

SENATE BILL No. 54

January 25, 2005, Introduced by Senators BROWN, PATTERSON and BISHOP and referred to the Committee on Technology and Energy.

A bill to amend 1979 PA 53, entitled

"An act to prohibit access to computers, computer systems, and computer networks for certain fraudulent purposes; to prohibit intentional and unauthorized access, alteration, damage, and destruction of computers, computer systems, computer networks, computer software programs, and data; to prohibit the sending of certain electronic messages; and to prescribe penalties,"

by amending section 7 (MCL 752.797), as amended by 2000 PA 180, and by adding section 5b.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 SEC. 5B. (1) A PERSON SHALL NOT INSTALL OR ATTEMPT TO INSTALL
2 SPYWARE INTO A COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR
3 COMPUTER NETWORK BELONGING TO ANOTHER PERSON UNLESS ALL OF THE
4 FOLLOWING APPLY:

5 (A) THE PERSON PROVIDES HIS OR HER NAME AND BUSINESS ADDRESS

1 AND A VALID TELEPHONE NUMBER, E-MAIL ADDRESS, OR INTERNET SERVICE
2 PROVIDER ADDRESS WHERE HE OR SHE CAN BE REACHED.

3 (B) IF THE SPYWARE IS TO BE INSTALLED ON BEHALF OF ANOTHER
4 PERSON, THE PERSON PROVIDES THE NAME AND BUSINESS ADDRESS AND A
5 VALID TELEPHONE NUMBER, E-MAIL ADDRESS, OR INTERNET SERVICE
6 PROVIDER ADDRESS OF THAT OTHER PERSON.

7 (C) THE PERSON PROVIDES SPECIFIC NOTICE OF THE INTENT TO
8 INSTALL THE SPYWARE. THE NOTICE SHALL INCLUDE A STATEMENT THAT
9 INSTRUCTIONS OR SOFTWARE WILL BE DOWNLOADED INTO THE COMPUTER
10 PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK, AND HOW
11 THE INSTRUCTIONS OR SOFTWARE ARE INTENDED TO AFFECT THE OPERATION
12 OF THE COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER
13 NETWORK.

14 (D) IF A FEE IS TO BE CHARGED OR MAY BE INCURRED, THE PERSON
15 SPECIFICALLY STATES THAT A FEE IS TO BE CHARGED OR MAY BE INCURRED
16 AND THE AMOUNT OF THE FEE.

17 (E) IF INFORMATION IS TO BE OBTAINED FROM THE COMPUTER
18 PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK, THE PERSON
19 SPECIFICALLY STATES THE INFORMATION THAT IS TO BE OBTAINED.

20 (F) IF SEXUALLY EXPLICIT MATERIAL WILL BE DISPLAYED, A
21 STATEMENT THAT SEXUALLY EXPLICIT MATERIAL WILL BE DISPLAYED.

22 (G) THE NOTICE PROVIDES A METHOD BY WHICH THE OWNER OR PERSON
23 RESPONSIBLE FOR MAINTAINING THE COMPUTER PROGRAM, COMPUTER,
24 COMPUTER SYSTEM, OR COMPUTER NETWORK CAN REFUSE INSTALLATION OF THE
25 SPYWARE AND REQUIRE THAT NO FURTHER CONTACT BE MADE REGARDING THE
26 INSTALLATION OF SPYWARE.

27 (H) THE OWNER OR PERSON RESPONSIBLE FOR MAINTAINING THE

1 COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK
2 AFFIRMATIVELY GRANTS THE RIGHT TO INSTALL THE SPYWARE.

3 (2) IF THE RIGHT TO INSTALL SPYWARE IS AUTHORIZED UNDER THIS
4 SECTION, THE PERSON INSTALLING THE SPYWARE SHALL NOT EXCEED THE
5 NATURE OR THE SCOPE OF THE AUTHORIZATION GRANTED.

6 (3) A PERSON SHALL NOT MANUFACTURE, CREATE, DISTRIBUTE, OR
7 POSSESS SPYWARE TO BE USED IN VIOLATION OF THIS SECTION.

8 (4) A PERSON SHALL NOT SUBSEQUENTLY CONTACT A PERSON WHO HAS
9 INFORMED HIM OR HER UNDER SUBSECTION (1)(G) THAT NO FURTHER CONTACT
10 IS TO BE MADE.

11 (5) EXCEPT AS PROVIDED IN SUBSECTION (6), AS USED IN THIS
12 SECTION, "SPYWARE" MEANS COMPUTER INSTRUCTIONS OR SOFTWARE
13 INSTALLED INTO A COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR
14 COMPUTER NETWORK FOR ANY OF THE FOLLOWING PURPOSES:

15 (A) MONITORING THE USE OF A COMPUTER PROGRAM, COMPUTER,
16 COMPUTER SYSTEM, OR COMPUTER NETWORK.

17 (B) SENDING INFORMATION ABOUT THE USE OF A COMPUTER PROGRAM,
18 COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK TO A REMOTE COMPUTER
19 OR SERVER OR DATA COLLECTION SITE OR POINT.

20 (C) DISPLAYING AN ADVERTISEMENT OR CAUSING AN ADVERTISEMENT TO
21 BE DISPLAYED IN RESPONSE TO THE USE OF A COMPUTER PROGRAM,
22 COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK.

23 (6) SPYWARE DOES NOT INCLUDE ANY OF THE FOLLOWING:

24 (A) COMPUTER INSTRUCTIONS OR SOFTWARE INSTALLED INTO A
25 COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK BY
26 THE MANUFACTURER OF THE COMPUTER PROGRAM, COMPUTER, COMPUTER
27 SYSTEM, OR COMPUTER NETWORK AND THAT IS INTENDED TO FACILITATE

1 ORDINARY AND EXPECTED ACCESS TO AND USE OF THE COMPUTER PROGRAM,
2 COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK.

3 (B) EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, COMPUTER
4 INSTRUCTIONS OR SOFTWARE INSTALLED INTO A COMPUTER PROGRAM,
5 COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK BY THE OWNER OF THAT
6 COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK.

7 (C) COMPUTER INSTRUCTIONS OR SOFTWARE INSTALLED INTO A
8 COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK BY
9 A PERSON MAINTAINING A COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM,
10 OR COMPUTER NETWORK ON BEHALF OF THE OWNER OF THAT COMPUTER
11 PROGRAM, COMPUTER, COMPUTER SYSTEM, OR COMPUTER NETWORK WHILE
12 ACTING WITHIN THE SCOPE OF HIS OR HER AUTHORITY.

13 (D) AN INTERNET SERVICE PROVIDER ACTING WITHIN THE SCOPE OF
14 HIS OR HER AUTHORITY AS AN INTERNET SERVICE PROVIDER.

15 (E) A PERSON AUTHORIZED BY LAW TO CONDUCT CRIMINAL
16 INVESTIGATIONS WHILE ACTING WITHIN THE SCOPE OF HIS OR HER
17 AUTHORITY AS AN INVESTIGATOR.

18 (F) INSTRUCTIONS COMMONLY KNOWN AS COOKIES THAT ARE INTENDED
19 SOLELY TO FACILITATE RECOGNITION OF THE COMPUTER FOR INTERNET
20 ACCESS OR INTERNET USE.

21 Sec. 7. (1) A person who violates section 4 is guilty of a
22 crime as follows:

23 (a) If the violation involves an aggregate amount of less than
24 \$200.00, the person is guilty of a misdemeanor punishable by
25 imprisonment for not more than 93 days or a fine of not more than
26 \$500.00 or 3 times the aggregate amount, whichever is greater, or
27 both imprisonment and a fine.

1 (b) If any of the following apply, the person is guilty of a
2 misdemeanor punishable by imprisonment for not more than 1 year or
3 a fine of not more than \$2,000.00 or 3 times the aggregate amount,
4 whichever is greater, or both imprisonment and a fine:

5 (i) The violation involves an aggregate amount of \$200.00 or
6 more but less than \$1,000.00.

7 (ii) The person violates this act and has a prior conviction.

8 (c) If any of the following apply, the person is guilty of a
9 felony punishable by imprisonment for not more than 5 years or a
10 fine of not more than \$10,000.00 or 3 times the aggregate amount,
11 whichever is greater, or both imprisonment and a fine:

12 (i) The violation involves an aggregate amount of \$1,000.00 or
13 more but less than \$20,000.00.

14 (ii) The person has 2 prior convictions.

15 (d) If any of the following apply, the person is guilty of a
16 felony punishable by imprisonment for not more than 10 years or a
17 fine of not more than 3 times the aggregate amount, or both
18 imprisonment and a fine:

19 (i) The violation involves an aggregate amount of \$20,000.00 or
20 more.

21 (ii) The person has 3 or more prior convictions.

22 (2) A person who violates section 5 is guilty of a crime as
23 follows:

24 (a) Except as provided in subdivision (b), the person is
25 guilty of a felony punishable by imprisonment for not more than 5
26 years or a fine of not more than \$10,000.00, or both.

27 (b) If the person has a prior conviction, the person is guilty

1 of a felony punishable by imprisonment for not more than 10 years
2 or a fine of not more than \$50,000.00, or both.

3 (3) A PERSON WHO VIOLATES SECTION 5B IS GUILTY OF A CRIME AS
4 FOLLOWS:

5 (A) EXCEPT AS PROVIDED IN SUBDIVISIONS (B) AND (C), THE PERSON
6 IS GUILTY OF A MISDEMEANOR PUNISHABLE BY IMPRISONMENT FOR NOT MORE
7 THAN 93 DAYS OR A FINE OF NOT MORE THAN \$1,000.00, OR BOTH.

8 (B) IF THE VIOLATION CAUSES INTERRUPTION OF OR INTERFERENCE TO
9 THE USE OF THE COMPUTER PROGRAM, COMPUTER, COMPUTER SYSTEM, OR
10 COMPUTER NETWORK, THE PERSON IS GUILTY OF A FELONY PUNISHABLE BY
11 IMPRISONMENT FOR NOT MORE THAN 2 YEARS OR A FINE OF NOT MORE THAN
12 \$5,000.00, OR BOTH.

13 (C) IF THE PERSON HAS A PRIOR CONVICTION, THE PERSON IS GUILTY
14 OF A FELONY PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN 4 YEARS OR
15 A FINE OF NOT MORE THAN \$10,000.00, OR BOTH.

16 (4) ~~—(3)—~~ A person who violates section 6 is guilty of a
17 crime as follows:

18 (a) If the underlying crime is a misdemeanor or a felony with
19 a maximum term of imprisonment of 1 year or less, the person is
20 guilty of a misdemeanor punishable by imprisonment for not more
21 than 1 year or a fine of not more than \$5,000.00, or both.

22 (b) If the underlying crime is a misdemeanor or a felony with
23 a maximum term of imprisonment of more than 1 year but less than 2
24 years, the person is guilty of a felony punishable by imprisonment
25 for not more than 2 years or a fine of not more than \$5,000.00, or
26 both.

27 (c) If the underlying crime is a misdemeanor or a felony with

1 a maximum term of imprisonment of 2 years or more but less than 4
2 years, the person is guilty of a felony punishable by imprisonment
3 for not more than 4 years or a fine of not more than \$5,000.00, or
4 both.

5 (d) If the underlying crime is a felony with a maximum term of
6 imprisonment of 4 years or more but less than 10 years, the person
7 is guilty of a felony punishable by imprisonment for not more than
8 7 years or a fine of not more than \$5,000.00, or both.

9 (e) If the underlying crime is a felony punishable by a
10 maximum term of imprisonment of 10 years or more but less than 20
11 years, the person is guilty of a felony punishable by imprisonment
12 for not more than 10 years or a fine of not more than \$10,000.00,
13 or both.

14 (f) If the underlying crime is a felony punishable by a
15 maximum term of imprisonment of 20 years or more or for life, the
16 person is guilty of a felony punishable by imprisonment for not
17 more than 20 years or a fine of not more than \$20,000.00, or both.

18 (5) ~~-(4)-~~ The court may order that a term of imprisonment
19 imposed under subsection ~~-(3)-~~ (4) be served consecutively to any
20 term of imprisonment imposed for conviction of the underlying
21 offense.

22 (6) ~~-(5)-~~ If the prosecuting attorney intends to seek an
23 enhanced sentence under section 4, ~~or section~~ 5, **OR 5A** based upon
24 the defendant having a prior conviction, the prosecuting attorney
25 shall include on the complaint and information a statement listing
26 that prior conviction. The existence of the defendant's prior
27 conviction shall be determined by the court, without a jury, at

1 sentencing. The existence of a prior conviction may be established
2 by any evidence relevant for that purpose, including, but not
3 limited to, 1 or more of the following:

4 (a) A copy of the judgment of conviction.

5 (b) A transcript of a prior trial, plea-taking, or sentencing.

6 (c) Information contained in a presentence report.

7 (d) The defendant's statement.

8 (7) ~~—(6)—~~ It is a rebuttable presumption in a prosecution for
9 a violation of section 5 that the person did not have authorization
10 from the owner, system operator, or other person who has authority
11 from the owner or system operator to grant permission to access the
12 computer program, computer, computer system, or computer network or
13 has exceeded authorization unless 1 or more of the following
14 circumstances existed at the time of access:

15 (a) Written or oral permission was granted by the owner,
16 system operator, or other person who has authority from the owner
17 or system operator to grant permission of the accessed computer
18 program, computer, computer system, or computer network.

19 (b) The accessed computer program, computer, computer system,
20 or computer network had a pre-programmed access procedure that
21 would display a bulletin, command, or other message before access
22 was achieved that a reasonable person would believe identified the
23 computer program, computer, computer system, or computer network as
24 within the public domain.

25 (c) Access was achieved without the use of a set of
26 instructions, code, or computer program that bypasses, defrauds, or
27 otherwise circumvents the pre-programmed access procedure for the

1 computer program, computer, computer system, or computer network.

2 (8) ~~-(7)-~~ The court may order a person convicted of violating
3 this act to reimburse this state or a local unit of government of
4 this state for expenses incurred in relation to the violation in
5 the same manner that expenses may be ordered to be reimbursed under
6 section 1f of chapter IX of the code of criminal procedure, 1927 PA
7 175, MCL 769.1f.

8 (9) ~~-(8)-~~ As used in this section, "prior conviction" means a
9 violation or attempted violation of section 145d of the Michigan
10 penal code, 1931 PA 328, MCL 750.145d, or this act or a
11 substantially similar law of the United States, another state, or a
12 political subdivision of another state.