication device involved in the action. In any case in which the court finds that the violation was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, as set forth above, by an amount of not more than \$50,000 for each unlawful telecommunication device involved in the action.

D. A telecommunication service provider prevailing in an action pursuant to this section is entitled to recover from the defendant, upon application to the court, reasonable investigation expenses, court costs and attorney fees.

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