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CALIFORNIA LEGISLATURE—1997–98 REGULAR SESSION

ASSEMBLY BILL

No. 1629

**Introduced by Assembly Members Miller and Cunneen
(Coauthors: Assembly Members Alquist, Baldwin,
Bordonaro, Campbell, Frusetta, Leach, Lempert,
Morrissey, and Runner)**

January 5, 1998

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1629, as amended, Miller. 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 registered user of an electronic mail service provider, as defined, from using or causing to be used the provider's equipment in violation of the provider's published policy prohibiting or restricting the use of its 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 equipment in violation of the provider's published policy prohibiting or restricting the use of its 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, in addition to any other action available under law, a civil action to recover damages, as specified, and would ~~provide that the authorize the court to award reasonable attorney's fees to a prevailing party in that action shall be entitled to recover reasonable attorney's fees, as specified.~~

~~(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 thereby damage or cause damage to a computer, computer system, or computer network.* By creating a new crime, this bill would impose a state-mandated local program.

~~(4)~~

(3) 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) For purposes of this section, the
4 following words have the following meanings:

5 (1) “Electronic mail advertisement” means any
6 electronic mail message, the principal purpose of which
7 is to promote, directly or indirectly, the sale or other
8 distribution of goods or services to the recipient.

9 (2) “Unsolicited electronic mail advertisement”
10 means any electronic mail advertisement that meets both
11 of the following requirements:

12 (A) It is addressed to a recipient with whom the
13 initiator does not have an existing business or personal
14 relationship.

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

17 (3) “Electronic mail service provider” means any
18 business or organization qualified to do business in
19 California that provides registered users the ability to
20 send or receive electronic mail through equipment
21 located in this state and that is an intermediary in sending
22 or receiving electronic mail.

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

29 (5) “Publish” means to do both of the following with
30 respect to the electronic mail service provider’s policy on
31 unsolicited electronic mail advertisements:



1 (A) Make that policy available upon request in written
2 form, including, but not limited to, digital form, at no
3 charge.

4 (B) Display that policy through an on-line notice on
5 the Internet home page or other initial screen of the
6 electronic mail service provider, or a page or screen
7 accessible through a readily accessible link on the home
8 page or other initial screen of the electronic mail service
9 provider.

10 (6) "Registered user" means any individual,
11 corporation, or other entity that maintains an electronic
12 mail address with an electronic mail service provider.

13 (b) No registered user of an electronic mail service
14 provider shall use or cause to be used that electronic mail
15 service provider's equipment located in this state in
16 violation of that electronic mail service provider's
17 published policy prohibiting or restricting the use of its
18 service or equipment for the initiation of unsolicited
19 electronic mail advertisements.

20 (c) No individual, corporation, or other entity shall use
21 or cause to be used, by initiating an unsolicited electronic
22 mail advertisement, an electronic mail service provider's
23 equipment located in this state in violation of that
24 electronic mail service provider's published policy
25 prohibiting or restricting the use of its equipment to
26 deliver unsolicited electronic mail advertisements to its
27 registered users.

28 (d) An electronic mail service provider shall not be
29 required to create a policy prohibiting or restricting the
30 use of its equipment for the initiation or delivery of
31 unsolicited electronic mail advertisements.

32 (e) Nothing in this section shall be construed to limit
33 or restrict the rights of an electronic mail service provider
34 under Section 230(c)(1) of Title 47 of the United States
35 Code, or any decision of an electronic mail service
36 provider to permit or to restrict access to or use of its
37 system, or any exercise of its editorial function.

38 (f) (1) In addition to any other action available under
39 law, any electronic mail service provider whose
40 published policy on unsolicited electronic mail



1 advertisements is violated as provided in this section may
2 bring a civil action to recover the actual monetary loss
3 suffered by that provider by reason of that violation, or
4 liquidated damages of fifty dollars (\$50) for each
5 electronic mail message initiated or delivered in violation
6 of this section, up to a maximum of ~~fifteen thousand~~
7 ~~dollars (\$15,000)~~ *twenty-five thousand dollars (\$25,000)*
8 per day, whichever amount is greater.

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

12 *(2) In any action brought pursuant to paragraph (1),*
13 *the court may award reasonable attorney's fees to a*
14 *prevailing party.*

15 (3) In any action brought pursuant to paragraph (1),
16 the electronic mail service provider shall be required to
17 establish as an element of its cause of action that its policy
18 on unsolicited electronic mail advertisements had been
19 published for at least 30 days preceding the alleged
20 violation of that policy.

21 *(4) A violation of this section shall not be subject to*
22 *Section 17534.*

23 SEC. 2. Section 502 of the Penal Code is amended to
24 read:

25 502. (a) It is the intent of the Legislature in enacting
26 this section to expand the degree of protection afforded
27 to individuals, businesses, and governmental agencies
28 from tampering, interference, damage, and
29 unauthorized access to lawfully created computer data
30 and computer systems. The Legislature finds and
31 declares that the proliferation of computer technology
32 has resulted in a concomitant proliferation of computer
33 crime and other forms of unauthorized access to
34 computers, computer systems, and computer data.

35 The Legislature further finds and declares that
36 protection of the integrity of all types and forms of
37 lawfully created computers, computer systems, and
38 computer data is vital to the protection of the privacy of
39 individuals as well as to the well-being of financial
40 institutions, business concerns, governmental agencies,



1 and others within this state that lawfully utilize those
2 computers, computer systems, and data.

3 (b) For the purposes of this section, the following
4 terms have the following meanings:

5 (1) “Access” means to gain entry to, instruct, or
6 communicate with the logical, arithmetical, or memory
7 function resources of a computer, computer system, or
8 computer network.

9 (2) “Computer network” means any system that
10 provides communications between one or more
11 computer systems and input/output devices including,
12 but not limited to, display terminals and printers
13 connected by telecommunication facilities.

14 (3) “Computer program or software” means a set of
15 instructions or statements, and related data, that when
16 executed in actual or modified form, cause a computer,
17 computer system, or computer network to perform
18 specified functions.

19 (4) “Computer services” includes, but is not limited to,
20 computer time, data processing, or storage functions, or
21 other uses of a computer, computer system, or computer
22 network.

23 (5) “Computer system” means a device or collection
24 of devices, including support devices and excluding
25 calculators that are not programmable and capable of
26 being used in conjunction with external files, one or more
27 of which contain computer programs, electronic
28 instructions, input data, and output data, that performs
29 functions including, but not limited to, logic, arithmetic,
30 data storage and retrieval, communication, and control.

31 (6) “Data” means a representation of information,
32 knowledge, facts, concepts, computer software,
33 computer programs or instructions. Data may be in any
34 form, in storage media, or as stored in the memory of the
35 computer or in transit or presented on a display device.

36 (7) “Supporting documentation” includes, but is not
37 limited to, all information, in any form, pertaining to the
38 design, construction, classification, implementation, use,
39 or modification of a computer, computer system,
40 computer network, computer program, or computer



1 software, which information is not generally available to
2 the public and is necessary for the operation of a
3 computer, computer system, computer network,
4 computer program, or computer software.

5 (8) “Injury” means any alteration, deletion, damage,
6 or destruction of a computer system, computer network,
7 computer program, or data caused by the access.

8 (9) “Victim expenditure” means any expenditure
9 reasonably and necessarily incurred by the owner or
10 lessee to verify that a computer system, computer
11 network, computer program, or data was or was not
12 altered, deleted, damaged, or destroyed by the access.

13 (10) “Computer contaminant” means any set of
14 computer instructions that are designed to modify,
15 damage, destroy, record, or transmit information within
16 a computer, computer system, or computer network
17 without the intent or permission of the owner of the
18 information. They include, but are not limited to, a group
19 of computer instructions commonly called viruses or
20 worms, that are self-replicating or self-propagating and
21 are designed to contaminate other computer programs or
22 computer data, consume computer resources, modify,
23 destroy, record, or transmit data, or in some other fashion
24 usurp the normal operation of the computer, computer
25 system, or computer network.

26 (11) “Internet domain name” means a globally
27 unique, hierarchical reference to an Internet host or
28 service, assigned through centralized Internet naming
29 authorities, comprising a series of character strings
30 separated by periods, with the rightmost character string
31 specifying the top of the hierarchy.

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

35 (1) Knowingly accesses and without permission alters,
36 damages, deletes, destroys, or otherwise uses any data,
37 computer, computer system, or computer network in
38 order to either (A) devise or execute any scheme or
39 artifice to defraud, deceive, or extort, or (B) wrongfully
40 control or obtain money, property, or data.



1 (2) Knowingly accesses and without permission takes,
2 copies, or makes use of any data from a computer,
3 computer system, or computer network, or takes or
4 copies any supporting documentation, whether existing
5 or residing internal or external to a computer, computer
6 system, or computer network.

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

9 (4) Knowingly accesses and without permission adds,
10 alters, damages, deletes, or destroys any data, computer
11 software, or computer programs which reside or exist
12 internal or external to a computer, computer system, or
13 computer network.

14 (5) Knowingly and without permission disrupts or
15 causes the disruption of computer services or denies or
16 causes the denial of computer services to an authorized
17 user of a computer, computer system, or computer
18 network.

19 (6) Knowingly and without permission provides or
20 assists in providing a means of accessing a computer,
21 computer system, or computer network in violation of
22 this section.

23 (7) Knowingly and without permission accesses or
24 causes to be accessed any computer, computer system, or
25 computer network.

26 (8) Knowingly introduces any computer contaminant
27 into any computer, computer system, or computer
28 network.

29 (9) Knowingly and without permission uses the
30 Internet domain name of another individual,
31 corporation, or entity in connection with the sending of
32 one or more electronic mail messages, *and thereby*
33 *damages or causes damage to a computer, computer*
34 *system, or computer network.*

35 (d) (1) Any person who violates any of the provisions
36 of paragraph (1), (2), (4), or (5) of subdivision (c) is
37 punishable by a fine not exceeding ten thousand dollars
38 (\$10,000), or by imprisonment in the state prison for 16
39 months, or two or three years, or by both that fine and
40 imprisonment, or by a fine not exceeding five thousand



1 dollars (\$5,000), or by imprisonment in a county jail not
2 exceeding one year, or by both that fine and
3 imprisonment.

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

6 (A) For the first violation that does not result in injury,
7 and where the value of the computer services used does
8 not exceed four hundred dollars (\$400), by a fine not
9 exceeding five thousand dollars (\$5,000), or by
10 imprisonment in a county jail not exceeding one year, or
11 by both that fine and imprisonment.

12 (B) For any violation that results in a victim
13 expenditure in an amount greater than five thousand
14 dollars (\$5,000) or in an injury, or if the value of the
15 computer services used exceeds four hundred dollars
16 (\$400), or for any second or subsequent violation, by a
17 fine not exceeding ten thousand dollars (\$10,000), or by
18 imprisonment in the state prison for 16 months, or two or
19 three years, or by both that fine and imprisonment, or by
20 a fine not exceeding five thousand dollars (\$5,000), or by
21 imprisonment in a county jail not exceeding one year, or
22 by both that fine and imprisonment.

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

25 (A) For a first violation that does not result in injury,
26 an infraction punishable by a fine not exceeding two
27 hundred fifty dollars (\$250).

28 (B) For any violation that results in a victim
29 expenditure in an amount not greater than five thousand
30 dollars (\$5,000), or for a second or subsequent violation,
31 by a fine not exceeding five thousand dollars (\$5,000), or
32 by imprisonment in a county jail not exceeding one year,
33 or by both that fine and imprisonment.

34 (C) For any violation that results in a victim
35 expenditure in an amount greater than five thousand
36 dollars (\$5,000), by a fine not exceeding ten thousand
37 dollars (\$10,000), or by imprisonment in the state prison
38 for 16 months, or two or three years, or by both that fine
39 and imprisonment, or by a fine not exceeding five
40 thousand dollars (\$5,000), or by imprisonment in a county



1 jail not exceeding one year, or by both that fine and
2 imprisonment.

3 (4) Any person who violates paragraph (9) of
4 subdivision (c) is punishable as follows:

5 (A) For a first violation that 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 that results in injury, or for a
9 second or subsequent violation, by a fine not exceeding
10 five thousand dollars (\$5,000), or by imprisonment in a
11 county jail not exceeding one year, or by both that fine
12 and imprisonment.

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

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

30 (3) A community college, state university, or
31 academic institution accredited in this state is required to
32 include computer-related crimes as a specific violation of
33 college or university student conduct policies and
34 regulations that may subject a student to disciplinary
35 sanctions up to and including dismissal from the academic
36 institution. This paragraph shall not apply to the
37 University of California unless the Board of Regents
38 adopts a resolution to that effect.

39 (f) This section shall not be construed to preclude the
40 applicability of any other provision of the criminal law of



1 this state which applies or may apply to any transaction,
2 nor shall it make illegal any employee labor relations
3 activities that are within the scope and protection of state
4 or federal labor laws.

5 (g) Any computer, computer system, computer
6 network, or any software or data, owned by the
7 defendant, that is used during the commission of any
8 public offense described in subdivision (c) or any
9 computer, owned by the defendant, which is used as a
10 repository for the storage of software or data illegally
11 obtained in violation of subdivision (c) shall be subject to
12 forfeiture, as specified in Section 502.01.

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

17 (2) Paragraph (3) of subdivision (c) does not apply to
18 any employee who accesses or uses his or her employer's
19 computer system, computer network, computer
20 program, or data when acting outside the scope of his or
21 her lawful employment, so long as the employee's
22 activities do not cause an injury, as defined in paragraph
23 (8) of subdivision (b), to the employer or another, or so
24 long as the value of supplies and computer services, as
25 defined in paragraph (4) of subdivision (b), which are
26 used do not exceed an accumulated total of one hundred
27 dollars (\$100).

28 (i) No activity exempted from prosecution under
29 paragraph (2) of subdivision (h) which incidentally
30 violates paragraph (2), (4), or (7) of subdivision (c) shall
31 be prosecuted under those paragraphs.

32 (j) For purposes of bringing a civil or a criminal action
33 under this section, a person who causes, by any means, the
34 access of a computer, computer system, or computer
35 network in one jurisdiction from another jurisdiction is
36 deemed to have personally accessed the computer,
37 computer system, or computer network in each
38 jurisdiction.



1 (k) In determining the terms and conditions
2 applicable to a person convicted of a violation of this
3 section the court shall consider the following:

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

6 (2) Except as otherwise required by law, the court
7 shall consider alternate sentencing, including community
8 service, if the defendant shows remorse and recognition
9 of the wrongdoing, and an inclination not to repeat the
10 offense.

11 SEC. 3. No reimbursement is required by this act
12 pursuant to Section 6 of Article XIII B of the California
13 Constitution because the only costs that may be incurred
14 by a local agency or school district will be incurred
15 because this act creates a new crime or infraction,
16 eliminates a crime or infraction, or changes the penalty
17 for a crime or infraction, within the meaning of Section
18 17556 of the Government Code, or changes the definition
19 of a crime within the meaning of Section 6 of Article
20 XIII B of the California Constitution.

21 Notwithstanding Section 17580 of the Government
22 Code, unless otherwise specified, the provisions of this act
23 shall become operative on the same date that the act
24 takes effect pursuant to the California Constitution.

