

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 An Act to amend and reenact §§ 18.2-152.2, 18.2-152.3:1, and 18.2-152.12 of the Code of Virginia,
3 relating to unsolicited commercial electronic mail (spam); penalty.

4 [H 1]
5 Approved

6 Be it enacted by the General Assembly of Virginia:

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

9 § 18.2-152.2. Definitions; computer crimes.

10 For purposes of this article:

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

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

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

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

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

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

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

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

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

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

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

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

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

48 "Property" shall include:

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

57 d. Located on any paper or in any device on which it is stored by a computer or by a human; and
58 4. Computer services.

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

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

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

65 § 18.2-152.3:1. Transmission of unsolicited commercial electronic mail (spam); penalty.

66 A. Any person who:

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

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

79 B. A person is guilty of a Class 6 felony if he ~~Any person who~~ commits a violation of subsection
80 subdivision A 1 and when: (i)

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

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

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

90 § 18.2-152.12. Civil relief; damages.

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

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

107 C. If the injury under this article arises from the transmission of ~~unsolicited bulk electronic mail~~
108 spam in contravention of the authority granted by or in violation of the policies set by the electronic
109 mail service provider where the defendant has knowledge of the authority or policies of the EMSP or
110 where the authority or policies of the EMSP are available on the electronic mail service provider's
111 website, an injured electronic mail service provider may also recover attorneys' fees and costs, and may
112 elect, in lieu of actual damages, to recover \$1 for each and every intended recipient of an ~~unsolicited~~
113 ~~bulk electronic mail~~ a spam message where the intended recipient is an end user of the EMSP or
114 \$25,000 for each day an attempt is made to transmit an ~~unsolicited bulk electronic mail~~ a spam message
115 to an end user of the EMSP. In calculating the statutory damages under this provision, the court may
116 adjust the amount awarded as necessary, but in doing so shall take into account the number of
117 complaints to the EMSP generated by the defendant's messages, the defendant's degree of culpability, the

118 defendant's prior history of such conduct, and the extent of economic gain resulting from the conduct.
119 Transmission of electronic mail from an organization to its members shall not be deemed to be
120 ~~unsolicited bulk electronic mail spam~~.

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

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

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

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

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