STATE OF NEW YORK

1973

2017-2018 Regular Sessions

IN SENATE

January 11, 2017

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

AN ACT to amend the penal law, in relation to personal identifying information, establishes the crimes of petit theft of service, scheme to defraud and counterfeit trademarking; and to repeal certain provisions of the penal law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 1, 2, 3, 4, 5, 8 and 9 of section 155.00 of the penal law, subdivisions 1 and 8 as amended by chapter 514 of the laws of 1986, subdivision 9 as added by chapter 530 of the laws of 1975, are amended and three new subdivisions 7-d, 9 and 10 are added to read as follows:

1. "Property" means any money, personal property, real property, computer data, computer program, *personal identifying information, secret scientific material,* thing in action, evidence of debt or contract, or any article, substance or thing of value, including any gas, steam, water or electricity, which is provided for a charge or compensation.

2. "Obtain" includes, but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein, whether to the obtainer or another. *With regard to personal identifying information, computer data or a computer program, obtain includes duplicating, recording, copying, downloading, uploading or printing out the information, data, or program, or obtaining a physical object containing such information. With regard to service, obtain includes, but is not limited to, using or accessing a service.*

3. "Deprive." To "deprive" another of property means (a) to withhold it or cause it to be withheld from him *or her* permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him *or her*, or (b) to dispose

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

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of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property. **When the property is personal identifying information, computer data or a computer program, to deprive another of it means to obtain it or cause a third person to obtain it under such circumstances that a substantial portion of the economic benefit or value of having control over it or authority over its use is lost to an owner. To deprive another of service is to use or access a service or cause a third person to use or access a service under such circumstances that some of the economic benefit or value of having control or authority over providing the service is lost to an owner.**

4. "Appropriate." To "appropriate" property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person. **When the property is personal identifying information, computer data or a computer program of another, to appropriate it to oneself or a third person means to obtain it under such circumstances as to acquire the ability to use it or dispose of it to the economic benefit of oneself or a third person or to the economic detriment or damage of an owner. To appropriate a service provided by another to oneself or a third person means to use or access the service under such circumstances as to acquire the ability to use it to the economic benefit of oneself or a third person or to the economic detriment or damage of an owner.**

5. "Owner." When property is taken, obtained or withheld by one person from another person, an "owner" thereof means any person who has a right to possession [~~thereof~~] **of the property or a right to provide the service** superior to that of the taker, obtainer or withholder.

A person who has obtained possession of property **or service** by theft or other illegal means shall be deemed to have a right of possession **of the property or a right to provide the service** superior to that of a person who takes, obtains or withholds it from him by larcenous means. A joint or common owner of property **or service** shall not be deemed to have a right of possession **of property or a right to provide service** thereto superior to that of any other joint or common owner thereof. In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest therein, even if legal title lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

7-d. "Personal identifying information" means a person's date of birth, driver's license number, social security number, personal identification number, financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, taxpayer identification number, computer system password, signature or copy of a signature, electronic signature, unique biometric data that is a fingerprint, voice print, retinal image or iris image of another person, telephone calling card number, mobile identification number or code, electronic serial number or personal identification number, or any other name, number, code or information that may be used alone or in conjunction with other such information to assume the identity of another person or access financial resources or credit of another person, or any

physical object containing such information, such as a printout or other written material, driver's license or other identity card, credit card, debit card, public benefit card, automated teller or other transactional card, or computer, hard drive, or other data storage device. In this subdivision, "person" has all the meanings set forth in subdivision seven of section 10.00 of this chapter; "electronic signature" has the meaning provided in subdivision three of section three hundred two of the state technology law; "credit card" and "debit card" have the meanings provided in section five hundred eleven of the general business law; "public benefit card" means any medical assistance card, food stamp assistance card, public assistance card, or any other identification, authorization card or electronic access device issued by the state or a social services district as defined in subdivision seven of section two of the social services law which entitles a person to obtain public assistance benefits under a local, state or federal program administered by the state, its political subdivisions or social services districts.

8. "Service" includes, but is not limited to, [~~labor, professional service,~~] a computer service, transportation service, telecommunications service, cable or satellite television service, microwave transmission service, the supplying of service pursuant to a public or governmental benefit program, including housing and medical care, the supplying of service pursuant to an insurance policy or program, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water. A ticket or equivalent instrument which evidences a right to receive a service is not in itself service but constitutes property within the meaning of subdivision one.

[~~9. "Cable television service" means any and all services provided by or through the facilities of any cable television system or closed circuit coaxial cable communications system, or any microwave or similar transmission service used in connection with any cable television system or other similar closed circuit coaxial cable communications system.~~]

9. "Computer program" means an ordered set of data representing coded instructions or statements that when executed by the computer, cause the computer to process data or direct the computer to perform one or more computer operations or both and may be in any form, including magnetic storage media, optical media, computing devices, punched cards, or stored internally in the memory of the computer.

10. "Computer data" means a representation of information, knowledge, facts, concepts or instructions which are being processed, or have been processed in a computer and may be in any form including magnetic storage media, punched cards, or stored internally in the memory of the computer.

§ 2. Paragraph (c) of subdivision 2 of section 155.05 of the penal law is amended and a new paragraph (f) is added to read as follows:

(c) By committing the crime of issuing a bad check, as defined in section 190.05, or by obtaining property or service by using or presenting a form of payment or personal identifying information the actor knows he or she is not authorized to use or knows is expired or forged or otherwise not valid;

(f) By theft of service. Theft of service means either: (i) using or accessing a service in a manner that otherwise requires payment and intentionally failing to pay for such use or access by either tampering without authority with a delivery, payment, or measurement device or mechanism, or by entering or leaving premises where the service is

provided by stealth or by evading a physical barrier, or (ii) using or accessing a service in a manner that otherwise requires payment or the presentation of personal identifying information and using or presenting a form of payment or personal identifying information the actor knows he or she is not authorized to use or knows is expired or forged or otherwise not valid.

§ 3. Subdivision 1 of section 155.20 of the penal law is amended and a new subdivision 2-a is added to read as follows:

1. Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained[~~,~~]**: (i) with regard to property,** the cost of replacement of the property within a reasonable time after the crime**; or (ii) with regard to service, the cost of providing the service at the time of the crime**.

2-a. The value of computer data or computer program value is the replacement cost or the market value at the time and place of the crime, whichever is greater.

§ 4. The penal law is amended by adding a new section 155.23 to read as follows:

§ 155.23 Petit theft of service.

A person is guilty of petit theft of service when he or she steals a service.

Petit theft of service is a class B misdemeanor.

§ 5. Section 155.25 of the penal law is amended to read as follows:

§ 155.25 Petit larceny.

A person is guilty of petit larceny when he **or she** steals property**, or steals a service and the value of the service exceeds five hundred dollars**.

Petit larceny is a class A misdemeanor.

§ 6. The opening paragraph and subdivisions 1, 4 and 6 of section 155.30 of the penal law, the opening paragraph and subdivisions 1 and 6 as amended by chapter 515 of the laws of 1986, subdivision 4 as amended by chapter 556 of the laws of 1987, are amended to read as follows:

A person is guilty of grand larceny in the fourth degree when he **or she** steals property **or a service** and when:

1. The value of the property **or service** exceeds one thousand dollars; or

4. The property consists of a credit card or debit card **or personal identifying information**; or

6. The property **or service**, regardless of its nature and value, is obtained by extortion; or

§ 7. Section 155.35 of the penal law, as amended by chapter 464 of the laws of 2010, is amended to read as follows:

§ 155.35 Grand larceny in the third degree.

A person is guilty of grand larceny in the third degree when he or she steals property **or a service** and:

1. when the value of the property **or service** exceeds three thousand dollars, or

2. the property is an automated teller machine or the contents of an automated teller machine**, or**

3. the property is personal identifying information of twenty-five or more persons.

Grand larceny in the third degree is a class D felony.

§ 8. Section 155.40 of the penal law, as amended by chapter 515 of the laws of 1986, is amended to read as follows:

§ 155.40 Grand larceny in the second degree.

A person is guilty of grand larceny in the second degree when he **or she** steals property **or service** and when:

1. The value of the property **or service** exceeds fifty thousand dollars; or

2. The property **or service**, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely**, or**

3. the property is personal identifying information of one hundred or more persons.

Grand larceny in the second degree is a class C felony.

§ 9. Section 155.42 of the penal law, as added by chapter 515 of the laws of 1986, is amended to read as follows:

§ 155.42 Grand larceny in the first degree.

A person is guilty of grand larceny in the first degree when he **or she** steals property **or a service** and when the value of the property **or service** exceeds one million dollars**; or the property is personal identifying information of one thousand or more persons**.

Grand larceny in the first degree is a class B felony.

§ 10. Section 165.71 of the penal law, as added by chapter 490 of the laws of 1992, is amended to read as follows:

§ 165.71 Trademark counterfeiting in the [~~third~~] **fourth** degree.

A person is guilty of trademark counterfeiting in the [~~third~~] **fourth** degree when, with the intent to deceive or defraud some other person or with the intent to evade a lawful restriction on the sale, resale, offering for sale, or distribution of goods, he or she manufactures, distributes, sells, or offers for sale goods which bear a counterfeit trademark, or possesses a trademark knowing it to be counterfeit for the purpose of affixing it to any goods.

Trademark counterfeiting in the [~~third~~] **fourth** degree is a class A misdemeanor.

§ 11. Section 165.72 of the penal law, as amended by chapter 535 of the laws of 1995, is amended to read as follows:

§ 165.72 Trademark counterfeiting in the [~~second~~] **third** degree.

A person is guilty of trademark counterfeiting in the [~~second~~] **third** degree when, with the intent to deceive or defraud some other person or with the intent to evade a lawful restriction on the sale, resale, offering for sale, or distribution of goods, he or she manufactures, distributes, sells, or offers for sale goods which bear a counterfeit trademark, or possesses a trademark knowing it to be counterfeit for the purpose of affixing it to any goods, and the retail value of all such goods bearing **or intended to bear** counterfeit trademarks exceeds one thousand dollars **or the total numbers of all such goods bearing counterfeit trademarks exceeds two hundred**.

Trademark counterfeiting in the [~~second~~] **third** degree is a class E felony.

§ 12. Section 165.73 of the penal law, as amended by chapter 535 of the laws of 1995, is amended to read as follows:

§ 165.73 Trademark counterfeiting in the [~~first~~] **second** degree.

A person is guilty of trademark counterfeiting in the first degree when, with the intent to deceive or defraud some other person, or with the intent to evade a lawful restriction on the sale, resale, offering for sale, or distribution of goods, he or she manufactures, distributes, sells, or offers for sale goods which bear a counterfeit trademark, or possesses a trademark knowing it to be counterfeit for the purpose of affixing it to any goods, and the retail value of all such goods bearing or intended to bear counterfeit trademarks exceeds [~~one hundred~~] twenty-five thousand dollars or the total numbers of all such goods bearing counterfeit trademarks exceeds two thousand.

Trademark counterfeiting in the [~~first~~] second degree is a class [~~C~~] D felony.

§ 13. Section 165.74 of the penal law is REPEALED and two new sections 165.74 and 165.75 are added to read as follows:

§ 165.74 Trademark counterfeiting in the first degree.

A person is guilty of trademark counterfeiting in the first degree when, with the intent to deceive or defraud some other person, or with the intent to evade a lawful restriction on the sale, resale, offering for sale, or distribution of goods, he or she manufactures, distributes, sells, or offers for sale goods which bear a counterfeit trademark, or possesses a trademark knowing it to be counterfeit for the purpose of affixing it to any goods, and the retail value of all such goods bearing or intended to bear counterfeit trademarks exceeds one hundred thousand dollars or the total numbers of all such goods bearing counterfeit trademarks exceeds ten thousand dollars.

Trademark counterfeiting in the first degree is a class C felony.

§ 165.75 Seizure and destruction of goods bearing counterfeit trademarks.

Any goods manufactured, sold, offered for sale, distributed or produced in violation of this article may be seized by any police officer. The magistrate must, upon written application of defendant, within forty-eight hours after arraignment of the defendant, determine whether probable cause exists to believe that the goods had been manufactured, sold, offered for sale, distributed or produced in violation of this article, and upon a finding that probable cause exists to believe that the goods had been manufactured, sold, offered for sale, distributed, or produced in violation of this article, the court shall authorize such articles up to the relevant statutory threshold to be retained as evidence pending the trial of the defendant. Upon conviction of the defendant, the articles in respect whereof the defendant stands convicted shall be destroyed. All counterfeit goods which exceed the statutory threshold may be destroyed prior to trial provided defendant is given written notice and a seven day period upon which to inspect those goods to be destroyed. Destruction shall not include auction, sale or distribution of the items in their original form unless the trademark holder requests, in writing, that the counterfeit goods be turned over to him or her.

§ 14. Sections 190.60 and 190.65 of the penal law are REPEALED and six new sections 190.60, 190.61, 190.62, 190.63, 190.64 and 190.65 are added to read as follows:

§ 190.60 Scheme to defraud defined.

1. A person engages in a scheme to defraud when he or she engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud at least one person or to obtain property or service from at least one person by false or fraudulent pretenses, representations or promises, and so obtains property or service from at least one person.

2. Property, service, computer data and computer program shall have the meanings set forth in section 155.00 of this chapter.

3. In any prosecution of a scheme to defraud, it shall be necessary to prove the identity of at least one person from whom the defendant so

obtained property or service, but it shall not be necessary to prove the identity of any other intended victim, provided that in a prosecution of a scheme to defraud pursuant to subdivision three of section 190.62 of this article, it shall be necessary to prove the identity of at least one such vulnerable elderly person.

§ 190.61 Scheme to defraud in the fifth degree.

A person is guilty of a scheme to defraud in the fifth degree when he or she engages in a scheme to defraud.

Scheme to defraud in the fifth degree is a class A misdemeanor.

§ 190.62 Scheme to defraud in the fourth degree.

A person is guilty of a scheme to defraud in the fourth degree when he or she engages in a scheme to defraud, and

1. intends to obtain property or service from ten or more persons; or

2. the value of the property or service obtained exceeds one thousand dollars; or

3. intends to obtain and does obtain property or service from at least one vulnerable elderly person as defined in section 260.31 of this chapter.

Scheme to defraud in the fourth degree is a class E felony.

§ 190.63 Scheme to defraud in the third degree.

A person is guilty of a scheme to defraud in the third degree when he or she engages in a scheme to defraud, and

1. intends to obtain property or service from twenty-five or more persons; or

2. the value of the property or service obtained exceeds three thousand dollars.

Scheme to defraud in the third degree is a class D felony.

§ 190.64 Scheme to defraud in the second degree.

A person is guilty of a scheme to defraud in the second degree when he or she engages in a scheme to defraud, and

1. intends to obtain property or service from one hundred or more persons; or

2. the value of the property or service obtained exceeds fifty thousand dollars.

Scheme to defraud in the second degree is a class C felony.

§ 190.65 Scheme to defraud in the first degree.

A person is guilty of a scheme to defraud in the first degree when he or she engages in a scheme to defraud, and

1. intends to obtain property or service from one thousand or more persons; or

2. the value of the property or service obtained exceeds one million dollars.

Scheme to defraud in the first degree is a class B felony.

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