

HOUSE No.

The Commonwealth of Massachusetts

PRESENTED BY:

James H. Fagan

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to broadband and telecommunications security.

PETITION OF:

NAME:

James H. Fagan

DISTRICT/ADDRESS:

3rd Bristol

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 3304 OF 2007-2008.]

The Commonwealth of Massachusetts

—————
In the Year Two Thousand and Nine
—————

AN ACT RELATIVE TO BROADBAND AND TELECOMMUNICATIONS SECURITY.

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

1 SECTION 1. Chapter 166: Section 42B. is hereby amended as follows:
2 Unlawful telecommunication and access devices; offenses; definitions; penalties; civil remedies.
3 (a) Offense defined.—Any person commits an offense if he:
4 (1) possesses, uses, manufactures, assembles, distributes, transfers, sells or offers, promotes or advertises for sale,
5 use or distribution any unlawful telecommunication device, or modifies, alters, programs or reprograms a
6 telecommunication device:
7 (i) for the commission of a theft of telecommunication service or to receive, disrupt, transmit, decrypt, acquire or
8 facilitate the receipt, disruption, transmission, decryption or acquisition of any telecommunication service without
9 the express consent or express authorization of the telecommunication service provider; or
10 (ii) to conceal or to assist another to conceal from any telecommunication service provider, or from any lawful
11 authority, the existence or place of origin or destination of any telecommunication; or
12 (2) possesses, uses, manufactures, assembles, distributes, transfers, sells, offers, promotes or advertises for sale, use
13 or distribution any unlawful access device; or
14 (3) possesses, uses, prepares, distributes, sells, gives, transfers or offers, promotes, publishes or advertises for sale,
15 use or distribution any:
16 (i) plans or instructions for making or assembling any unlawful telecommunication or access device, under
17 circumstances evidencing an intent to use or employ such unlawful telecommunication or access device, or to allow
18 the same to be used or employed, for a purpose prohibited by this section, or knowing or having reason to believe
19 that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for
20 manufacturing or assembling such unlawful telecommunication or access device, or
21 (ii) material including hardware, cables, tools, data, computer software or other information or equipment, knowing
22 that the purchaser or a third person intends to use the material in the manufacture or assembly of an unlawful
23 telecommunication or access device.
24 (b) Criminal Penalties.—
25 (1) (Except for violations of this section as provided for in paragraph (b)(2) or (b)(3), an offense under this section
26 shall be punished by a fine of not more than three thousand dollars or by imprisonment in a jail or house of
27 correction for not more than two and one half years or both.

28 (2) An offense under this section shall be punished by a fine of not more than ten thousand dollars and imprisonment
29 in the state prison for not more than ten years, if:
30 (i) the defendant has been convicted previously under this section or convicted of any similar crime in this or any
31 Federal or other state jurisdiction; or
32 (ii) the violation of this section involves at least 5, but not more than 50, unlawful telecommunication or access
33 devices.

34 (3) An offense under this section shall be punished by a fine of not more than thirty thousand dollars and
35 imprisonment in the state prison for not more than fifteen years. if:
36 (i) the defendant has been convicted previously on two or more occasions for offenses under this section or for any
37 similar crime in this or any Federal or other state jurisdiction, or
38 (ii) the violation of this section involves more than 50 unlawful telecommunication or access devices.

39 (4) For purposes of grading an offense based upon a prior conviction under this section or for any similar crime
40 pursuant to paragraphs (b)(2)(i) and (b)(3)(i), a prior conviction shall consist of convictions upon separate
41 indictments or criminal complaints for offenses under this section or any similar crime in this or any Federal or other
42 state jurisdiction.

43 (5) As provided for in paragraphs (b)(2)(i) and (b)(3)(i), in grading an offense under this section based upon a prior
44 conviction, the term "any similar crime" shall include, but not be limited to offenses involving theft of service or
45 fraud, including violation of the Cable Communications Policy Act of 1984 (Public Law 98-549, 98 Stat. 2779).

46 (6) Separate offenses.—For purposes of all criminal penalties or fines established for violations of this section, the
47 prohibited activity established herein as it applies to each unlawful telecommunication or access device shall be
48 deemed a separate offense.

49 (7) Fines.—For purposes of imposing fines upon conviction of a defendant for an offense under this section, all fines
50 shall be imposed as authorized by law for each unlawful telecommunication or access device involved in the
51 violation of this action.

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

59 In determining the amount, time and method of payment of restitution, the court shall consider the financial
60 resources of the defendant and the burden restitution will impose on the defendant. Upon a real or impending change
61 in financial circumstances, a defendant ordered to pay restitution may petition the court for a modification of the
62 amount, time or method payment of restitution. If the court finds that because of any such change the payment of
63 restitution will impose an undue financial hardship on the defendant or his family, the court may modify the amount,
64 time or method of payment, but may not grant complete remission from payment of restitution.

65 If a defendant who is required to make restitution defaults in any payment of restitution or installment thereof, the
66 court shall hold him in contempt unless said defendant has made a good faith effort to pay such restitution. If said
67 defendant has made a good faith effort to pay such restitution, the court may modify the amount, time or method of
68 payment. but may not grant complete remission for payment of restitution.

69 (9) Forfeiture of unlawful telecommunication or access devices.—
70 Any unlawful telecommunication or access devices or plans or instructions or publications described in this section
71 may be seized under warrant or incident to a lawful arrest, and, upon the conviction of a person for a violation of
72 this section, such unlawful telecommunication or access devices or plans or instructions or publications may be
73 destroyed as contraband by the sheriff of the county in which such person was convicted.

74 (c) Venue.—An offense or violation under this section may be deemed to have been committed at either place where
75 the defendant manufactures or assembles an unlawful telecommunication or access device or assists others in doing
76 so, or the places where the unlawful telecommunication or access device is sold or delivered to a purchaser or
77 recipient. It shall be no defense to a violation of this section that some of the acts constituting the violation occurred
78 outside of this Commonwealth.

79 (d) Civil actions.—
80 (1) Any person aggrieved by a violation of this section or Chapter 166, section 42A may bring a civil action in any

81 court of competent jurisdiction.

82 (2) In any civil action brought for violations of this section or Chapter 166, section 42A, the court may:

83 (i) grant preliminary and final injunctions to prevent or restrain violation of this section;

84 (ii) at any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any
85 unlawful telecommunication or access device that is in the custody or control of the violator and that the court has
86 reasonable cause to believe was involved in the alleged violation of this section or Chapter 166, section 42A;

87 (iii) award damages as described in subsection (3) below;

88 (iv) in its discretion, award reasonable attorney fees and costs, including, but not limited to, costs for investigation,
89 testing and expert witness fees, to an aggrieved party who prevails; and

90 (v) as part of a final judgment or decree finding a violation of this section, order the remedial modification or
91 destruction of any unlawful telecommunication or access device, or any other devices or equipment involved in the
92 violation, that is in the custody or control of the violator, or has been impounded under subparagraph (ii) above.

93 (3) Types of damages recoverable.—Damages awarded by a court for violations of this section or Chapter 166,
94 section 42A shall be computed as either of the following:

95 (i) Upon his election of such damages at any time before final judgment is entered, the complaining party may
96 recover the actual damages suffered by him as a result of the violation and any profits of the violator that are
97 attributable to the violation and are not taken into account in computing the actual damages. In determining the
98 violator's profits, the complaining party shall be required to prove only the violator's gross revenue, and the violator
99 shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the
100 violation.

101 (ii) Upon election by the complaining party at any time before final judgment is entered, that party may recover in
102 lieu of actual damages an award of statutory damages of between \$250 to \$10,000 for each violation involved in the
103 action. In all cases, the amount of statutory damages is to be determined by the court, not the jury, as the court
104 considers just. In any case where the court finds that any of the violations of this section or Chapter 166, section 42A
105 were committed willfully and for purposes of commercial advantage or private financial gain, the court in its
106 discretion may increase the award of statutory damages by an amount of not more than \$50,000 for each violation
107 involved in the action. Each unlawful telecommunication or access device involved in the action shall be deemed a
108 separate violation and shall entitle the complaining party to a separate award of statutory damages for each such
109 device.

110 (4) For purposes of all civil remedies established for violations of this section or Chapter 166, section 42A, the
111 prohibited activity applies to each unlawful telecommunication or access device and shall be deemed a separate
112 violation.

113 (e) Definitions.—As used in this section, the following words and phrases shall have, the following meanings:—

114 (1) "Manufacture of assembly of an unlawful telecommunication device." To make, produce or assemble an
115 unlawful telecommunication device or to modify, alter, program or reprogram a telecommunication device to be
116 capable of acquiring, disrupting, receiving, transmitting, decrypting or facilitating the acquisition, disruption,
117 receipt, transmission or decryption of a telecommunication service without the express consent or express
118 authorization of the telecommunication service provider, or to knowingly assist others in those activities.

119 (2) "Telecommunication device." Any type of instrument, device, machine, equipment, technology or software
120 which is capable of transmitting, acquiring, decrypting or receiving any telephonic, electronic, data, Internet access,
121 audio, video, microwave or radio transmissions, signals, communications or services, including the receipt,
122 acquisition, transmission or decryption of all such communications, transmissions, signals or services provided by or
123 through any cable television, fiber optic, telephone, satellite, microwave, data transmission, radio, Internet-based or
124 wireless distribution network, system or facility; or any part, accessory or components thereof, including any
125 computer circuit, security module, smart card, software, computer chip, electronic mechanism or other component,
126 accessory or part of any telecommunication device which is capable of facilitating the transmission, decryption,
127 acquisition or reception of any such communications, transmissions, signals or services.

128 (3) "Telecommunication service." Any service provided for a charge or compensation to facilitate the origination,
129 transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature
130 by telephone, including cellular telephones, wire, wireless, radio, electromagnetic, photoelectronic or photo-optical
131 systems, and any service provided by any radio, telephone, fiber optic, cable television, satellite, microwave, data
132 transmission, wireless or Internet-based distribution system, network, facility or technology, including, but not

133 limited to, any and all electronic, data, video, audio, Internet access, telephonic, microwave and radio
134 communications, transmissions, signals and services, and any such communications, transmissions, signals and
135 services provided directly or indirectly by or through any of the aforementioned systems, networks, facilities or
136 technologies.

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

144 (5) "Unlawful telecommunication device." Any electronic serial number, mobile identification number, personal
145 identification number or any unauthorized receipt, acquisition, access, decryption, disclosure, communication
146 transmission or re-transmission, or to knowingly assist others in those activities.