

SUBJECT: Unauthorized creation and use of computer zombies or botnets

COMMITTEE: Business and Industry — favorable, with amendment

VOTE: 6 ayes — Giddings, Elkins, Darby, Bohac, Solomons, Zedler
0 nays
3 absent — Bailey, Castro, Martinez

SENATE VOTE: On final passage, April 26 — 30-0

WITNESSES: For — (*Registered, but did not testify:* James Hines, Verizon; John Kuhl, Texas Business Law Foundation)
Against — None
On — Brad Schuelke, The Texas Attorney General’s Office

BACKGROUND: In 2005, the 79th Legislature enacted SB 327 by Zaffirini, the Consumer Protection Against Spyware Act (Business and Commerce Code, ch. 48). This act defines violations for unauthorized use of another person's computer and establishes related civil penalties. A civil litigant can recover damages in an amount equal to the greater of actual damages arising from the violation or \$100,000 for each violation of the same nature.

DIGEST: SB 1009 would amend the Consumer Protection Against Spyware Act to add violations for unauthorized creation or use of zombies or botnets. The bill would define a zombie as a computer that had been compromised so that it could be controlled by another person or program without the knowledge of the computer’s owner. A botnet would be a collection of zombies.

A person could not knowingly create, have created, use, or offer to use a zombie or botnet:

- to send unsolicited commercial electronic mail messages;

- for an attack on a computer system or network that caused a loss of service to users;
- to artificially add increments to a click counter by automatically clicking on an advertisement on an Internet website;
- to forward computer software designed to damage or disrupt another computer or system;
- to collect personally identifiable information;
- to manipulate online polls or games; or
- for another purpose not authorized by the owner or operator of the computer.

In addition, a person could not purchase, rent, sell, or lease a zombie or botnet.

A knowing violation would include both actual knowledge and consciously avoiding information that would establish actual knowledge.

The prohibitions would not apply to certain service providers, such as telecommunications carriers or cable operators, if done for certain security purposes.

The bill would allow an Internet Service Provider (ISP), the attorney general, or a business that had incurred a loss due to botnet or zombie related activities to bring civil action against a violator. The suit could seek injunctive relief or recovery of damages in an amount equal to the greater of:

- the actual damages arising from the violation;
- \$100,000 for each violation consisting of the same course of conduct; or
- \$100,000 for each zombie used to commit the violation.

The court could increase the award in a civil suit by up to three times the amount of applicable damages if it found the frequency of violations constituted a pattern or practice. A plaintiff also could recover court costs and attorney's fees. These civil remedies could be combined with any other remedy offered by law.

The bill would take effect September 1, 2007, and apply only to conduct that occurred on or after that date.

**SUPPORTERS
SAY:**

SB 1009 would provide the tools to curb a pervasive problem that seriously injures consumers and businesses. Botnets consisting of more than a million zombies have been used to spam consumers. Internet service providers (ISPs) can monitor spam practices, and ISPs estimate that spam constitutes more than 90 percent of e-mail and that 70 percent or more of spam is sent by botnets. This year, spam will cost Texas businesses and consumers more than \$1.9 billion.

Also, the use of botnets can run companies out of business through denial of service attacks. Those operating botnets — known as “botnet herders” — can flood a business’ servers so that the servers no longer can function. Botnet herders successfully have extorted businesses for thousands of dollars in exchange for restoring server operating capacity. Beyond the financial costs associated with the use of botnets, unsolicited e-mails are a general nuisance to e-mail recipients. If a consumer’s computer becomes a zombie, it can drain a person’s storage capacity and processing speed. The bill also could contribute to the prevention of identity theft and protect a company’s investment in Internet advertising.

While ISPs can monitor the majority of botnet activities, it is too costly for the ISP to take action against a botnet herder. The civil remedies in SB 1009 would provide economic incentives for ISPs to both take action to rectify consumer issues with zombies and to pursue legal action against botnet herders. In addition, if ISPs gathered information on botnet herders for civil suits, it could be used by the attorney general to prosecute botnet herders criminally. The civil remedies in the bill would be sufficiently punitive to dissuade botnet herders from extorting businesses, spamming consumers, and engaging in other unauthorized behaviors. At the same time, the court would use discretion in determining awards in civil suits. An ISP or business would not waste time and resources to bring suit against someone who did not cause the entity severe harm.

**OPPONENTS
SAY:**

While SB 1009 would be positive in prohibiting the use of zombies or botnets for unauthorized purposes, the civil remedies in the bill could be too severe for certain violations. The bill would direct the court to award damages in an amount equal to the greater of actual damages or \$100,000 for each violation or each zombie used. A \$100,000 penalty would be excessive in a number of cases. For example, a youth could play a prank by using a zombie to manipulate the results of an online poll that was offered for entertainment purposes. Such acts should be discouraged, but

given that these pranks would rarely cause harm, a \$100,000 penalty would be too severe. The bill instead should direct the court to award an amount the court deemed appropriate for the particular violation in an amount not to exceed \$100,000 for each violation or zombie used.

NOTES:

A related bill, HB 3173 by Giddings, passed the House by 139-0 on May 7 and has been referred to the Senate Business and Commerce Committee. HB 3173 would limit the prohibitions on the use of zombies and botnets to violations involving unsolicited commercial emails.