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SENATE BILL NO. 1163

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice)

(Patron Prior to Substitute—Senator Stolle)

Senate Amendments in [] — February 2, 2005

A BILL to amend and reenact §§ 18.2-152.2, 18.2-152.3, 18.2-152.4 through 18.2-152.7, 18.2-152.8, 18.2-152.12, and 19.2-8 of the Code of Virginia; to amend the Code of Virginia by adding sections numbered 18.2-152.5:1 and 19.2-249.2; and to repeal §§18.2-152.9 and 18.2-152.10 of the Code of Virginia, relating to redefinition and modernization of terms and streamlining the laws governing computer crimes; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-152.2, 18.2-152.3, 18.2-152.4 through 18.2-152.7, 18.2-152.8, 18.2-152.12, and 19.2-8 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a sections numbered 18.2-152.5:1 and 19.2-249.2 as follows:

§ 18.2-152.2. Definitions.

For purposes of this article:

"Computer" means an electronic, magnetic, optical, hydraulic or organic device or group of devices which, pursuant to a computer program, to human instruction, or to permanent instructions contained in the device or group of devices, can automatically perform computer operations with or on computer data and can communicate the results to another computer or to a person. The term "computer" includes any connected or directly related device, equipment, or facility which enables the computer to store, retrieve or communicate computer programs, computer data or the results of computer operations to or from a person, another computer or another device a device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions. 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 mail service provider" (EMSP) means any person who (i) is an intermediary in sending or receiving electronic mail and (ii) provides to end-users of electronic mail services the ability to send or receive electronic mail.

"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;

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60 2. Computers and computer networks;
61 3. Financial instruments, computer data, computer programs, computer software and all other
62 personal property regardless of whether they are:
63 a. Tangible or intangible;
64 b. In a format readable by humans or by a computer;
65 c. In transit between computers or within a computer network or between any devices which
66 comprise a computer; or
67 d. Located on any paper or in any device on which it is stored by a computer or by a human; and
68 4. Computer services.
69 A person "uses" a computer or computer network when he attempts to cause or causes:
70 1. ~~A~~ *a* computer or computer network to perform or to stop performing computer operations;
71 2. ~~The withholding or denial of the use of a computer, computer network, computer program,~~
72 ~~computer data or computer software to another user; or~~
73 3. ~~A person to put false information into a computer.~~
74 A person is "without authority" when *he knows or reasonably should know that* he has no right or
75 permission of the owner to use a computer or computer network or he uses a computer or computer
76 network or knowingly acts in a manner exceeding such right or permission.
77 § 18.2-152.3. Computer fraud; penalty.
78 Any person who uses a computer or computer network, without authority and ~~with the intent to:~~
79 1. ~~Obtain~~ *Obtains* property or services by false pretenses;
80 2. ~~Embezzle~~ *Embezzles* or ~~commit~~ *commits* larceny; or
81 3. ~~Convert~~ *Converts* the property of another
82 is guilty of the crime of computer fraud.
83 If the value of the property or services obtained is \$200 or more, the crime of computer fraud shall
84 be punishable as a Class 5 felony. Where the value of the property or services obtained is less than
85 \$200, the crime of computer fraud shall be punishable as a Class 1 misdemeanor.
86 § 18.2-152.4. Computer trespass; penalty.
87 A. It shall be unlawful for any person ~~to use a computer or computer network without authority and,~~
88 ~~with the malicious~~ intent, to:
89 1. Temporarily or permanently remove, halt, or otherwise disable any computer data, computer
90 programs, or computer software from a computer or computer network;
91 2. Cause a computer to malfunction, regardless of how long the malfunction persists;
92 3. Alter, *disable*, or erase any computer data, computer programs, or computer software;
93 4. Effect the creation or alteration of a financial instrument or of an electronic transfer of funds;
94 5. ~~Cause~~ *Use a computer or computer network to cause* physical injury to the property of another; or
95 6. ~~Make~~ *Use a computer or computer network to make* or cause to be made an unauthorized copy, in
96 any form, including, but not limited to, any printed or electronic form of computer data, computer
97 programs, or computer software residing in, communicated by, or produced by a computer or computer
98 network.
99 7. [Repealed].
100 B. Any person who violates this section shall be guilty of computer trespass, which offense shall be
101 punishable as a Class 1 misdemeanor. If there is damage to the property of another valued at ~~\$2,500~~
102 ~~\$1,000~~ or more caused by such person's ~~malicious~~ act in violation of this section, the offense shall be
103 punishable as a Class 6 felony.
104 C. Nothing in this section shall be construed to interfere with or prohibit terms or conditions in a
105 contract or license related to computers, computer data, computer networks, computer operations,
106 computer programs, computer services, or computer software or to create any liability by reason of
107 terms or conditions adopted by, or technical measures implemented by, a Virginia-based electronic mail
108 service provider to prevent the transmission of unsolicited electronic mail in violation of this article.
109 Nothing in this section shall be construed to prohibit the monitoring of computer usage of, the otherwise
110 lawful copying of data of, or the denial of computer or Internet access to a minor by a parent or legal
111 guardian of the minor.
112 § 18.2-152.5. Computer invasion of privacy; penalties.
113 A. A person is guilty of the crime of computer invasion of privacy when he uses a computer or
114 computer network and intentionally examines without authority any employment, salary, credit or any
115 other financial or ~~personal~~ *identifying* information, *as defined in clauses (iii) through (xiii) of subsection*
116 *C of § 18.2-186.3*, relating to any other person. "Examination" under this section requires the offender to
117 review the information relating to any other person after the time at which the offender knows or should
118 know that he is without authority to view the information displayed.
119 B. The crime of computer invasion of privacy shall be punishable as a Class 1 misdemeanor.
120 C. *Any person who violates this section after having been previously convicted of a violation of this*
121 *section or any substantially similar laws of any other state or of the United States is guilty of a Class 6*

felony.

D. Any person who violates this section and sells or distributes such information to another is guilty of a Class 6 felony.

E. Any person who violates this section and uses such information in the commission of another crime is guilty of a Class 6 felony.

F. This section shall not apply to any person collecting information that is reasonably needed to (i) protect the security of a computer, computer service, or computer business, or to facilitate diagnostics or repair in connection with such computer, computer service, or computer business or (ii) determine whether the computer user is licensed or authorized to use specific computer software or a specific computer service.

§ 18.2-152.5:1. Using a computer to gather identifying information; penalties.

A. It is unlawful for any person, other than a law-enforcement officer, as defined in § 9.1-101, and acting in the performance of his official duties, to use a computer to obtain, access, or record, through the use of material artifice, trickery or deception, any identifying information, as defined in clauses (iii) through (xiii) of subsection C of § 18.2-186.3. Any person who violates this section is guilty of a Class 6 felony.

B. Any person who violates this section and sells or distributes such information to another is guilty of a Class 5 felony.

C. Any person who violates this section and uses such information in the commission of another crime is guilty of a Class 5 felony.

§ 18.2-152.6. Theft of computer services; penalties.

Any person who willfully uses a computer or computer network, with intent to obtain obtains computer services without authority, shall be is guilty of the crime of theft of computer services, which shall be punishable as a Class 1 misdemeanor. If the theft of computer services is valued at \$2,500 or more, he is guilty of a Class 6 felony.

§ 18.2-152.7. Personal trespass by computer; penalty.

A. A person is guilty of the crime of personal trespass by computer when he uses a computer or computer network without authority and with the intent to cause physical injury to an individual.

B. If committed maliciously, the crime of personal trespass by computer shall be punishable as a Class 3 felony. If such act is done unlawfully but not maliciously, the crime of personal trespass by computer shall be punishable as a Class 6 felony.

§ 18.2-152.8. Property capable of embezzlement.

For purposes of §§ 18.2-95, 18.2-96, 18.2-108, and 18.2-111, personal property subject to embezzlement, larceny, or receiving stolen goods shall include:

1. Computers and computer networks;
2. 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 comprise a computer; or
 - d. Located on any paper or in any device on which it is stored by a computer or by a human; and
3. Computer services.

§ 18.2-152.12. Civil relief; damages.

A. Any person whose property or person is injured by reason of a violation of any provision of this article or by any nonmalicious violation of § 18.2-152.4 may sue therefor and recover for any damages sustained and the costs of suit. Without limiting the generality of the term, "damages" shall include loss of profits.

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

C. If the injury under this article arises from the transmission of unsolicited bulk electronic mail in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider where the defendant has knowledge of the authority or policies of the EMSP or where the

183 authority or policies of the EMSP are available on the electronic mail service provider's website, an
184 injured electronic mail service provider may also recover attorneys' fees and costs, and may elect, in lieu
185 of actual damages, to recover \$1 for each and every intended recipient of an unsolicited bulk electronic
186 mail message where the intended recipient is an end user of the EMSP or \$25,000 for each day an
187 attempt is made to transmit an unsolicited bulk electronic mail message to an end user of the EMSP. In
188 calculating the statutory damages under this provision, the court may adjust the amount awarded as
189 necessary, but in doing so shall take into account the number of complaints to the EMSP generated by
190 the defendant's messages, the defendant's degree of culpability, the defendant's prior history of such
191 conduct, and the extent of economic gain resulting from the conduct. Transmission of electronic mail
192 from an organization to its members shall not be deemed to be unsolicited bulk electronic mail.

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

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

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

204 § 19.2-8. Limitation of prosecutions.

205 A prosecution for a misdemeanor, or any pecuniary fine, forfeiture, penalty or amercement, shall be
206 commenced within one year next after there was cause therefor, except that a prosecution for petit
207 larceny may be commenced within five years, and for an attempt to produce abortion, within two years
208 after commission of the offense.

209 A prosecution for violation of laws governing the placement of children for adoption without a
210 license pursuant to § 63.2-1701 shall be commenced within one year from the date of the filing of the
211 petition for adoption.

212 A prosecution for making a false statement or representation of a material fact knowing it to be false
213 or knowingly failing to disclose a material fact, to obtain or increase any benefit or other payment under
214 the Virginia Unemployment Compensation Act (§ 60.2-100 et seq.) shall be commenced within three
215 years next after the commission of the offense.

216 A prosecution for any violation of §§—10.1-1320, 62.1-44.32 (b), 62.1-194.1, or Article 11
217 (§ 62.1-44.34:14 et seq.) of Chapter 3.1 of Title 62.1 ~~which~~ *that* involves the discharge, dumping or
218 emission of any toxic substance as defined in § 32.1-239 shall be commenced within three years next
219 after the commission of the offense.

220 Prosecution of Building Code violations under § 36-106 shall commence within one year of
221 discovery of the offense by the owner or by the building official; provided that such discovery occurs
222 within two years of the date of initial occupancy or use after construction of the building or structure, or
223 the issuance of a certificate of use and occupancy for the building or structure, whichever is later.
224 However, prosecutions under § 36-106 relating to the maintenance of existing buildings or structures as
225 contained in the Uniform Statewide Building Code shall commence within one year of the discovery of
226 the offense.

227 Prosecution of nonfelonious offenses which constitute malfeasance in office shall commence within
228 two years next after the commission of the offense.

229 Prosecution of any violation of §§ 55-79.87, 55-79.88, 55-79.89, 55-79.90, 55-79.93, 55-79.94,
230 55-79.95, 55-79.103, or any rule adopted under or order issued pursuant to § 55-79.98, shall commence
231 within three years next after the commission of the offense.

232 Prosecution of illegal sales or purchases of wild birds, wild animals and freshwater fish under
233 § 29.1-553 shall commence within three years after commission of the offense.

234 Prosecution of violations under Title 58.1 for offenses involving false or fraudulent statements,
235 documents or returns, or for the offense of willfully attempting in any manner to evade or defeat any
236 tax or the payment thereof, or for the offense of willfully failing to pay any tax, or willfully failing to
237 make any return at the time or times required by law or regulations shall commence within three years
238 next after the commission of the offense, unless a longer period is otherwise prescribed.

239 Prosecution of violations of subsection A or B of § 3.1-796.122 shall commence within five years of
240 the commission of the offense, except violations regarding agricultural animals shall commence within
241 one year of the commission of the offense.

242 A prosecution for a violation of § 18.2-386.1 shall be commenced within five years of the
243 commission of the offense.

244 A prosecution for any violation of the Campaign Finance Disclosure Act (§ 24.2-900 et seq.) shall

commence within one year of the discovery of the offense but in no case more than three years after the date of the commission of the offense.

A prosecution of a crime that is punishable as a misdemeanor pursuant to the Virginia Computer Crimes Act (§ 18.2-152.1 et seq.) shall be commenced before the earlier of (i) five years after the commission of the last act in the course of conduct constituting a violation of the article or (ii) one year after the existence of the illegal act and the identity of the offender are discovered by the Commonwealth, by the owner, or by anyone else who is damaged by such violation.

Nothing in this section shall be construed to apply to any person fleeing from justice or concealing himself within or without ~~this~~ the Commonwealth to avoid arrest or be construed to limit the time within which any prosecution may be commenced for desertion of a spouse or child or for neglect or refusal or failure to provide for the support and maintenance of a spouse or child.

§ 19.2-249.2. Venue for prosecution of computer crimes.

For the purpose of venue under the Virginia Computer Crimes Act (§ 18.2-152.1 et seq.), any violation of the article shall be considered to have been committed in any county or city:

1. In which any act was performed in furtherance of any course of conduct that violated this article;

2. In which the owner has his principal place of business in the Commonwealth;

3. In which any offender had control or possession of any proceeds of the violation or of any books, records, documents, property, financial instrument, computer software, computer program, computer data, or other material or objects that were used in furtherance of the violation;

4. From which, to which, or through which any access to a computer or computer network was made whether by wires, electromagnetic waves, microwaves, or any other means of communication;

5. In which the offender resides; or

6. In which any computer that is an object or an instrument of the violation is located at the time of the alleged offense.

2. That §§ 18.2-152.9 and 18.2-152.10 of the Code of Virginia are repealed.

3. 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 is [\$0] for periods of commitment to the custody of the Department of Juvenile Justice.

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