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HOUSE BILL NO. 1**AMENDMENT IN THE NATURE OF A SUBSTITUTE**

(Proposed by the House Committee for Courts of Justice)

(Patron Prior to Substitute—Delegate Loupassi)

House Amendments in [] - February 15, 2010

A BILL to amend and reenact §§ 18.2-152.2 [~~and~~ ,] 18.2-152.3:1 [, and 18.2-152.12] of the Code of Virginia, relating to unsolicited commercial electronic mail (spam); penalty.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-152.2 [~~and~~ ,] 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; computer crimes.

For purposes of this article:

"Commercial electronic mail" means electronic mail, the primary purpose of which is the advertisement or promotion of a commercial product or service.

"Computer" means 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;
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 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

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4. Computer services.

"Spam" means unsolicited commercial electronic mail. Spam shall not include commercial electronic mail transmitted to a recipient with whom the sender has an existing business or personal relationship.

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

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

§ 18.2-152.3:1. Transmission of unsolicited commercial electronic mail (spam); penalty.

A. Any person who:

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

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

B. A person is guilty of a Class 6 felony if he Any person who commits a violation of subsection subdivision A1 and when: (i)

1. The the volume of UBE spam transmitted exceeded 10,000 attempted recipients in any 24-hour time period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period; or

2. The (ii) revenue generated from a specific UBE transmission of spam exceeded \$1,000 or the total revenue generated from all UBE spam transmitted to any EMSP exceeded \$50,000, is guilty of a Class 6 felony.

C. A person is guilty of a Class 6 felony if he Any person who knowingly hires, employs, uses, or permits any minor to assist in the transmission of UBE spam in violation of subdivision B 1 or subdivision B 2 subsection B is guilty of a Class 6 felony.

§ 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 act of computer trespass set forth in subdivisions A 1 through A 6 of § 18.2-152.4 regardless of whether such act is committed with malicious intent 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 spam 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 spam 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 spam over its computer network. Transmission of electronic mail from an organization to its members shall not be deemed to be unsolicited bulk electronic mail spam.

C. If the injury under this article arises from the transmission of unsolicited bulk electronic mail spam 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, an injured electronic mail service provider may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover \$1 for each and every intended recipient of an unsolicited bulk electronic mail a spam message where the intended recipient is an end user of the EMSP or \$25,000 for each day an attempt is made to transmit an unsolicited bulk electronic mail a spam message to an end user of the EMSP. In calculating the statutory damages under this provision, the court may adjust the amount awarded as necessary, but in doing so shall take into account the number of complaints to the EMSP generated by the defendant's messages, the defendant's degree of culpability, the defendant's prior history of such conduct, and the extent of economic gain resulting from the conduct. Transmission of electronic mail from an organization to its members shall not be deemed to be

122 ~~unsolicited bulk electronic mail spam.~~

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

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

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

134 **2. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be**
135 **determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter**
136 **781 of the 2009 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign**
137 **a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated amount of the**
138 **necessary appropriation is \$0 for periods of commitment to the custody of the Department of**
139 **Juvenile Justice.**

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