

## Consumer Electronics Retailers Coalition



### TENNESSEE “Theft Of Service” Bills An MPAA Model Statute Made Worse

Background: The Motion Picture Association of American (MPAA) has shopped a model bill around to a few state legislatures this year; it is nearing passage in Tennessee as H.B. No. 457 and S.B. No. 213. This legislation is designed to expose those who engage in “unauthorized practices” and possess “unlawful devices” to massive civil and criminal liability, even though its definitions of unlawful conduct are vague and unsettled. It could subject retailers who sell consumer electronics and component parts for home use to criminal and civil penalties and fines. A bill that creates such horrific liability could chill both the sale and manufacture of what are now considered to be “legal” devices, such as innovative digital home recorders and broadband modem accessories.

Undefined “Intent To Defraud” Standard: The bill declares illegal a wide range of conduct generally thought to be in the domain of the U.S. copyright law -- including unauthorized “connection,” “transmission,” “retransmission” -- but the proponents say it only covers “theft,” because an “intent to defraud” must also be shown. HOWEVER: Because “intent” can seldom be proven by direct evidence, under Tennessee law it may be inferred by a jury from conduct and circumstances.<sup>1</sup> The MPAA has *rejected* a proposed definition of “With Intent To Defraud” that, like the federal law governing counterfeit descrambling devices, would require an element of *deceit*.<sup>2</sup>

#### Retailer Objections to the “Theft of Service” model bill:

- To show “intent,” it seems likely that resort would be had to circumstantial evidence of ordinary consumer behavior -- *e.g.*, copying a movie on a digital video recorder despite a “do not copy” warning at the outset of the movie; or emailing a brief clip to a relative; or connecting to your office computer network in violation of a cable modem instruction that such connection is not “authorized.”
- Among the criminal “offenses” are “transmission” and “retransmission” of content -- even when this may be a “fair use” under federal copyright law.

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<sup>1</sup> See *State v. Holland*, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993); see generally *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997). The Tennessee statutory definition of “intentional,” Sec. 39-11-106(a)(18), is: “ ‘Intentional’ ” refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Because this (circular) definition is thought to be “confusing,” a standard jury instruction to Tennessee judges is offered (T.P.I. - CRIM. 2.08): “A person acts ‘intentionally’ when that person acts with a conscious objective either: (1) to cause a particular result; or (2) to engage in particular conduct.” There is no Tennessee statutory or case law general definition of “Intent to Defraud.”

<sup>2</sup> The definition of “With Intent To Defraud” rejected by the MPAA is: “A conscious objective, desire or purpose to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.” [Source: *9th Circuit Model Criminal Jury Instructions re 18 U.S.C. 1029(a)(1), “Counterfeit Access Devices”*]

- The bill defines “Unlawful Access Device” in terms of what *someone else* may *subsequently* do with it -- so a device, legal when sold, may become *illegal* while sitting on a retailer’s shelf. The retailer’s only defense is the vague, undefined, “intent to defraud” provision.
- The bill paves the way for the service provider to demand compensation for a variety of consumer practices over which it has no control but now demands *remuneration* -- *e.g.*, additional home network connections, Internet connection to a virtual private network (“VPN”), home copies, fair use retransmissions -- because it now can threaten the consumer with *criminal sanctions* or *civil liability* for failing to toe the line.
- The legislation provides for potential criminal liability, and massive civil liability, for a technical breach of the terms of service contract. This will have a chilling effect on consumers and create great uncertainty about which devices they may lawfully connect to a home network.
- The bill reaches *all* components of a product as well as the product itself.

How The Tennessee Bill Has Become Worse: Proponents have cited improvements made in response to “the consumer electronics industry.” In reality, the bill is opposed by the Consumer Electronics Association (CEA, [www.ce.org](http://www.ce.org)) and the Consumer Electronics Retailers Coalition (CERC, [www.ceretailers.org](http://www.ceretailers.org)). On April 14, CEA sent to MPAA an *annotated version* that contained a proposed definition of “With Intent To Defraud” and several other draft improvements. Meanwhile, the most recent proposed version appears now to cover use of home or office *encryption* technology, and contains a *new* provision, **part (f)**, that was *not* in the MPAA “model” bill. It reads:

**(f) In any criminal prosecution or civil action under this section, any of the following shall create an inference that the defendant intended to violate this section:**

- (1) The presence of an unauthorized connection of any kind between the defendant’s property and any network, system or facility owned or operated by a communication service provider; or**
- (2) The presence on the defendant’s property, or in the defendant’s possession or control, of any communication device which is connected in such a manner as would permit the unauthorized receipt, interception, acquisition, decryption, transmission or re-transmission of a communication service; or**
- (3) The defendant’s possession of five (5) or more communication or unlawful access devices for any purpose prohibited by this section.**

The new (f)(2) explicitly reads “intent” out of the statute and is so vague -- *e.g.*, it does not indicate *connected to what* -- that it subjects consumers and others to fending off criminal and civil suits for behavior that is either thoroughly ordinary or that may be controversial but not criminal under the U.S. copyright law.<sup>3</sup>

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<sup>3</sup> Federal copyright law contains a “fair use” defense (17 U.S.C. § 107) for unauthorized uses that may apply to conduct, including transmission and retransmission, made criminal by these bills. This was the law interpreted by the Supreme Court in the 1984 “Betamax” case that affirmed consumers’ rights to own VCRs. *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).