

HOUSE No. 3075

The Commonwealth of Massachusetts

In the Year Two Thousand 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:Unlawful
2 telecommunication and access devices; offenses; definitions; penalties; civil remedies.(a)
3 Offense defined.—Any person commits an offense if he:(1) possesses, uses, manufactures,
4 assembles, distributes, transfers, sells or offers, promotes or advertises for sale, use car
5 distribution any unlawful telecommunication device, or modifies, alters, programs or reprograms
6 a telecommunication device:(i) for the commission of a theft of telecommunication service or to
7 receive, disrupt, transmit, decrypt, acquire or facilitate the receipt, disruption, transmission,
8 decryption or acquisition of any telecommunication service without the express consent or
9 express authorization of the telecommunication service provider; or(ii) to conceal or to assist
10 another to conceal from any telecommunication service provider, or from any lawful authority,
11 the existence or place of origin or destination of any telecommunication; or(2) possesses, uses,
12 manufactures, assembles, distributes, transfers, sells, offers, promotes or advertises for sale, use
13 or distribution any unlawful access device; or(3) possesses, uses, prepares, distributes, sells,
14 gives, transfers or offers, promotes, publishes or advertises for sale, use or distribution any:(i)

15 plans or instructions for making or assembling any unlawful telecommunication or access
16 device, under circumstances evidencing an intent to use or employ such unlawful
17 telecommunication or access device, or to allow the same to be used or employed, for a purpose
18 prohibited by this section, or knowing or having reason to believe that the same is intended to be
19 so used, or that the aforesaid plans or instructions are intended to be used for manufacturing or
20 assembling such unlawful telecommunication or access device, or(ii) material including
21 hardware, cables, tools, data, computer software or other information or equipment, knowing that
22 the purchaser or a third person intends to use the material in the manufacture or assembly of an
23 unlawful telecommunication or access device.(b) Criminal Penalties.—

24 (1) (Except for violations of this section as provided for in paragraph (b)(2) or (b)(3), an
25 offense under this section shall be punished by a fine of not more than three thousand dollars or
26 by imprisonment in a jail or house of correction for not more than two and one half years or
27 both.(2) An offense under this section shall be punished by a fine of not more than ten thousand
28 dollars and imprisonment in the state prison for not more than ten years, if:(i) the defendant has
29 been convicted previously under this section or convicted of any similar crime in this or any
30 Federal or other state jurisdiction; or(ii) the violation of this section involves at least 5, but not
31 more than 50, unlawful telecommunication or access devices.(3) An offense under this section
32 shall be punished by a fine of not more than thirty thousand dollars and imprisonment in the state
33 prison for not more than fifteen years. if:(i) the defendant has been convicted previously on two
34 or more occasions for offenses under this section or for any similar crime in this or any Federal
35 or other state jurisdiction, or(ii) the violation of this section involves more than 50 unlawful
36 telecommunication or access devices.(4) For purposes of grading an offense based upon a prior
37 conviction under this section or for any similar crime pursuant to paragraphs (b)(2)(i) and

38 (b)(3)(i), a prior conviction shall consist of convictions upon separate indictments or criminal
39 complaints for offenses under this section or any similar crime in this or any Federal or other
40 state jurisdiction.(5) As provided for in paragraphs (b)(2)(i) and (b)(3)(i), in grading an offense
41 under this section based upon a prior conviction, the term “any similar crime” shall include, but
42 not be limited to offenses involving theft of service or fraud, including violation of the Cable
43 Communications Policy Act of 1984 (Public Law 98-549, 98 Stat. 2779).

44 (6) Separate offenses.—For purposes of all criminal penalties or fines established for
45 violations of this section, the prohibited activity established herein as it applies to each unlawful
46 telecommunication or access device shall be deemed a separate offense.(7) Fines.—For purposes
47 of imposing fines upon conviction of a defendant for an offense under this section, all fines shall
48 be imposed as authorized by law for each unlawful telecommunication or access device involved
49 in the violation of this action.(8) Restitution.—The court shall, after conviction, conduct an
50 evidentiary hearing to ascertain the extent of the damages or financial loss suffered as a result of
51 the defendant’s crime. A person found guilty of violating this section shall, in all cases, upon
52 conviction, in addition to any other punishment, be ordered to make restitution to the insurer for
53 any financial loss sustained as a result of the commission of the crime; provided, however, that
54 restitution shall not be ordered to a party whom the court determines to be aggrieved without that
55 party’s consent. Restitution shall be imposed in addition to imprisonment and/or fine and not in
56 lieu thereof, provided, however, the court shall consider the defendant’s present and future
57 ability to pay in its determinations regarding a fine.In determining the amount, time and method
58 of payment of restitution, the court shall consider the financial resources of the defendant and the
59 burden restitution will impose on the defendant. Upon a real or impending change in financial
60 circumstances, a defendant ordered to pay restitution may petition the court for a modification of

61 the amount, time or method payment of restitution. If the court finds that because of any such
62 change the payment of restitution will impose an undue financial hardship on the defendant or
63 his family, the court may modify the amount, time or method of payment, but may not grant
64 complete remission from payment of restitution.

65 If a defendant who is required to make restitution defaults in any payment of restitution
66 or installment thereof, the court shall hold him in contempt unless said defendant has made a
67 good faith effort to pay such restitution. If said defendant has made a good faith effort to pay
68 such restitution, the court may modify the amount, time or method of payment. but may not grant
69 complete remission for payment of restitution.(9) Forfeiture of unlawful telecommunication or
70 access devices.—Any unlawful telecommunication or access devices or plans or instructions or
71 publications described in this section may be seized under warrant or incident to a lawful arrest,
72 and, upon the conviction of a person for a violation of this section, such unlawful
73 telecommunication or access devices or plans or instructions or publications may be destroyed as
74 contraband by the sheriff of the county in which such person was convicted.(c) Venue.—An
75 offense or violation under this section may be deemed to have been committed at either place
76 where the defendant manufactures or assembles an unlawful telecommunication or access device
77 or assists others in doing so, or the places where the unlawful telecommunication or access
78 device is sold or delivered to a purchaser or recipient. It shall be no defense to a violation of this
79 section that some of the acts constituting the violation occurred outside of this
80 Commonwealth.(d) Civil actions.—(1) Any person aggrieved by a violation of this section or
81 Chapter 166, section 42A may bring a civil action in any court of competent jurisdiction.(2) In
82 any civil action brought for violations of this section or Chapter 166, section 42A, the court
83 may:(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
85 deems reasonable, of any unlawful telecommunication or access device that is in the custody or
86 control of the violator and that the court has reasonable cause to believe was involved in the
87 alleged violation of this section or Chapter 166, section 42A;(iii) award damages as described in
88 subsection (3) below;(iv) in its discretion, award reasonable attorney fees and costs, including,
89 but not limited to, costs for investigation, testing and expert witness fees, to an aggrieved party
90 who prevails; and(v) as part of a final judgment or decree finding a violation of this section,
91 order the remedial modification or destruction of any unlawful telecommunication or access
92 device, or any other devices or equipment involved in the violation, that is in the custody or
93 control of the violator, or has been impounded under subparagraph (ii) above.(3) Types of
94 damages recoverable.—Damages awarded by a court for violations of this section or Chapter
95 166, section 42A shall be computed as either of the following:(i) Upon his election of such
96 damages at any time before final judgment is entered, the complaining party may recover the
97 actual damages suffered by him as a result of the violation and any profits of the violator that are
98 attributable to the violation and are not taken into account in computing the actual damages. In
99 determining the violator’s profits, the complaining party shall be required to prove only the
100 violator’s gross revenue, and the violator shall be required to prove his deductible expenses and
101 the elements of profit attributable to factors other than the violation.

102 (ii) Upon election by the complaining party at any time before final judgment is entered,
103 that party may recover in lieu of actual damages an award of statutory damages of between \$250
104 to \$10,000 for each violation involved in the action. In all cases, the amount of statutory
105 damages is to be determined by the court, not the jury, as the court considers just. In any case
106 where the court finds that any of the violations of this section or Chapter 166, section 42A were

107 committed willfully and for purposes of commercial advantage or private financial gain, the
108 court in its discretion may increase the award of statutory damages by an amount of not more
109 than \$50,000 for each violation involved in the action. Each unlawful telecommunication or
110 access device involved in the action shall be deemed a separate violation and shall entitle the
111 complaining party to a separate award of statutory damages for each such device.(4) For
112 purposes of all civil remedies established for violations of this section or Chapter 166, section
113 42A, the prohibited activity applies to each unlawful telecommunication or access device and
114 shall be deemed a separate violation.(e) Definitions.—As used in this section, the following
115 words and phrases shall have, the following meanings:—(1) “Manufacture of assembly of an
116 unlawful telecommunication device.” To make, produce or assemble an unlawful
117 telecommunication device or to modify, alter, program or reprogram a telecommunication device
118 to be capable of acquiring, disrupting, receiving, transmitting, decrypting or facilitating the
119 acquisition, disruption, receipt, transmission or decryption of a telecommunication service
120 without the express consent or express authorization of the telecommunication service provider,
121 or to knowingly assist others in those activities.(2) “Telecommunication device.” Any type of
122 instrument, device, machine, equipment, technology or software which is capable of
123 transmitting, acquiring, decrypting or receiving any telephonic, electronic, data, Internet access,
124 audio, video, microwave or radio transmissions, signals, communications or services, including
125 the receipt, acquisition, transmission or decryption of all such communications, transmissions,
126 signals or services provided by or through any cable television, fiber optic, telephone, satellite,
127 microwave, data transmission, radio, Internet-based or wireless distribution network, system or
128 facility; or any part, accessory or components thereof, including any computer circuit, security
129 module, smart card, software, computer chip, electronic mechanism or other component,

130 accessory or part of any telecommunication device which is capable of facilitating the
131 transmission, decryption, acquisition or reception of any such communications, transmissions,
132 signals or services.

133 (3) "Telecommunication service." Any service provided for a charge or compensation to
134 facilitate the origination, transmission, emission or reception of signs, signals, data, writings,
135 images and sounds or intelligence of any nature by telephone, including cellular telephones,
136 wire, wireless, radio, electromagnetic, photoelectronic or photo-optical systems, and any service
137 provided by any radio, telephone, fiber optic, cable television, satellite, microwave, data
138 transmission, wireless or Internet-based distribution system, network, facility or technology,
139 including, but not limited to, any and all electronic, data, video, audio, Internet access,
140 telephonic, microwave and radio communications, transmissions, signals and services, and any
141 such communications, transmissions, signals and services provided directly or indirectly by or
142 through any of the aforementioned systems, networks, facilities or technologies.(4)

143 "Telecommunication service provider." 1) Any person or entity providing a telecommunication
144 service, whether directly or indirectly as a reseller, including, but not limited to, a cellular,
145 paging or other wireless communications company or other person or entity which, for a fee
146 supplies the facility, cell site, mobile telephone switching office or other equipment or
147 telecommunication service; 2) any person or entity owning or operating any fiber optic, cable
148 television, satellite, Internet based, telephone, wireless, microwave, data transmission or radio
149 distribution system network or facility; and 3) any person or entity providing any
150 telecommunication service directly or indirectly by or through any such distribution systems,
151 networks or facilities.(5) "Unlawful telecommunication device." Any electronic serial number,
152 mobile identification number, personal identification number or any unauthorized receipt,

- 153 acquisition, access, decryption, disclosure, communication transmission or re-transmission, or to
- 154 knowingly assist others in those activities.