

By Mr. Tobin of Quincy, petition (accompanied by bill, House, No. 2743) of A. Stephen Tobin for legislation to establish a crime of illegal internet and broadband access and establishing penalties therefor. Criminal Justice.



IN THE YEAR TWO THOUSAND **THREE**

AN ACT TO IMPROVE BROADBAND AND INTERNET SECURITY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter one hundred and sixty-six of the General Laws as appearing in the 2000 Official Edition, is hereby amended by deleting section forty-two A in its entirety and replacing it with the following:—

166:42A. Definitions; telecommunications service; fraud; penalties, civil remedies.

Section 42A. (a) As used in this and the following section, the following words shall, unless the context requires otherwise, have the following meanings:—

“Manufacture or assembly of an unlawful telecommunication device,” to make, produce or assemble an unlawful telecommunication device or to modify, alter, program or reprogram a telecommunication device to be capable of acquiring, disrupting, receiving, transmitting, decrypting or facilitating the acquisition, disruption, receipt, transmission or decryption of a telecommunication service without the express consent or express authorization of the telecommunication service provider, or to knowingly assist others in these activities.

“Telecommunication device,” any type of instrument, device, machine, equipment, technology or software which is capable of transmitting, acquiring, decrypting or receiving any telephonic, electronic, data, Internet access, audio, video, microwave or radio transmissions, signals, communications or services, including the receipt, acquisition, transmission or decryption of all such communications, transmissions, signals or services provided by or through any cable television, fiber optic, telephone,

satellite microwave, data transmission, radio, Internet-based or wireless distribution network, system or facility; or any part, accessory or components thereof, including any computer circuit, security module, smart card, software, computer chip, electronic mechanism or other computer, accessory or part of any telecommunication device which is capable of facilitating the transmission, decryption, acquisition or reception of any such communications, transmissions, signals or services.

“Telecommunication service,” any service provided for a charge or compensation to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, wireless, radio, electromagnetic, photoelectronic or photo-optical systems; and any service provided by any radio, telephone, fiber optic, cable television, satellite, microwave, data transmission, wireless or Internet-based distribution system, network, facility or technology, including, but not limited to, any and all electronic data, video, audio, Internet access, telephonic, microwave and radio communications, transmissions, signals and services, and any such communications, transmissions, signals and services provided directly and indirectly by or through any of the aforementioned systems, networks, facilities or technologies.

“Telecommunication service provider,” 1) Any person or entity providing a telecommunication service, whether directly or indirectly as a reseller, including, but not limited to, a cellular, paging or other wireless communications company or other person or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office or other equipment or telecommunication service; 2) any person or entity owning or operating any fiber optic, cable television, satellite, Internet-based, telephone, wireless, microwave, data transmission or radio distribution system, network or facility; and 3) any person or entity providing any telecommunication service directly or indirectly by or through any such distribution systems, networks or facilities.

“Unlawful telecommunication device,” a) any electronic serial number, mobile identification number, personal identification number or any telecommunication device that is capable of acquiring or facilitating the acquisition of a telecommunication service without the express consent or express authorization of the telecommunication service provider, or that has been altered, modified, programmed or reprogrammed alone or in conjunction with another telecommunication device or other equipment to so acquire or facilitate the unauthorized acquisition of a telecommunication service; b) any phones altered to obtain service without the express consent or express authorization of the telecommunication service provider, tumbler phones, counterfeit or clone phones, tumbler microchips, counterfeit or clone microchip and other instruments capable of disguising their identity or location or of gaining unauthorized access to a communications system operated by a telecommunication service provider; c) any telecommunication device which is capable of, or has been altered, designed, modified, programmed or reprogrammed, alone or in conjunction with another telecommunication device or devices, so as to be capable of facilitating the disruption, acquisition, receipt, transmission or decryption of a telecommunication service without the express consent or express authorization of the telecommunication service provider, including but not

limited to, any device, technology, product, service, equipment, computer software or component or part thereof, primarily distributed, sold, designed, assembled, manufactured, modified, programmed, reprogrammed or used for the purpose of providing the unauthorized receipt of, transmission, disruption of, decryption of, access to, or acquisition of any telecommunication service provided by any telecommunication service provider.

“Unlawful access device,” any type of instrument, device, machine, equipment, technology or software which is primarily designed, assembled, manufactured, sold, distributed, possessed, used or offered, promoted or advertised, for the purpose of defeating or circumventing any technology, device or software, or any component or part thereof, used by the provider, owner or licensee of any telecommunication service or of any data, audio or video programs or transmissions, to protect any such telecommunication, data, audio or video services, programs or transmissions from unauthorized receipt, acquisition, access, decryption, disclosure, communication, transmission or re-transmission.

“Manufacture or assembly of an unlawful access device,” to make, produce or assemble an unlawful access device or modify, alter program or reprogram any instrument, device, machine, equipment, technology or software so that is capable of defeating or circumventing any technology, device or software used by the provider, owner or licensee of a telecommunication service, or of any data, audio or video programs or transmissions, to protect any such telecommunication, data, audio or video services, programs or transmissions from unauthorized receipt, acquisition, access, decryption, disclosure, communication, transmission or re-transmission, or to knowingly assist others in those activities.

(b) Whoever, with intent to defraud, obtains, or attempts to obtain, or aids or abets another in obtaining, any telecommunications services valued less than five thousand dollars by any false representation, false statement, or stratagem, by unauthorized charging to the account of another, by installing or tampering with any facilities or equipment or by any other means, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two and one-half years in a house of correction, or both.

(c) Whoever, with intent to defraud, obtains, or attempts to obtain, or aids or abets another in obtaining, any telecommunications services of a value equal to or greater than five thousand dollars by any false representation, false statement, or stratagem, by unauthorized charging to the account of another, by installing or tampering with any facilities or equipment or by any other means, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years in a state prison, or both.

Any aggrieved party may bring a civil action for violations of this section under the provisions of Chapter 166 section 42B(j).

SECTION 2: Chapter one hundred and sixty-six is further amended by deleting section forty-two B in its entirety and replacing it with the following:—

166:42B. Unlawful telecommunication and access devices; offenses; penalties; civil remedies.

Section 42B. (a) Whoever possesses, uses, manufactures, assembles, distributes, transfers, sells or offers, promotes or advertises for sale, use or distribution any unlawful telecommunication device, or modifies, alters, programs or reprograms a telecommunication device for the commission of a theft of telecommunication service or to receive, disrupt, transmit, decrypt, acquire or facilitate the receipt, disruption, transmission, decryption or acquisition of any telecommunication service without the express or express authorization of the telecommunication service provider shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two and one-half years in the house of correction, or both.

(b) Whoever possesses, uses, manufactures, assembles, distributes, transfers, sells, offers, promotes or advertises for sale, use or distribution any unlawful telecommunication device, or modifies, alters, programs or reprograms a telecommunication device to conceal or to assist another to conceal from any telecommunication service provider, or from any unlawful authority, the existence or place of origin or destination of any telecommunication shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two and one-half years in the house of correction, or both.

(c) Whoever possesses, uses, manufactures, assembles, distributes, transfers, sells, offers, promotes or advertises for sale, use or distribution any unlawful access device shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two and one-half years in the house of correction, or both.

(d) Whoever possesses, uses, manufactures, assembles, distributes, transfers, sells, offers, promotes or advertises for sale, use or distribution any plans or instructions for making or assembling any unlawful telecommunication or access device, with the intent to use or employ such unlawful telecommunications or access device, or to allow the same to be used or employed, for a purpose prohibited by this section, or knowing or having reason to know that the same is intended to be so used for manufacturing or assembling such unlawful telecommunication or access device shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two and one-half years in the house of correction, or both.

(e) Whoever possesses, uses, manufactures assembles, distributes, transfers, sells, offers, promotes or advertises for sale, use or distribution any material, including hardware, cables, tools, data, computer software or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture or assembly of an unlawful telecommunication or access device shall be punished by a fine of not

more than three thousand dollars or by imprisonment for not more than two and one-half years in the house of correction, or both.

(f) Whoever commits any offense described in this section, having been convicted previously under this section or a similar crime in any federal or other state jurisdiction shall be punished by a fine of not more than ten thousand dollars and imprisonment in the state prison for not more than ten years.

(g) Whoever commits any offense described in this section, having been convicted previously on two or more occasions under this section or a similar crime in any federal or other state jurisdiction, shall be punished by a fine of not more than thirty thousand dollars and imprisonment in the state prison for not more than fifteen years. For purposes of grading an offense based on a prior conviction under this section, a prior conviction shall consist of convictions upon separate indictments or criminal complaints for offenses under this section or any similar crime in the federal or other state jurisdiction. In grading an offense under this section based upon a prior conviction, the term "any similar crime" shall include, but not be limited to, offenses involving theft of service or fraud, including violations of the Cable Communications Policy Act of 1984 (Public Law 98-549, 98 Stat. 2779).

(h) Whoever commits any offense described in this section, involving at least five but not more than fifty unlawful telecommunication or unlawful access devices, shall be punished by a fine of not more than ten thousand dollars and imprisonment in the state prison for not more than ten years.

(i) Whoever commits any offense described in this section, involving at least fifty unlawful telecommunication or unlawful access devices, shall be punished by a fine of not more than thirty thousand dollars and imprisonment in the state prison for not more than fifteen years.

For purposes of all criminal penalties or fines established for violations of this section, the prohibited activity established herein as it applies to each unlawful telecommunication device or access device shall be deemed a separate offense.

The court shall, after conviction, conduct an evidentiary hearing to ascertain the extent of the damages or financial loss suffered as a result of the defendant's crime. A person found guilty of violating this section shall, in all cases, upon conviction, in addition to any other punishment, be ordered to make restitution to the insurer for any financial loss sustained as a result of the commission of the crime; provided, however, that restitution shall not be ordered to a party whom the court determines to be aggrieved without that party's consent. Restitution shall not be imposed in addition to imprisonment and or a fine and in lieu thereof; provided, however, that the court shall consider the defendant's present and future ability to pay.

Any unlawful communication device, access device, plans or instructions or publications described in this section may be seized under warrant or incident to a lawful arrest, and,

upon the conviction of a person for a violation of this section, such unlawful telecommunication device or access device or plans or instructions or publications may be destroyed as contraband by the sheriff in the county in which such person was convicted.

An offense or violation under this section may be deemed to have been committed at either the place where the defendant manufactures or assembles an unlawful telecommunication device or access device or assists others in doing so, or the places where the unlawful telecommunication device or access device is sold or delivered to a purchaser or recipient. It shall be no defense to a violation of this section that some of the transactions occurred outside this Commonwealth.

(j) Any person aggrieved by a violation of this or the previous section may bring a civil action in any court of competent jurisdiction. In an action brought under either section forty-two A or forty-two B of this chapter, the court may (i) grant preliminary and final injunctions to prevent or restrain violations of this section; (ii) at any time while an action is pending, order the impounding of any unlawful telecommunication device or access device that is in the custody or control of the offender, which the court has reason to believe was involved in the violation of this section or the previous section.

The court may award reasonable attorney's fees and costs, including but not limited to, costs for investigation, testing and expert witness fees, to an aggrieved party who prevails.

As part of the final judgment or decree finding a violation of this section, the court may order the remedial modification or destruction of any unlawful telecommunication device or access device, or any other devices or equipment involved in the violation, that is in the custody or control of the violator, or has been impounded subject to the terms in this section.

Damages for this and the previous section shall be computed as follows: (i) upon his election of such damages at any time before final judgment is entered, the complaining party may recover the actual damages suffered by him as a result of the violation in addition to any profits attributable to the offense and are not taken into account in computing the actual damages. In determining the violator's profits, the complaining party shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or (ii) upon election by the complaining party at any time before final judgment is entered, that party may recover in lieu of actual damages an award of statutory damages of between two hundred and fifty dollars to ten thousand dollars for each violation involved in the action. In all cases, the amount of statutory damages is to be determined by the court, not the jury. In any case where the court finds that any of the violations of section forty-two A of chapter one hundred and sixty six were committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of statutory damages by an amount of not more than fifty thousand dollars for each violation involved in the action. Each unlawful

telecommunication device or access device involved in the action shall be deemed a separate violation and shall entitle the complaining party to a separate award of statutory damages for each such device.

For purposes of all civil remedies established for violations of this section and section 42A, the prohibited activity applies to each unlawful telecommunication device or access device and shall be deemed a separate violation.