S T A T E O F N E W Y O R K

714

2011-2012 Regular Sessions

I N S E N A T E

(PREFILED)

January 5, 2011

Introduced by Sen. ROBACH -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to computer crimes and obscenities

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The penal law is amended by adding two new sections 156.40 and 156.41 to read as follows:

S 156.40 CRIMINAL USE OF ENCRYPTION IN THE SECOND DEGREE.

A PERSON IS GUILTY OF CRIMINAL USE OF ENCRYPTION IN THE SECOND DEGREE WHEN HE OR SHE INTENTIONALLY USES OR ATTEMPTS TO USE ENCRYPTION TO:

1. COMMIT, FURTHER, FACILITATE OR PROMOTE CONDUCT CONSTITUTING A CRIME;

2. CONCEAL THE COMMISSION OF ANY CRIME;

3. CONCEAL OR PROTECT THE IDENTITY OF A PERSON WHO HAS COMMITTED ANY CRIME; OR

4. PREVENT, IMPEDE, DELAY OR DISRUPT THE NORMAL OPERATION OR USE OF A COMPUTER, COMPUTER PROGRAM OR COMPUTER SYSTEM.

CRIMINAL USE OF ENCRYPTION IN THE SECOND DEGREE IS A CLASS A MISDEMEANOR.

S 156.41 CRIMINAL USE OF ENCRYPTION IN THE FIRST DEGREE.

A PERSON IS GUILTY OF CRIMINAL USE OF ENCRYPTION IN THE FIRST DEGREE WHEN HE OR SHE COMMITS THE CRIME OF CRIMINAL USE OF ENCRYPTION IN THE SECOND DEGREE AND HE OR SHE:

1. DOES SO WITH AN INTENT TO COMMIT OR ATTEMPT TO COMMIT OR FURTHER THE COMMISSION OF A FELONY;

2. DOES SO WITH AN INTENT TO CONCEAL THE COMMISSION OF ANY FELONY;

3. DOES SO WITH THE INTENT TO PROTECT THE IDENTITY OF A PERSON WHO HAS COMMITTED ANY FELONY; OR

4. HAS BEEN PREVIOUSLY CONVICTED OF ANY CRIME UNDER THIS ARTICLE.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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CRIMINAL USE OF ENCRYPTION IN THE FIRST DEGREE IS A CLASS E FELONY.

S 2. Section 156.00 of the penal law is amended by adding a new subdivision 10 to read as follows:

10. "ENCRYPTION" MEANS ANY PROTECTIVE OR DISRUPTIVE MEASURE, INCLUDING, WITHOUT LIMITATION, CRYPTOGRAPHY, ENCIPHERING OR ENCODING, WHICH:

(A) CAUSES OR MAKES ANY DATA, INFORMATION, IMAGE, PROGRAM, SIGNAL OR SOUND UNINTELLIGIBLE OR UNUSABLE; OR

(B) PREVENTS, IMPEDES, DELAYS OR DISRUPTS ACCESS TO ANY DATA, INFORMATION, IMAGE, PROGRAM, SIGNAL OR SOUND.

S 3. Section 215.35 of the penal law is amended to read as follows:

S 215.35 Tampering with physical evidence; definitions of terms.

The following definitions are applicable to section 215.40:

1. "Physical evidence" means any article, object, document, record, PROPERTY OF ANY KIND, or other thing of physical substance [which is or is about to be produced or used as evidence in an official proceeding], INCLUDING BUT NOT LIMITED TO COMPUTER PROGRAMS, COMPUTER DATA AND COMPUTER SERVICES AS DEFINED IN SECTION 156.00 OF THIS PART.

2. "Official proceeding" means any action or proceeding, INVESTIGATION OR INQUIRY conducted by or before a legally constituted judicial, legislative, administrative or other governmental agency or official, in which evidence may properly be received OR GATHERED.

3. "ENCRYPTION" MEANS ANY PROTECTIVE OR DISRUPTIVE MEASURE, INCLUDING BUT NOT LIMITED TO CRYPTOGRAPHY, ENCIPHERING OR ENCODING, WHICH: (A) CAUSES OR MAKES ANY DATA, INFORMATION, IMAGE, PROGRAM, SIGNAL OR SOUND UNINTELLIGIBLE OR UNUSABLE; OR (B) PREVENTS, IMPEDES, DELAYS OR DISRUPTS ACCESS TO ANY DATA, INFORMATION, IMAGE, PROGRAM, SIGNAL OR SOUND.

S 4. Section 215.40 of the penal law is amended to read as follows:

S 215.40 Tampering with physical evidence.

A person is guilty of tampering with physical evidence when:

1. With intent that it be used or introduced in, OR BELIEVING THAT IT HAS BEEN REQUESTED OR MAY BE GATHERED DURING OR PURSUANT TO an official proceeding or a prospective official proceeding, [he] SUCH PERSON: (a) knowingly makes, devises or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or

2. Believing that certain physical evidence [is about to] HAS BEEN OR MAY be REQUESTED, GATHERED, produced or used in OR PURSUANT TO an official proceeding or a prospective official proceeding, and intending to prevent such production or use, [he] SUCH PERSON suppresses it by any act of concealment, alteration, ENCRYPTION or destruction, or by employing force, intimidation or deception against any person.

3. NO ELECTRONIC COMMUNICATIONS SERVICE OR REMOTE COMPUTING SERVICE, AS DEFINED UNDER THE FEDERAL ELECTRONIC COMMUNICATIONS PRIVACY ACT, WHICH IS ACTING WITHIN THE ORDINARY COURSE OF BUSINESS, SHALL BE OBLIGATED TO RETAIN CUSTOMER INFORMATION AND/OR CONTENT UNLESS IN RECEIPT OF AN OFFICIAL REQUEST TO RETAIN PHYSICAL EVIDENCE.

Tampering with physical evidence is a class [E] D felony.

S 5. The penal law is amended by adding a new article 495 to read as follows:

ARTICLE 495

COMPUTER SEX CRIMES AGAINST CHILDREN

SECTION 495.00 COMPUTER SEX CRIMES.

495.05 SENTENCE OF IMPRISONMENT FOR COMPUTER SEX CRIMES.

S 495.00 COMPUTER SEX CRIMES.

1. A PERSON COMMITS A COMPUTER SEX CRIME WHEN HE OR SHE COMMITS A SEX CRIME AGAINST A CHILD AND FACILITATED THE COMMISSION OF SUCH OFFENSE BY USING OR CAUSING TO BE USED A COMPUTER OR COMPUTER SERVICE TO COMMUNICATE WITH THE CHILD AGAINST WHOM SUCH OFFENSE IS COMMITTED.

2. A "SEX CRIME AGAINST A CHILD" MEANS A FELONY OFFENSE (A) THE ESSENTIAL ELEMENTS OF WHICH INCLUDE THE COMMISSION OR ATTEMPTED COMMISSION OF SEXUAL CONDUCT, AS DEFINED IN SUBDIVISION TEN OF SECTION 130.00 OF THIS CHAPTER, OR THE USE OR PROMOTION OF A SEXUAL OR OBSCENE SEXUAL PERFORMANCE, AS DEFINED IN SECTION 263.00 OF THIS CHAPTER, (B) COMMITTED OR ATTEMPTED TO BE COMMITTED AGAINST A CHILD LESS THAN SEVENTEEN YEARS OLD.

S 495.05 SENTENCE OF IMPRISONMENT FOR COMPUTER SEX CRIMES.

1. WHEN A PERSON IS CONVICTED OF A COMPUTER SEX CRIME PURSUANT TO SECTION 495.00 OF THIS ARTICLE, AND THE UNDERLYING CRIME AGAINST A CHILD IS A VIOLENT FELONY OFFENSE, AS DEFINED IN SECTION 70.02 OF THIS CHAPTER, THE COMPUTER SEX CRIME SHALL BE DEEMED A VIOLENT FELONY OFFENSE.

2. WHEN A PERSON IS CONVICTED OF A COMPUTER SEX CRIME PURSUANT TO SECTION 495.00 OF THIS ARTICLE, AND THE UNDERLYING SEX CRIME AGAINST A CHILD IS A CLASS C, D OR E FELONY, THE COMPUTER SEX CRIME SHALL BE DEEMED TO BE ONE CATEGORY HIGHER THAN THE SEX CRIME AGAINST A CHILD THE DEFENDANT COMMITTED, OR ONE CATEGORY HIGHER THAN THE OFFENSE LEVEL APPLICABLE TO THE DEFENDANT'S CONVICTION FOR AN ATTEMPT OR CONSPIRACY TO COMMIT A SEX CRIME AGAINST A CHILD, WHICHEVER IS APPLICABLE.

3. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, WHEN A PERSON IS CONVICTED OF A COMPUTER SEX CRIME PURSUANT TO SECTION 495.00 OF THIS ARTICLE AND THE UNDERLYING SEX CRIME AGAINST A CHILD IS A CLASS B FELONY:

(A) THE TERM OF THE DETERMINATE SENTENCE MUST BE AT LEAST EIGHT YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.02 OF THIS CHAPTER;

(B) THE TERM OF THE DETERMINATE SENTENCE MUST BE AT LEAST TWELVE YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.04 OF THIS CHAPTER; AND

(C) THE MAXIMUM TERM OF THE INDETERMINATE SENTENCE MUST BE AT LEAST FOUR YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.05 OF THIS CHAPTER.

S 6. Subdivisions 4 and 7 of section 200.50 of the criminal procedure law, as amended by chapter 7 of the laws of 2007, are amended to read as follows:

4. A statement in each count that the grand jury, or, where the accusatory instrument is a superior court information, the district attorney, accuses the defendant or defendants of a designated offense, provided that in any prosecution under article four hundred eighty-five of the penal law, the designated offense shall be the specified offense, as defined in subdivision three of section 485.05 of the penal law, followed by the phrase "as a hate crime", and provided further that in any prosecution under section 490.25 of the penal law, the designated offense shall be the specified offense, as defined in subdivision three of section 490.05 of the penal law, followed by the phrase "as a crime of terrorism"; and provided further that in any prosecution under section 130.91 of the penal law, the designated offense shall be the specified offense, as defined in subdivision two of section 130.91 of the penal law, followed by the phrase "as a sexually motivated felony", AND PROVIDED FURTHER THAT IN ANY PROSECUTION UNDER SECTION 495.00 OF THE PENAL LAW, THE DESIGNATED OFFENSE SHALL BE THE UNDERLYING SEX CRIME AGAINST A CHILD, AS DEFINED IN SUBDIVISION TWO OF SECTION 495.00 OF THE PENAL LAW, FOLLOWED BY THE PHRASE "AS A COMPUTER SEX CRIME"; and

7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature,

(a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation; and

(b) in the case of any armed felony, as defined in subdivision forty-one of section 1.20, states that such offense is an armed felony and specifies the particular implement the defendant or defendants possessed, were armed with, used or displayed or, in the case of an implement displayed, specifies what the implement appeared to be; and

(c) in the case of any hate crime, as defined in section 485.05 of the penal law, specifies, as applicable, that the defendant or defendants intentionally selected the person against whom the offense was committed or intended to be committed; or intentionally committed the act or acts constituting the offense, in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person; and

(d) in the case of a crime of terrorism, as defined in section 490.25 of the penal law, specifies, as applicable, that the defendant or defendants acted with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping; and

(e) in the case of a sexually motivated felony, as defined in section 130.91 of the penal law, asserts facts supporting the allegation that the offense was sexually motivated; and

(F) IN THE CASE OF A COMPUTER SEX CRIME, AS DEFINED IN SUBDIVISION ONE OF SECTION 495.00 OF THE PENAL LAW, SPECIFIES, AS APPLICABLE, THAT THE DEFENDANT OR DEFENDANTS FACILITATED THE COMMISSION OF A SEX CRIME AGAINST A CHILD, AS DEFINED IN SUBDIVISION TWO OF SUCH SECTION 495.00, BY USING OR CAUSING TO BE USED A COMPUTER OR COMPUTER SERVICE TO COMMUNICATE WITH THE CHILD AGAINST WHOM SUCH OFFENSE IS COMMITTED; AND

S 7. Paragraph (c) of subdivision 5 of section 156.00 of the penal law, as amended by chapter 558 of the laws of 2006, is amended and a new paragraph (d) is added to read as follows:

(c) is not and is not intended to be available to anyone other than the person or persons rightfully in possession thereof or selected persons having access thereto with his, her or their consent and which accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof[.]; OR

(D) CONTAINS RECORDS OF THE EMPLOYMENT, SALARY, CREDIT OR OTHER FINANCIAL OR PERSONAL INFORMATION RELATING TO ANOTHER PERSON AND SUCH RECORDS ARE ACCESSED AFTER THE TIME AT WHICH A PERSON KNOWS OR REASONABLY SHOULD KNOW THAT HE OR SHE IS WITHOUT AUTHORIZATION TO VIEW THE INFORMATION DISPLAYED.

S 8. Subdivision 2 of section 156.10 of the penal law, as amended by chapter 558 of the laws of 2006, is amended to read as follows:

2. he or she thereby knowingly gains access to computer material[.]; OR

S 9. Section 156.10 of the penal law is amended by adding a new subdivision 3 to read as follows:

3. HE OR SHE GAINS ACCESS TO SUCH COMPUTER OR COMPUTER SERVICE BY USING A CARD, CODE OR OTHER MEANS OF ACCESS, OR ANY COMBINATION THEREOF,

THAT HE OR SHE KNOWS TO BE FORGED OR STOLEN, OR THROUGH USE OF A FICTITIOUS IDENTITY.

S 10. The opening paragraph of section 156.20 of the penal law, as amended by chapter 558 of the laws of 2006, is amended to read as follows:

A person is guilty of computer tampering in the fourth degree when he or she uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and he or she intentionally alters in any manner or destroys, DAMAGES OR CONCEALS computer data or a computer program of another person.

S 11. Subdivisions 3 and 4 of section 156.25 of the penal law, as amended by chapter 89 of the laws of 1993, are amended to read as follows:

3. [he] SUCH PERSON intentionally alters in any manner or destroys, DAMAGES OR CONCEALS computer material; or

4. [he] SUCH PERSON intentionally alters in any manner or destroys, DAMAGES OR CONCEALS computer data or a computer program so as to cause damages in an aggregate amount exceeding one thousand dollars.

S 12. Section 156.26 of the penal law, as amended by chapter 590 of the laws of 2008, is amended to read as follows:

S 156.26 Computer tampering in the second degree.

A person is guilty of computer tampering in the second degree when he or she commits the crime of computer tampering in the fourth degree and he or she intentionally alters in any manner or destroys, DAMAGES OR CONCEALS:

1. computer data or a computer program: (A) so as to cause damages in an aggregate amount exceeding three thousand dollars, OR (B) DOES SO WITH THE INTENT TO ENDANGER PUBLIC SAFETY, INCLUDING, BUT NOT LIMITED TO, INTERRUPTING OR IMPAIRING THE PROVIDING OF SERVICES BY ANY PUBLIC OR PRIVATE UTILITY OR BY ANY STATE, COUNTY OR LOCAL GOVERNMENTAL AGENCY, PUBLIC CARRIER OR PUBLIC COMMUNICATION SERVICE; or

2. computer material that contains records of the medical history or medical treatment of an identified or readily identifiable individual or individuals and as a result of such alteration or destruction, such individual or individuals suffer serious physical injury, and he or she is aware of and consciously disregards a substantial and unjustifiable risk that such serious physical injury may occur.

Computer tampering in the second degree is a class D felony.

S 13. The opening paragraph of section 156.27 of the penal law, as added by chapter 89 of the laws of 1993, is amended to read as follows:

A person is guilty of computer tampering in the first degree when [he] SUCH PERSON commits the crime of computer tampering in the fourth degree and [he] SUCH PERSON intentionally alters in any manner or destroys, DAMAGES OR CONCEALS computer data or a computer program so as to cause damages in an aggregate amount exceeding fifty thousand dollars.

S 14. Subdivision 2 of section 115.00 of the penal law, as added by chapter 422 of the laws of 1978, is amended to read as follows:

2. to a person under sixteen years of age who intends to engage in conduct which would constitute a crime, [he] SUCH PERSON, being over eighteen years of age, engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a crime[.]; OR

S 15. Section 115.00 of the penal law is amended by adding a new subdivision 3 to read as follows:

3. TO A PERSON WHO INTENDS TO COMMIT A CRIME, HE ENGAGES IN CONDUCT WHICH INCLUDES THE INTENTIONAL DISCLOSURE OF A COMPUTER PASSWORD, IDEN-

TIFYING CODE, PERSONAL INFORMATION NUMBER, OR OTHER CONFIDENTIAL INFORMATION ABOUT A COMPUTER SECURITY SYSTEM WHICH PROVIDES SUCH PERSON WITH MEANS OR OPPORTUNITY FOR THE COMMISSION THEREOF AND IN FACT AIDS SUCH PERSON TO COMMIT A CRIME.

S 16. Subdivision 8 of section 700.05 of the criminal procedure law is amended by adding two new paragraphs (u) and (v) to read as follows:

(U) COMPUTER SEX CRIMES AS DEFINED IN SECTION 495.00 OF THE PENAL LAW, COMPUTER TRESPASS AS DEFINED IN SECTION 156.10 OF THE PENAL LAW, COMPUTER TAMPERING IN THE THIRD DEGREE AS DEFINED IN SECTION 156.25 OF THE PENAL LAW, COMPUTER TAMPERING IN THE SECOND DEGREE AS DEFINED IN SECTION 156.26 OF THE PENAL LAW, COMPUTER TAMPERING IN THE FIRST DEGREE AS DEFINED IN SECTION 156.27 OF THE PENAL LAW, UNLAWFUL DUPLICATION OF COMPUTER RELATED MATERIAL AS DEFINED IN SECTION 156.30 OF THE PENAL LAW, CRIMINAL POSSESSION OF COMPUTER RELATED MATERIAL AS DEFINED IN SECTION 156.35 OF THE PENAL LAW, CRIMINAL USE OF ENCRYPTION IN THE SECOND DEGREE AS DEFINED IN SECTION 156.40 OF THE PENAL LAW, CRIMINAL USE OF ENCRYPTION IN THE FIRST DEGREE AS DEFINED IN SECTION 156.41 OF THE PENAL LAW AND DISSEMINATING INDECENT MATERIAL TO MINORS IN THE FIRST DEGREE AS DEFINED IN SECTION 235.22 OF THE PENAL LAW.

(V) USE OF A CHILD IN A SEXUAL PERFORMANCE AS DEFINED IN SECTION 263.05 OF THE PENAL LAW, PROMOTING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD AS DEFINED IN SECTION 263.10 OF THE PENAL LAW, POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD AS DEFINED IN SECTION 263.11 OF THE PENAL LAW, PROMOTING A SEXUAL PERFORMANCE BY A CHILD AS DEFINED IN SECTION 263.15 OF THE PENAL LAW, POSSESSING A SEXUAL PERFORMANCE BY A CHILD AS DEFINED IN SECTION 263.16 OF THE PENAL LAW.

S 17. Paragraph (a) of subdivision 1 of section 460.10 of the penal law, as amended by chapter 405 of the laws of 2010, is amended to read as follows:

(a) Any of the felonies set forth in this chapter: sections 120.05, 120.10 and 120.11 relating to assault; sections 121.12 and 121.13 relating to strangulation; sections 125.10 to 125.27 relating to homicide; sections 130.25, 130.30 and 130.35 relating to rape; sections 135.20 and 135.25 relating to kidnapping; section 135.35 relating to labor trafficking; section 135.65 relating to coercion; sections 140.20, 140.25 and 140.30 relating to burglary; sections 145.05, 145.10 and 145.12 relating to criminal mischief; article one hundred fifty relating to arson; sections 155.30, 155.35, 155.40 and 155.42 relating to grand larceny; SECTION 156.10 RELATING TO COMPUTER TRESPASS; SECTIONS 156.25, 156.26 AND 156.27 RELATING TO COMPUTER TAMPERING; SECTION 156.30 RELATING TO UNLAWFUL DUPLICATION OF COMPUTER RELATED MATERIAL; SECTION 156.35 RELATING TO CRIMINAL POSSESSION OF COMPUTER RELATED MATERIAL; SECTION 156.41 RELATING TO CRIMINAL USE OF ENCRYPTION; sections 177.10, 177.15, 177.20 and 177.25 relating to health care fraud; article one hundred sixty relating to robbery; sections 165.45, 165.50, 165.52 and 165.54 relating to criminal possession of stolen property; sections 165.72 and 165.73 relating to trademark counterfeiting; sections 170.10, 170.15, 170.25, 170.30, 170.40, 170.65 and 170.70 relating to forgery; sections 175.10, 175.25, 175.35, 175.40 and 210.40 relating to false statements; sections 176.15, 176.20, 176.25 and 176.30 relating to insurance fraud; sections 178.20 and 178.25 relating to criminal diversion of prescription medications and prescriptions; sections 180.03, 180.08, 180.15, 180.25, 180.40, 180.45, 200.00, 200.03, 200.04, 200.10, 200.11, 200.12, 200.20, 200.22, 200.25, 200.27, 215.00, 215.05 and 215.19 relating to bribery; sections 187.10, 187.15, 187.20 and 187.25 relating to residential mortgage fraud[,]; sections 190.40 and 190.42 relating to

criminal usury; section 190.65 relating to schemes to defraud; sections 205.60 and 205.65 relating to hindering prosecution; sections 210.10, 210.15, and 215.51 relating to perjury and contempt; section 215.40 relating to tampering with physical evidence; sections 220.06, 220.09, 220.16, 220.18, 220.21, 220.31, 220.34, 220.39, 220.41, 220.43, 220.46, 220.55, 220.60 and 220.77 relating to controlled substances; sections 225.10 and 225.20 relating to gambling; sections 230.25, 230.30, and 230.32 relating to promoting prostitution; section 230.34 relating to sex trafficking; sections 235.06, 235.07, 235.21 and 235.22 relating to obscenity; sections 263.05, 263.10 [and], 263.11, 263.15 AND 263.16 relating to [promoting] a sexual performance by a child; sections 265.02, 265.03, 265.04, 265.11, 265.12, 265.13 and the provisions of section 265.10 which constitute a felony relating to firearms and other dangerous weapons; and sections 265.14 and 265.16 relating to criminal sale of a firearm; and section 275.10, 275.20, 275.30, or 275.40 relating to unauthorized recordings; [and] sections 470.05, 470.10, 470.15 and 470.20 relating to money laundering AND SECTION 495.00 RELATING TO COMPUTER SEX CRIMES; or

S 18. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.