

SUBJECT: Unauthorized creation and use of computer zombies or botnets

COMMITTEE: Technology, Economic Development, and Workforce — committee substitute recommended

VOTE: 7 ayes — Strama, F. Brown, Button, Eissler, Gattis, Harless, Rodriguez
0 nays
2 absent — Parker, Ritter

SENATE VOTE: On final passage, April 14 — 30-0

WITNESSES: For — Ronald Chichester, Texas Business Law Foundation; (*Registered, but did not testify*: Celinda Gonzalez, Texas Cable Association)
Against — None
On — Paul Singer, Office of Attorney General, Consumer Protection Division

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: CSSB 28 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 send data from a computer without authorization by the computer owner or operator;
- to forward computer software designed to damage or disrupt another computer or system;
- to collect personally identifiable information; 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.

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, for each violation, seek injunctive relief, recovery of damages, or both in an amount equal to the greater of:

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

The attorney general could only seek injunctive relief and actual damages, except when representing a governmental entity.

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.

These provisions could not be construed to impose liability on the following with respect to a violation committed by another person:

- an ISP;
- an interactive computer service provider;
- a telecommunication provider; or
- a video or cable service provider.

The bill would take effect September 1, 2009.

**SUPPORTERS
SAY:**

SB 28 would provide the tools to curb a pervasive problem that injures seriously consumers and businesses. Botnets consisting of between several thousand to more than a million zombies have been used to spam consumers. Internet service providers (ISPs), which monitor spam practices, estimate that spam constitutes more than 90 percent of e-mail and that roughly 80 percent or more of spam is sent by botnets. In 2007, spam cost Texas businesses and consumers more than \$1.9 billion.

The use of botnets can force companies out of business through denial of service attacks. Those operating botnets — known as “botnet herders” — can flood a business’ servers so that they no longer can function. Botnet herders successfully have extorted businesses for thousands of dollars in exchange for restoring server operating capacity. As Texas has more botnet herders than any other state, action is sorely needed. Beyond the financial costs associated with the use of botnets, unsolicited e-mails are a general nuisance to 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.

While ISPs can monitor best the majority of botnet activities, it often is too costly for an ISP to take action against a botnet herder. The civil remedies in SB 28 would provide economic incentives for ISPs to 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 28 would be a positive step 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.

**OTHER
OPPONENTS
SAY:**

While SB 28 is a positive step toward mitigation of the harmful effects of zombies and botnets, it would not address a major contributing factor to their proliferation. Open relay e-mail systems in Texas universities allow incoming messages from a zombie to be relayed easily throughout an entire system. While there is sophisticated zombie software that can go into computers and eradicate other zombies for its exclusive use, less-sophisticated botnets rely on the open relay systems of universities to spread mayhem. To aid in this area, universities should not be allowed to have open relays in their e-mail systems. This action alone would remove incentive for herders to operate in the state.

NOTES:

Rep. Deshotel plans to offer a floor amendment that would remove the attorney general from the enforcement provisions. Business and Commerce Code, sec. 324.102 outlines the current authority of the attorney general in the Consumer Protection Against Computer Spyware Act, including that the attorney general could bring an action to recover a civil penalty of up to \$100,000 for each violation.