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**HOUSE BILL NO. 2973**

Offered January 10, 2007

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*A BILL to amend and reenact §§ 18.2-152.2, 18.2-152.3:1, 18.2-152.12 of the Code of Virginia, relating to the transmission of unsolicited bulk electronic messages (spam); penalty.*

Patrons—Bell, Athey, Cosgrove, Frederick, Gear, Jones, S.C., Miller, J.H. and O'Bannon

Referred to Committee on Science and Technology

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 18.2-152.2, 18.2-152.3:1, and 18.2-152.12 of the Code of Virginia are amended and reenacted as follows:**

§ 18.2-152.2. Definitions.

For purposes of this article:

"Computer" means a device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions, *including but not limited to wireless communication devices*. Such term does not include simple calculators, automated typewriters, facsimile machines, or any other specialized computing devices that are preprogrammed to perform a narrow range of functions with minimal end-user or operator intervention and are dedicated to a specific task.

"Computer data" means any representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared and is intended to be processed, is being processed, or has been processed in a computer or computer network. "Computer data" may be in any form, whether readable only by a computer or only by a human or by either, including, but not limited to, computer printouts, magnetic storage media, punched cards, or stored internally in the memory of the computer.

"Computer network" means two or more computers connected by a network.

"Computer operation" means arithmetic, logical, monitoring, storage or retrieval functions and any combination thereof, and includes, but is not limited to, communication with, storage of data to, or retrieval of data from any device or human hand manipulation of electronic or magnetic impulses. A "computer operation" for a particular computer may also be any function for which that computer was generally designed.

"Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, causes the computer to perform one or more computer operations.

"Computer services" means computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection therewith.

"Computer software" means a set of computer programs, procedures and associated documentation concerned with computer data or with the operation of a computer, computer program, or computer network.

*"Electronic message" means any text, image, or other communication transmitted to a computer.*

"Electronic ~~mail~~ message service provider" (EMSP) means any person who (i) is an intermediary in sending or receiving electronic ~~mail~~ messages and (ii) provides to end-users of electronic ~~mail~~ message services the ability to send or receive electronic ~~mail~~ messages.

"Financial instrument" includes, but is not limited to, any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction authorization mechanism, marketable security, or any computerized representation thereof.

"Network" means any combination of digital transmission facilities and packet switches, routers, and similar equipment interconnected to enable the exchange of computer data.

"Owner" means an owner or lessee of a computer or a computer network or an owner, lessee, or licensee of computer data, computer programs or computer software.

"Person" shall include any individual, partnership, association, corporation or joint venture.

"Property" shall include:

1. Real property;
2. Computers and computer networks;
3. Financial instruments, computer data, computer programs, computer software and all other personal property regardless of whether they are:
  - a. Tangible or intangible;
  - b. In a format readable by humans or by a computer;
  - c. In transit between computers or within a computer network or between any devices which

59 comprise a computer; or

60 d. Located on any paper or in any device on which it is stored by a computer or by a human; and

61 4. Computer services.

62 A person "uses" a computer or computer network when he attempts to cause or causes a computer or  
63 computer network to perform or to stop performing computer operations.

64 A person is "without authority" when he knows or reasonably should know that he has no right or  
65 permission or knowingly acts in a manner exceeding such right or permission.

66 § 18.2-152.3:1. Transmission of unsolicited bulk electronic messages (UBEM); penalty.

67 A. Any person who:

68 1. Uses a computer or computer network with the intent to falsify or forge electronic ~~mail~~ message  
69 transmission information or other routing information in any manner in connection with the transmission  
70 of unsolicited bulk electronic ~~mail~~ messages through or into the computer network of an electronic ~~mail~~  
71 message service provider or its subscribers; or

72 2. Knowingly sells, gives, or otherwise distributes or possesses with the intent to sell, give, or  
73 distribute software that (i) is primarily designed or produced for the purpose of facilitating or enabling  
74 the falsification of electronic ~~mail~~ message transmission information or other routing information; (ii)  
75 has only limited commercially significant purpose or use other than to facilitate or enable the  
76 falsification of electronic ~~mail~~ message transmission information or other routing information; or (iii) is  
77 marketed by that person acting alone or with another for use in facilitating or enabling the falsification  
78 of electronic ~~mail~~ message transmission information or other routing information is guilty of a Class 1  
79 misdemeanor.

80 B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:

81 1. The volume of ~~UBE~~ unsolicited bulk electronic messages (UBEM) transmitted ~~exceeded~~ 10,000  
82 exceeds 2,500 attempted recipients in any 24-hour period, 100,000 25,000 attempted recipients in any  
83 30-day time period, or ~~one million~~ 250,000 attempted recipients in any one-year time period; or

84 2. The revenue generated from a specific ~~UBE~~ UBEM transmission ~~exceeded~~ exceeds \$1,000 or the  
85 total revenue generated from all ~~UBE~~ UBEM transmitted to any EMSP ~~exceeded~~ exceeds \$50,000.; or

86 3. A single recipient of an electronic message or multiple electronic messages incurs damages in  
87 excess of \$250 during any one-year time period.

88 C. A person is guilty of a Class 6 felony if he knowingly hires, employs, uses, or permits any minor  
89 to assist in the transmission of ~~UBE~~ UBEM in violation of ~~subdivision~~ subdivisions B 1 or ~~subdivision~~,  
90 B 2, or B 3.

91 § 18.2-152.12. Civil relief; damages.

92 A. Any person whose property or person is injured by reason of a violation of any provision of this  
93 article or by any act of computer trespass set forth in subdivisions A 1 through A 6 of § 18.2-152.4  
94 regardless of whether such act is committed with malicious intent may sue therefor and recover for any  
95 damages sustained and the costs of suit. Without limiting the generality of the term, "damages" shall  
96 include loss of profits.

97 B. If the injury under this article arises from the transmission of unsolicited bulk electronic  
98 ~~mail~~ messages in contravention of the authority granted by or in violation of the policies set by the  
99 electronic ~~mail~~ message service provider where the defendant has knowledge of the authority or policies  
100 of the EMSP or where the authority or policies of the EMSP are available on the electronic ~~mail~~ message  
101 service provider's website, the injured person, other than an electronic ~~mail~~ message service provider,  
102 may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover the  
103 lesser of \$10 for each and every unsolicited bulk electronic ~~mail~~ message transmitted in violation of this  
104 article, or \$25,000 per day. The injured person shall not have a cause of action against the electronic  
105 ~~mail~~ message service provider that merely transmits the unsolicited bulk electronic ~~mail~~ messages over its  
106 computer network. Transmission of electronic ~~mail~~ messages from an organization to its members shall  
107 not be deemed to be unsolicited bulk electronic ~~mail~~ messages.

108 C. If the injury under this article arises from the transmission of unsolicited bulk electronic  
109 ~~mail~~ messages in contravention of the authority granted by or in violation of the policies set by the  
110 electronic ~~mail~~ message service provider where the defendant has knowledge of the authority or policies  
111 of the EMSP or where the authority or policies of the EMSP are available on the electronic ~~mail~~ message  
112 service provider's website, an injured electronic ~~mail~~ message service provider may also recover attorneys'  
113 fees and costs, and may elect, in lieu of actual damages, to recover \$1 for each and every intended  
114 recipient of an unsolicited bulk electronic ~~mail~~ message where the intended recipient is an end user of  
115 the EMSP or \$25,000 for each day an attempt is made to transmit an unsolicited bulk electronic ~~mail~~  
116 message to an end user of the EMSP. In calculating the statutory damages under this provision, the  
117 court may adjust the amount awarded as necessary, but in doing so shall take into account the number  
118 of complaints to the EMSP generated by the defendant's messages, the defendant's degree of culpability,  
119 the defendant's prior history of such conduct, and the extent of economic gain resulting from the  
120 conduct. Transmission of electronic ~~mail~~ messages from an organization to its members shall not be

121 deemed to be unsolicited bulk electronic ~~mail~~messages.

122 D. At the request of any party to an action brought pursuant to this section, the court may, in its  
123 discretion, conduct all legal proceedings in such a way as to protect the secrecy and security of the  
124 computer, computer network, computer data, computer program and computer software involved in order  
125 to prevent possible recurrence of the same or a similar act by another person and to protect any trade  
126 secrets of any party and in such a way as to protect the privacy of nonparties who complain about  
127 violations of this section.

128 E. The provisions of this article shall not be construed to limit any person's right to pursue any  
129 additional civil remedy otherwise allowed by law.

130 F. A civil action under this section must be commenced before expiration of the time period  
131 prescribed in § 8.01-40.1. In actions alleging injury arising from the transmission of unsolicited bulk  
132 electronic ~~mail~~messages, personal jurisdiction may be exercised pursuant to § 8.01-328.1.

133  
134 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**  
135 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**  
136 **be determined for periods of imprisonment in state adult correctional facilities and is \$0 for**  
137 **periods of commitment to the custody of the Department of Juvenile Justice.**