

H. B. 2308

(By Delegate Iaquina)

[Introduced January 12, 2011; referred to the
Committee on the Judiciary.]

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10 A Bill to amend and reenact §61-3C-3 and §61-3C-16 of the Code of
11 West Virginia, 1931, as amended; and to amend said code by
12 adding thereto four new sections, designated §61-3C-4a, §61-
13 3C-4b, §61-3C-4c and §61-3C-4d, all relating to protecting
14 computer owners and users from computer spyware; making it
15 unlawful for persons to transmit computer software for the
16 purpose of modifying settings, collecting personal information
17 by deceptive means or preventing efforts to protect a computer
18 to access a computer; making it unlawful to transmit software
19 to control in such a way as to cause damage or opening
20 multiple pop-up windows; making it unlawful to transmit
21 software for the purpose of modifying settings that protect
22 personal information; making it unlawful to transmit software
23 for the purpose of blocking efforts to block or disable
24 computer software; making it unlawful to induce the

1 installation by misrepresentations or deception; exceptions;
2 and authorizing the Attorney General to enforce this act.

3 *Be it enacted by the Legislature of West Virginia:*

4 That §61-3C-3 and §61-3C-16 of the Code of West Virginia,
5 1931, as amended, be amended and reenacted; and that said code be
6 amended by adding thereto four new sections, designated §61-3C-4a,
7 §61-3C-4b, §61-3C-4c and §61-3C-4d, all to read as follows:

8 **ARTICLE 3C. WEST VIRGINIA COMPUTER CRIME AND ABUSE ACT.**

9 **§61-3C-3. Definitions.**

10 As used in this article, unless the context clearly indicates
11 otherwise:

12 (a) "Access" means to instruct, communicate with, store data
13 in, retrieve data from, intercept data from or otherwise make use
14 of ~~any~~ a computer, computer network, computer program, computer
15 software, computer data or other computer resources.

16 (b) "Advertisement" means a communication, the primary purpose
17 of which is the commercial promotion of a commercial product or
18 service, including a communication on an Internet web site that is
19 operated for a commercial purpose.

20 ~~(b)~~ (c) "Authorization" means the express or implied consent
21 given by a person to another to access or use ~~said~~ the person's
22 computer, computer network, computer program, computer software,
23 computer system, password, identifying code or personal
24 identification number.

1 ~~(c)~~ (d) "Computer" means an electronic, magnetic, optical,
2 electrochemical or other high speed data processing device
3 performing logical, arithmetic or storage functions and includes
4 any data storage facility or communication facility directly
5 related to or operating in conjunction with ~~such~~ the device. The
6 term "computer" includes any connected or directly related device,
7 equipment or facility which enables the computer to store, retrieve
8 or communicate computer programs, computer data or the results of
9 computer operations to or from a person, another computer or
10 another device. ~~but such~~ The term "computer" does not include an
11 automated typewriter or typesetter, a portable hand-held calculator
12 or other similar device.

13 ~~(d)~~ (e) "Computer contaminant" means ~~any~~ a set of computer
14 instructions that are designed to damage or destroy information
15 within a computer, computer system or computer network without the
16 consent or permission of the owner of the information. ~~They~~ These
17 include, but are not limited to, a group of computer instructions
18 commonly called viruses or worms that are self-replicating or self-
19 propagating and are designed to contaminate other computer programs
20 or computer data, consume computer resources or damage or destroy
21 the normal operation of the computer.

22 ~~(e)~~ (f) "Computer data" means ~~any~~ a representation of
23 knowledge, facts, concepts, instruction or other information
24 computed, classified, processed, transmitted, received, retrieved,

1 originated, stored, manifested, measured, detected, recorded,
2 reproduced, handled or utilized by a computer, computer network,
3 computer program or computer software and ~~may be~~ in any medium,
4 including, but not limited to, computer print-outs, microfilm,
5 microfiche, magnetic storage media, optical storage media, punch
6 paper tape or punch cards, or ~~it may be~~ stored internally in read-
7 only memory or random access memory of a computer or ~~any~~ other
8 peripheral device.

9 ~~(f)~~ (g) "Computer network" means a set of connected devices
10 and communication facilities, including more than one computer,
11 with the capability to transmit computer data among them through
12 ~~such~~ the communication facilities.

13 ~~(g)~~ (h) "Computer operations" means arithmetic, logical,
14 storage, display, monitoring or retrieval functions or any
15 combination ~~thereof~~ and includes, but is not limited to,
16 communication with, storage of data in or to, or retrieval of data
17 from any device and the human manual manipulation of electronic
18 magnetic impulses. A "computer operation" for a particular
19 computer ~~shall~~ also ~~mean~~ means any function for which that
20 computer was designed.

21 ~~(h)~~ (i) "Computer program" means an ordered set of computer
22 data representing instructions or statements, in a form readable by
23 a computer, which controls, directs or otherwise influences the
24 functioning of a computer or computer network.

1 ~~(i)~~ (j) "Computer software" means a ~~set of computer programs,~~
2 ~~procedures and associated documentation concerned with computer~~
3 ~~data or with the operation of a computer, computer program or~~
4 ~~computer network~~ sequence of instructions written in a programming
5 language that is executed on a computer. "Computer software" does
6 not include computer software that is a web page or data
7 components of web pages that are not executable independently of
8 the web page.

9 ~~(j)~~ (k) "Computer services" means computer access time,
10 computer data processing or computer data storage and the
11 associated computer data processed or stored. ~~in connection~~
12 ~~therewith.~~

13 ~~(k)~~ (l) "Computer supplies" means punch cards, paper tape,
14 magnetic tape, magnetic disks or diskettes, optical disks or
15 diskettes, disk or diskette packs, paper, microfilm and any other
16 tangible input, output or storage medium used in connection with a
17 computer, computer network, computer data, computer software or
18 computer program.

19 ~~(l)~~ (m) "Computer resources" includes, but is not limited to,
20 information retrieval; computer data processing, transmission and
21 storage; and ~~any~~ other functions performed, in whole or in part, by
22 the use of a computer, computer network, computer software or
23 computer program.

24 (n) "Damage" means significant impairment to the integrity or

1 availability of data, computer software, a system or information.

2 (o) "Execute" means the performance of the functions or the
3 carrying out of the instructions of the computer software.

4 (p) "Financial instrument" includes, but is not limited to, a
5 check, draft, warrant, money order, note, certificate of deposit,
6 letter of credit, bill of exchange, credit or debit card,
7 transaction authorization mechanism, marketable security or its
8 computerized representation.

9 (q) "Intentionally deceptive" means any of the following:

10 (1) An intentionally and materially false or fraudulent
11 statement;

12 (2) A statement or description that intentionally omits or
13 misrepresents material information in order to deceive an owner or
14 operator; and

15 (3) An intentional and material failure to provide any notice
16 to an owner or operator regarding the installation or execution of
17 computer software in order to deceive the owner or operator.

18 (r) "Internet" means the global information system that is
19 logically linked together by a globally unique address space based
20 on the Internet protocol (IP), or its subsequent extensions, and
21 that is able to support communications using the transmission
22 control protocol/Internet protocol (TCP/IP) suite, or its
23 subsequent extensions, or other IP-compatible protocols, and that
24 provides, uses, or makes accessible, either publicly or privately,

1 high level services layered on the communications and related
2 infrastructure described in this subsection.

3 ~~(m)~~ (s) "Owner or Operator" means ~~any person who owns or~~
4 ~~leases or is a licensee of a computer, computer network, computer~~
5 ~~data, computer program, computer software, computer resources or~~
6 ~~computer supplies~~ the owner or lessee of a computer, or someone
7 using the computer with the owner's or lessee's authorization.
8 "Owner or operator" does not include any person who owns a computer
9 before the first retail sale of the computer.

10 ~~(n)~~ (t) "Person" means ~~any~~ a natural person, general
11 partnership, limited partnership, trust, association, corporation,
12 joint venture or ~~any~~ a state, county or municipal government and
13 ~~any~~ a subdivision, branch, department or agency thereof.

14 (u) "Personally identifiable information" means any of the
15 following with respect to an individual who is an owner or
16 operator:

17 (1) First name or first initial in combination with last name;

18 (2) A home or other physical address including street name;

19 (3) An electronic mail address;

20 (4) A credit or debit card number, bank account number or a
21 password or access code associated with a credit or debit card or
22 bank account;

23 (5) Social security number, tax identification number,
24 driver's license number, passport number, or any other government-

1 issued identification number; and

2 (6) Any of the following information in a form that personally
3 identifies an owner or operator:

4 (i) Account balances;

5 (ii) Overdraft history; and

6 (iii) Payment history.

7 ~~(v)~~ (v) "Property" includes:

8 (1) Real property;

9 (2) Computers and computer networks;

10 (3) Financial instruments, computer data, computer programs,
11 computer software and all other personal property regardless of
12 whether they are:

13 (i) Tangible or intangible;

14 (ii) In a format readable by humans or by a computer;

15 (iii) In transit between computers or within a computer
16 network or between any devices which comprise a computer; or

17 (iv) Located on ~~any~~ a paper or in ~~any~~ a device on which it is
18 stored by a computer or by a human; and

19 (4) Computer services.

20 (w) "Transmit" means to transfer, send, or make available
21 computer software, or a component thereof, via the Internet or
22 other medium, including local area networks of computers, other
23 nonwire transmission and disc or other data storage device.

24 "Transmit" does not include any action by a person providing:

1 (1) The Internet connection, telephone connection or other
2 means of transmission capability such as a compact disk or digital
3 video disk through which the software was made available;

4 (2) The storage or hosting of the software program or a web
5 page through which the software was made available; or

6 (3) An information location tool, such as a directory, index
7 reference, pointer, or hypertext link through which the user of the
8 computer located the software unless the person receives a direct
9 economic benefit from the execution of the software on the
10 computer.

11 ~~(p)~~ (x) "Value" means having any potential to provide ~~any~~ a
12 direct or indirect gain or advantage to any person.

13 ~~(q) "Financial instrument" includes, but is not limited to,~~
14 ~~any check, draft, warrant, money order, note, certificate of~~
15 ~~deposit, letter of credit, bill of exchange, credit or debit card,~~
16 ~~transaction authorization mechanism, marketable security or any~~
17 ~~computerized representation thereof.~~

18 ~~(r)~~ (y) "Value of property or computer services" ~~shall be~~ is:

19 (1) The market value of the property or computer services at
20 the time of a violation of this article; or

21 (2) If the property or computer services are unrecoverable,
22 damaged or destroyed as a result of a violation of section six or
23 seven of this article, the cost of reproducing or replacing the
24 property or computer services at the time of the violation.

1 §61-3C-4a. Unlawful transmission of computer software to modify
2 settings; collection of personal information by
3 deceptive means; prevention of efforts to protect a
4 computer.

5 It is unlawful for a person who is not an owner or operator to
6 transmit computer software to the owner or operator's computer with
7 actual knowledge or with conscious avoidance of actual knowledge
8 and to use the software to do any of the following:

9 (1) Modify, through intentionally deceptive means, settings
10 that control any of the following:

11 (A) The page that appears when an owner or operator launches
12 an Internet browser or similar computer software used to access and
13 navigate the Internet;

14 (B) The default provider or web proxy the owner or operator
15 uses to access or search the Internet; and

16 (C) The owner or operator's list of bookmarks used to access
17 web pages;

18 (2) Collect, through intentionally deceptive means, personally
19 identifiable information:

20 (A) Through the use of a keystroke-logging function that
21 records all keystrokes made by an owner or operator and transfers
22 that information from the computer to another person;

23 (B) In a manner that correlates the information with data
24 respecting all or substantially all of the web sites visited by an

1 owner or operator, other than web sites operated by the person
2 collecting the information; and

3 (C) Described in section three, subdivision (u), paragraph
4 (4), (5), or (6) of this article by extracting the information from
5 the owner or operator's hard drive;

6 (3) Prevent, through intentionally deceptive means, an owner
7 or operator's efforts to block the installation or execution of, or
8 to disable, computer software by causing the software that the
9 owner or operator has properly removed or disabled automatically to
10 reinstall or reactivate on the computer;

11 (4) Intentionally misrepresent that computer software will be
12 uninstalled or disabled by an owner or operator's action; or

13 (5) Through intentionally deceptive means, remove, disable or
14 render inoperative security, anti-spyware or anti-virus computer
15 software installed on the computer.

16 **§61-3C-4b. Unlawful transmission of software to take control of a**
17 **computer or by opening multiple pop-up windows;**
18 **modifying computer setting to steal personal**
19 **information or damage computer; preventing efforts**
20 **to block or disable software.**

21 It is unlawful for a person who is not an owner or operator to
22 transmit computer software to the owner or operator's computer with
23 actual knowledge or with conscious avoidance of actual knowledge
24 and to use the software to do any of the following:

1 (1) Take control of the computer by:

2 (A) Accessing or using the modem or Internet service for the
3 computer to cause damage to the computer or cause an owner or
4 operator to incur financial charges for a service that is not
5 authorized by the owner or operator;

6 (B) Opening multiple, sequential, stand-alone advertisements
7 in the owner or operator's Internet browser without the
8 authorization of an owner or operator and that a computer user
9 cannot close without turning off the computer or closing the
10 Internet browser;

11 (2) Modify any of the following settings related to the
12 computer's access to, or use of, the Internet:

13 (A) Settings that protect information about the owner or
14 operator in order to steal the owner or operator's personally
15 identifiable information; and

16 (B) Security settings in order to cause damage to a computer;
17 or

18 (3) Prevent an owner or operator's efforts to block the
19 installation of, or to disable, computer software by doing any of
20 the following:

21 (A) Presenting the owner or operator with an option to decline
22 installation of computer software with knowledge that, when the
23 option is selected, the installation nevertheless proceeds; and

24 (B) Falsely representing that computer software has been

1 disabled.

2 **§61-3C-4c. Unlawful inducement to install software or deceptively**
3 **causing the execution of harmful software.**

4 It is unlawful for a person who is not an owner or operator to
5 do any of the following with regard to the owner or operator's
6 computer:

7 (1) Induce an owner or operator to install a computer software
8 component onto the computer by intentionally misrepresenting the
9 extent to which installing the software is necessary for security
10 or privacy reasons or in order to open, view, or play a particular
11 type of content; or

12 (2) Deceptively cause the execution on the computer of a
13 computer software component with the intent of causing the owner or
14 operator to use the component in a manner that violates any other
15 provision of this section.

16 **§61-3C-4d. Exceptions.**

17 Sections four-b and four-c of this article do not apply to any
18 monitoring of, or interaction with, a subscriber's Internet or
19 other network connection or service, or a computer, by a
20 telecommunications carrier, cable operator, computer hardware or
21 software provider, or provider of information service or
22 interactive computer service for network or computer security
23 purposes, diagnostics, technical support, maintenance, repair,
24 authorized updates of software or system firmware, authorized

1 remote system management, or detection or prevention of the use of
2 or fraudulent or other illegal activities prohibited by this act in
3 connection with a network, service, or computer software, including
4 scanning for and removing software under this article.

5 **§61-3C-16. Civil relief; damages.**

6 (a) Any person whose property or person is injured by reason
7 of a violation of ~~any provision of~~ this article may sue ~~therefor~~ in
8 circuit court and may be entitled to recover for each violation:

9 (1) Compensatory damages;

10 (2) Punitive damages; and

11 (3) ~~Such~~ Other relief, including injunctive relief, as the
12 court may deem appropriate.

13 Without limiting the generality of the term, "damages" ~~shall~~
14 ~~include~~ includes loss of profits.

15 (b) The Attorney General is authorized to receive and act on
16 complaints and take action designed to obtain voluntary compliance
17 with this article and to commence proceedings against a person who
18 violates this article to enjoin further violations and to recover
19 damages as provided in subsection (a) of this section.

20 ~~(b)~~ (c) At the request of any party to an action brought
21 pursuant to this section, the court may, in its discretion, conduct
22 all legal proceedings in ~~such~~ a manner as to protect the secrecy
23 and security of the computer network, computer data, computer
24 program or computer software involved in order to prevent ~~any~~

1 possible recurrence of the same or a similar act by another person
2 or to protect ~~any~~ a trade secret or confidential information of ~~any~~
3 a person. For the purposes of this section, "trade secret" means
4 the whole or any portion or phase of ~~any~~ scientific or
5 technological information, design, process, procedure or formula or
6 improvement which is secret and of value. A trade secret ~~shall be~~
7 is presumed to be secret when ~~the~~ its owner ~~thereof~~ takes measures
8 to prevent it from becoming available to persons other than those
9 authorized by the owner to have access ~~thereto~~ for a limited
10 purpose.

11 ~~(c)~~ (d) ~~The provisions of This section shall not be construed~~
12 ~~to~~ does not limit any person's right to pursue ~~any~~ additional civil
13 remedies ~~otherwise~~ allowed by law.

14 ~~(d)~~ (e) A civil action under this section must be commenced
15 before the earlier of: (1) Five years after the last act in the
16 course of conduct constituting a violation of this article; or (2)
17 two years after the plaintiff discovers or reasonably should have
18 discovered the last act in the course of conduct constituting a
19 violation of this article.

NOTE: The purpose of this bill provides protection for computer owners and users from deceptive or otherwise unauthorized spyware including civil remedies and authorization for the Attorney General to receive and act on complaints of owners and users.

Strike-throughs indicate language that would be stricken from the present law and underscoring indicates new language that would be added.