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SENATE BILL NO. 767

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws

on February 2, 2000)

Senate Amendments in [ ] — February 4, 2000

A BILL to amend the Code of Virginia 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.

Be it enacted by the General Assembly of Virginia:

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

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.

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

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

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

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

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

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

"Legal page" means the page that contains the access agreement and the website's privacy policies.

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

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

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

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

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

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

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

§ 59.1-482. Scope; exclusions.

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

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

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

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

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

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

3. To promulgate regulations that are necessary or desirable to carry out the provisions of this chapter. At a minimum, the regulations shall include the following: (i) procedures for filing and renewing, electronically and otherwise; (ii) a schedule of fees for initial filing, renewing, amending, modifying, certifying, and copying; and (iii) procedures for requesting certified copies of access agreements of, and certificates of good standing for, domesticated websites.

[*4. To delegate by regulation or order such duties under this chapter as it deems necessary or desirable to carry out the provisions of this chapter.*]

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

C. The Commission shall not be subject to suit in any matter relating to its performance of its duties under this chapter.

[*D. The fees paid into the state treasury under this section and § 59.1-486 shall be set aside and paid into the special fund created under § 13.1-775.1, and shall be used only by the Commission as it deems necessary to defray the costs of the Commission and of the office of the Clerk of the Commission in supervising, implementing, administering and enforcing the provisions of this chapter. The projected excess of fees collected over the costs of administration and enforcement so incurred shall be paid into the general fund prior to the close of each fiscal year, based on the unexpended balances of the special fund at the end of the prior fiscal year. An adjustment of this transfer amount to reflect actual fees collected shall occur during the first quarter of the succeeding fiscal year.*]

§ 59.1-484. Domestication; requirements.

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

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

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

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

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

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

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

A. To qualify as a Virginia website agent, the candidate shall (i) be an individual who resides 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 Virginia website agent shall accept any service of process, notices, and other such matters directed to a website owner and forward them to the website owner.

C. A website owner may change its Virginia website agent or its agent's registered office address, or both, upon filing with the Commissioner a statement of change on a form supplied by the Commission that sets forth:

1. The name of the website owner;

2. The address of its Virginia website agent's current registered office';

3. If the current registered office is to be changed, the post office address, including the street and number, if any, of the new registered office, including the name of the city or county in which it is to be located;

4. If the current Virginia website agent is to be changed, the name of the new Virginia website agent; and

A statement of change shall forthwith be filed with the Commission by a website owner whenever its Virginia website agent dies, resigns, or ceases to satisfy the requirements of § 59.1-485.

D. A Virginia website agent may resign his agency appointment by signing and filing with the Commission his statement of resignation accompanied by his certification that he has mailed a copy thereof by certified mail to the principal business address or principal office address, as the case may be, of the website owner. The statement may include a statement that the registered office is also discontinued. The agency appointment is terminated, and the registered office is discontinued if so provided, on the thirty-first day after the date on which the statement is filed.

E. If any website owner whose Virginia website agent has filed with the Commission his statement of registration pursuant to subsection D of this section fails to file a statement of change pursuant to subsection C of this section within thirty-one days after the date on which the statement of resignation was filed, the Commission shall mail notice to the website owner of impending termination of its website's status as a domesticated website and removal of its website from the Registry. If the website owner fails to file the statement of change before the last day of the second month immediately following the month in which the impending termination and removal notice was mailed, its website's status as a domesticated website shall be automatically terminated and removed from the Registry as of that day.

§ 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, the applicant's electronic mail address and the name and registered office address in Virginia of the website agent designated by the website owner as the person authorized to accept service in Virginia; or

b. If an entity owns the website: the type of the entity, the jurisdiction where the entity was organized, the address and telephone number of the principal office of the entity, and the name and registered office address in Virginia 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;

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; and

7. Such additional information as the Commission may require.

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

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;

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; and

6. Such additional information as the Commission may require.

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

A website is a personal property that is not taxable under the laws 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:

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

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

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

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

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

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

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

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

§ 59.1-490. Unenforceable provisions.

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

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

§ 59.1-491. Prohibited conducts.

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

1. Knowingly and intentionally bypassing the website's home page thereby accessing the files or

webpages within the website without first visiting the website's home page for the purpose of (i) converting all or part of the website to the third party's benefit; (ii) deriving unfair competitive advantage over the website owner; (iii) intimidating, harassing, embarrassing, or defaming the website owner; or (iv) injuring the website owner or his properties; or

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

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

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

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

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

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

C. In any adjudication proceeding, a showing that (i) another website contains a link to any part of the aggrieved website owner's website; (ii) the aggrieved website owner's home page or legal page contains provisions prohibiting such link; (iii) the aggrieved website owner did not consent to such link; 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 provisions of this act shall become effective on February 1, 2001.