

AMENDED IN ASSEMBLY MARCH 12, 1998

CALIFORNIA LEGISLATURE—1997–98 REGULAR SESSION

ASSEMBLY BILL

No. 1629

**Introduced by Assembly Member Miller Members Miller
and Cunneen**

**(Coauthors: Assembly Members Baldwin, Bordonaro,
Campbell, Leach, and Lempert)**

January 5, 1998

An act to add Section 17538.45 to the Business and Professions Code, relating to advertising. *Professions Code, and to amend Section 502 of the Penal Code, relating to electronic mail.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1629, as amended, Miller. ~~Advertising:—electronic~~ *Electronic mail.*

(1) Existing law prohibits a person conducting business in this state from faxing unsolicited advertising material, unless certain conditions are satisfied.

~~This bill would also prohibit a person conducting business in the state from using a computer or other electronic device to send an unsolicited advertisement to an electronic mail address within the state unless (1) that person has a preexisting and ongoing business or personal relationship with the recipient, or absent that relationship, the recipient has previously provided express consent or permission with respect to the advertisement and (2) that person provides certain identifying information at the beginning of the~~

~~advertisement. It would also authorize any person with legal standing to bring an action in a court of competent jurisdiction to enjoin any violation of these prohibitions, or to recover civil damages, as specified, or to seek both of those remedies. It would also provide that the prevailing party in any of those actions shall be entitled to recover reasonable attorney's fees.~~

This bill would also prohibit a registered user of an electronic mail service provider, as defined, from using or causing to be used the provider's service or equipment in violation of the provider's published policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements. It would also prohibit any individual, corporation, or other entity from using or causing to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's service or equipment in violation of the provider's published policy prohibiting or restricting the use of its service or equipment to deliver unsolicited electronic mail advertisements to its registered users. It would authorize any electronic mail service provider whose published policy is violated as provided in these provisions to bring a civil action to recover damages, as specified, and would provide that the prevailing party in that action shall be entitled to recover reasonable attorney's fees.

(2) Existing law provides for the regulation of advertising and provides that any violation of those provisions is a crime. This bill, by creating additional prohibitions with regard to advertising, would expand the scope of an existing crime, thereby imposing a state-mandated local program.

(3) *Existing law makes it a crime to knowingly and without permission tamper with, interfere with, damage, or gain unlawful access to certain computers, computer systems, and computer data.*

This bill would, in addition, make it a crime to knowingly and without permission use the Internet domain name, as defined, of another individual, corporation, or entity in connection with the sending of one or more electronic mail messages and to thereby disrupt or cause the disruption of computer services or deny or cause the denial of computer



services to an authorized user of a computer, computer system, or computer network.

By creating a new crime, this bill would impose a state-mandated local program.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 17538.45 is added to the Business
2 and Professions Code, to read:

3 ~~17538.45. (a) No person conducting business in this~~
4 ~~state shall use any computer or other electronic device to~~
5 ~~send an unsolicited advertisement to an electronic mail~~
6 ~~address within the state unless each of the following~~
7 ~~requirements are satisfied:~~

8 ~~(1) That person has a preexisting and ongoing business~~
9 ~~or personal relationship with the recipient, or absent that~~
10 ~~relationship, the recipient has previously provided~~
11 ~~express consent or permission with respect to the~~
12 ~~advertisement.~~

13 ~~(2) That person clearly provides, at the beginning of~~
14 ~~the unsolicited advertisement, the date and time the~~
15 ~~message was sent, the identity of the person sending the~~
16 ~~message, and the return electronic mail address of that~~
17 ~~person.~~

18 ~~(b) (1) Notwithstanding Sections 17535 and 17536,~~
19 ~~any person who has legal standing may bring an action in~~
20 ~~a court of competent jurisdiction for either or both of the~~
21 ~~following purposes:~~

22 ~~(A) To enjoin any violation of this section.~~

23 ~~(B) To recover civil damages in an amount equal to~~
24 ~~the actual monetary loss suffered by that person by reason~~
25 ~~of any violation, or five hundred dollars (\$500) for each~~



1 violation, whichever amount is greater. However, if the
 2 court finds that a violation of this section was willful or
 3 knowing, the court may, in its discretion, award up to
 4 three times the amount of those civil damages.

5 ~~(2) The prevailing party in any action brought under~~
 6 ~~paragraph (1) shall be entitled to recover reasonable~~
 7 ~~attorney's fees.~~

8 17538.45. (a) For purposes of this section, the
 9 following words have the following meanings:

10 (1) "Electronic mail advertisement" means any
 11 electronic mail message, the principal purpose of which
 12 is to promote, directly or indirectly, the sale or other
 13 distribution of goods or services.

14 (2) "Unsolicited electronic mail advertisement"
 15 means any electronic mail advertisement that meets both
 16 of the following requirements:

17 (A) It is addressed to a recipient with whom the
 18 initiator does not have an existing business or personal
 19 relationship.

20 (B) It is not sent at the request of or with the express
 21 consent of the recipient.

22 (3) "Electronic mail service provider" means any
 23 business or organization qualified to do business in
 24 California that provides registered users the ability to
 25 send or receive electronic mail.

26 (4) "Initiation" of an unsolicited electronic mail
 27 advertisement refers to the action by the initial sender of
 28 the electronic mail advertisement. It does not refer to the
 29 actions of any intervening electronic mail service
 30 provider that may handle or retransmit the electronic
 31 message.

32 (5) "Publish" means to do either of the following with
 33 respect to the electronic mail service provider's policy on
 34 unsolicited electronic mail advertisements:

35 (A) Make that policy available upon request in written
 36 form, at no charge.

37 (B) Display that policy through an on-line notice on
 38 the Internet home page of the electronic mail service
 39 provider, or a page accessible through a conspicuous link



1 on the Internet home page of the electronic mail service
2 provider.

3 (6) “Registered user” means any individual,
4 corporation, or other entity that maintains an electronic
5 mail address with an electronic mail service provider.

6 (b) No registered user of an electronic mail service
7 provider shall use or cause to be used that electronic mail
8 service provider’s service or equipment in violation of
9 that electronic mail service provider’s published policy
10 prohibiting or restricting the use of its service or
11 equipment for the initiation of unsolicited electronic mail
12 advertisements.

13 (c) No individual, corporation, or other entity shall use
14 or cause to be used, by initiating an unsolicited electronic
15 mail advertisement, an electronic mail service provider’s
16 service or equipment in violation of that electronic mail
17 service provider’s published policy prohibiting or
18 restricting the use of its service or equipment to deliver
19 unsolicited electronic mail advertisements to its
20 registered users.

21 (d) An electronic mail service provider shall not be
22 required to create a policy prohibiting or restricting the
23 use of its service or equipment for the initiation or
24 delivery of unsolicited electronic mail advertisements.

25 (e) (1) In addition to any action available under
26 Section 17536, any electronic mail service provider whose
27 published policy on unsolicited electronic mail
28 advertisements is violated as provided in this section may
29 bring a civil action to recover the actual monetary loss
30 suffered by that provider by reason of that violation, or
31 fifty dollars (\$50) for each electronic mail message
32 initiated or delivered in violation of this section, up to a
33 maximum of fifteen thousand dollars (\$15,000) per day,
34 whichever amount is greater.

35 (2) The prevailing party in any action brought under
36 paragraph (1) shall be entitled to recover reasonable
37 attorney’s fees.

38 SEC. 2. Section 502 of the Penal Code is amended to
39 read:



1 502. (a) It is the intent of the Legislature in enacting
2 this section to expand the degree of protection afforded
3 to individuals, businesses, and governmental agencies
4 from tampering, interference, damage, and
5 unauthorized access to lawfully created computer data
6 and computer systems. The Legislature finds and
7 declares that the proliferation of computer technology
8 has resulted in a concomitant proliferation of computer
9 crime and other forms of unauthorized access to
10 computers, computer systems, and computer data.

11 The Legislature further finds and declares that
12 protection of the integrity of all types and forms of
13 lawfully created computers, computer systems, and
14 computer data is vital to the protection of the privacy of
15 individuals as well as to the well-being of financial
16 institutions, business concerns, governmental agencies,
17 and others within this state that lawfully utilize those
18 computers, computer systems, and data.

19 (b) For the purposes of this section, the following
20 terms have the following meanings:

21 (1) "Access" means to gain entry to, instruct, or
22 communicate with the logical, arithmetical, or memory
23 function resources of a computer, computer system, or
24 computer network.

25 (2) "Computer network" means any system which
26 provides communications between one or more
27 computer systems and input/output devices including,
28 but not limited to, display terminals and printers
29 connected by telecommunication facilities.

30 (3) "Computer program or software" means a set of
31 instructions or statements, and related data, that when
32 executed in actual or modified form, cause a computer,
33 computer system, or computer network to perform
34 specified functions.

35 (4) "Computer services" includes, but is not limited to,
36 computer time, data processing, or storage functions, or
37 other uses of a computer, computer system, or computer
38 network.

39 (5) "Computer system" means a device or collection
40 of devices, including support devices and excluding



1 calculators which are not programmable and capable of
2 being used in conjunction with external files, one or more
3 of which contain computer programs, electronic
4 instructions, input data, and output data, that performs
5 functions including, but not limited to, logic, arithmetic,
6 data storage and retrieval, communication, and control.

7 (6) "Data" means a representation of information,
8 knowledge, facts, concepts, computer software,
9 computer programs or instructions. Data may be in any
10 form, in storage media, or as stored in the memory of the
11 computer or in transit or presented on a display device.

12 (7) "Supporting documentation" includes, but is not
13 limited to, all information, in any form, pertaining to the
14 design, construction, classification, implementation, use,
15 or modification of a computer, computer system,
16 computer network, computer program, or computer
17 software, which information is not generally available to
18 the public and is necessary for the operation of a
19 computer, computer system, computer network,
20 computer program, or computer software.

21 (8) "Injury" means any alteration, deletion, damage,
22 or destruction of a computer system, computer network,
23 computer program, or data caused by the access.

24 (9) "Victim expenditure" means any expenditure
25 reasonably and necessarily incurred by the owner or
26 lessee to verify that a computer system, computer
27 network, computer program, or data was or was not
28 altered, deleted, damaged, or destroyed by the access.

29 (10) "Computer contaminant" means any set of
30 computer instructions that are designed to modify,
31 damage, destroy, record, or transmit information within
32 a computer, computer system, or computer network
33 without the intent or permission of the owner of the
34 information. They include, but are not limited to, a group
35 of computer instructions commonly called viruses or
36 worms, which are self-replicating or self-propagating and
37 are designed to contaminate other computer programs or
38 computer data, consume computer resources, modify,
39 destroy, record, or transmit data, or in some other fashion

1 usurp the normal operation of the computer, computer
2 system, or computer network.

3 (11) *“Internet domain name” means a globally*
4 *unique, hierarchical reference to an Internet host or*
5 *service, assigned through centralized Internet naming*
6 *authorities, comprising a series of character strings*
7 *separated by periods, with the rightmost character string*
8 *specifying the top of the hierarchy.*

9 (c) Except as provided in subdivision (h), any person
10 who commits any of the following acts is guilty of a public
11 offense:

12 (1) Knowingly accesses and without permission alters,
13 damages, deletes, destroys, or otherwise uses any data,
14 computer, computer system, or computer network in
15 order to either (A) devise or execute any scheme or
16 artifice to defraud, deceive, or extort, or (B) wrongfully
17 control or obtain money, property, or data.

18 (2) Knowingly accesses and without permission takes,
19 copies, or makes use of any data from a computer,
20 computer system, or computer network, or takes or
21 copies any supporting documentation, whether existing
22 or residing internal or external to a computer, computer
23 system, or computer network.

24 (3) Knowingly and without permission uses or causes
25 to be used computer services.

26 (4) Knowingly accesses and without permission adds,
27 alters, damages, deletes, or destroys any data, computer
28 software, or computer programs which reside or exist
29 internal or external to a computer, computer system, or
30 computer network.

31 (5) Knowingly and without permission disrupts or
32 causes the disruption of computer services or denies or
33 causes the denial of computer services to an authorized
34 user of a computer, computer system, or computer
35 network.

36 (6) Knowingly and without permission provides or
37 assists in providing a means of accessing a computer,
38 computer system, or computer network in violation of
39 this section.



1 (7) Knowingly and without permission accesses or
2 causes to be accessed any computer, computer system, or
3 computer network.

4 (8) Knowingly introduces any computer contaminant
5 into any computer, computer system, or computer
6 network.

7 (9) *Knowingly and without permission uses the*
8 *Internet domain name of another individual,*
9 *corporation, or entity in connection with the sending of*
10 *one or more electronic mail messages and thereby*
11 *disrupts or causes the disruption of computer services or*
12 *denies or causes the denial of computer services to an*
13 *authorized user of a computer, computer system, or*
14 *computer network.*

15 (d) (1) Any person who violates any of the provisions
16 of paragraph (1), (2), (4), or (5) of subdivision (c) is
17 punishable by a fine not exceeding ten thousand dollars
18 (\$10,000), or by imprisonment in the state prison for 16
19 months, or two or three years, or by both that fine and
20 imprisonment, or by a fine not exceeding five thousand
21 dollars (\$5,000), or by imprisonment in ~~the~~ a county jail
22 not exceeding one year, or by both that fine and
23 imprisonment.

24 (2) Any person who violates paragraph (3) of
25 subdivision (c) is punishable as follows:

26 (A) For the first violation which does not result in
27 injury, and where the value of the computer services used
28 does not exceed four hundred dollars (\$400), by a fine not
29 exceeding five thousand dollars (\$5,000), or by
30 imprisonment in ~~the~~ a county jail not exceeding one year,
31 or by both that fine and imprisonment.

32 (B) For any violation which results in a victim
33 expenditure in an amount greater than five thousand
34 dollars (\$5,000) or in an injury, or if the value of the
35 computer services used exceeds four hundred dollars
36 (\$400), or for any second or subsequent violation, by a
37 fine not exceeding ten thousand dollars (\$10,000), or by
38 imprisonment in the state prison for 16 months, or two or
39 three years, or by both that fine and imprisonment, or by
40 a fine not exceeding five thousand dollars (\$5,000), or by



1 imprisonment in~~the~~ a county jail not exceeding one year,
2 or by both that fine and imprisonment.

3 (3) Any person who violates paragraph (6), (7), ~~or~~ (8),
4 or (9) of subdivision (c) is punishable as follows:

5 (A) For a first violation which does not result in injury,
6 an infraction punishable by a fine not exceeding two
7 hundred fifty dollars (\$250).

8 (B) For any violation which results in a victim
9 expenditure in an amount not greater than five thousand
10 dollars (\$5,000), or for a second or subsequent violation,
11 by a fine not exceeding five thousand dollars (\$5,000), or
12 by imprisonment in~~the~~ a county jail not exceeding one
13 year, or by both that fine and imprisonment.

14 (C) For any violation which results in a victim
15 expenditure in an amount greater than five thousand
16 dollars (\$5,000), by a fine not exceeding ten thousand
17 dollars (\$10,000), or by imprisonment in the state prison
18 for 16 months, or two or three years, or by both that fine
19 and imprisonment, or by a fine not exceeding five
20 thousand dollars (\$5,000), or by imprisonment in~~the~~ a
21 county jail not exceeding one year, or by both that fine
22 and imprisonment.

23 (e) (1) In addition to any other civil remedy
24 available, the owner or lessee of the computer, computer
25 system, computer network, computer program, or data
26 may bring a civil action against any person convicted
27 under this section for compensatory damages, including
28 any expenditure reasonably and necessarily incurred by
29 the owner or lessee to verify that a computer system,
30 computer network, computer program, or data was or
31 was not altered, damaged, or deleted by the access. For
32 the purposes of actions authorized by this subdivision, the
33 conduct of an unemancipated minor shall be imputed to
34 the parent or legal guardian having control or custody of
35 the minor, pursuant to the provisions of Section 1714.1 of
36 the Civil Code.

37 (2) In any action brought pursuant to this subdivision
38 the court may award reasonable attorney's fees to a
39 prevailing party.



1 (3) A community college, state university, or
2 academic institution accredited in this state is required to
3 include computer-related crimes as a specific violation of
4 college or university student conduct policies and
5 regulations that may subject a student to disciplinary
6 sanctions up to and including dismissal from the academic
7 institution. This paragraph shall not apply to the
8 University of California unless the Board of Regents
9 adopts a resolution to that effect.

10 (f) This section shall not be construed to preclude the
11 applicability of any other provision of the criminal law of
12 this state which applies or may apply to any transaction,
13 nor shall it make illegal any employee labor relations
14 activities that are within the scope and protection of state
15 or federal labor laws.

16 (g) Any computer, computer system, computer
17 network, or any software or data, owned by the
18 defendant, which is used during the commission of any
19 public offense described in subdivision (c) or any
20 computer, owned by the defendant, which is used as a
21 repository for the storage of software or data illegally
22 obtained in violation of subdivision (c) shall be subject to
23 forfeiture, as specified in Section 502.01.

24 (h) (1) Subdivision (c) does not apply to any person
25 who accesses his or her employer's computer system,
26 computer network, computer program, or data when
27 acting within the scope of his or her lawful employment.

28 (2) Paragraph (3) of subdivision (c) does not apply to
29 any employee who accesses or uses his or her employer's
30 computer system, computer network, computer
31 program, or data when acting outside the scope of his or
32 her lawful employment, so long as the employee's
33 activities do not cause an injury, as defined in paragraph
34 (8) of subdivision (b), to the employer or another, or so
35 long as the value of supplies and computer services, as
36 defined in paragraph (4) of subdivision (b), which are
37 used do not exceed an accumulated total of one hundred
38 dollars (\$100).

39 (i) No activity exempted from prosecution under
40 paragraph (2) of subdivision (h) which incidentally



1 violates paragraph (2), (4), or (7) of subdivision (c) shall
2 be prosecuted under those paragraphs.

3 (j) For purposes of bringing a civil or a criminal action
4 under this section, a person who causes, by any means, the
5 access of a computer, computer system, or computer
6 network in one jurisdiction from another jurisdiction is
7 deemed to have personally accessed the computer,
8 computer system, or computer network in each
9 jurisdiction.

10 (k) In determining the terms and conditions
11 applicable to a person convicted of a violation of this
12 section the court shall consider the following:

13 (1) The court shall consider prohibitions on access to
14 and use of computers.

15 (2) Except as otherwise required by law, the court
16 shall consider alternate sentencing, including community
17 service, if the defendant shows remorse and recognition
18 of the wrongdoing, and an inclination not to repeat the
19 offense.

20 ~~SEC. 2.~~

21 SEC. 3. No reimbursement is required by this act
22 pursuant to Section 6 of Article XIII B of the California
23 Constitution because the only costs that may be incurred
24 by a local agency or school district will be incurred
25 because this act creates a new crime or infraction,
26 eliminates a crime or infraction, or changes the penalty
27 for a crime or infraction, within the meaning of Section
28 17556 of the Government Code, or changes the definition
29 of a crime within the meaning of Section 6 of Article
30 XIII B of the California Constitution.

31 Notwithstanding Section 17580 of the Government
32 Code, unless otherwise specified, the provisions of this act
33 shall become operative on the same date that the act
34 takes effect pursuant to the California Constitution.

