

**Before the
TEXAS SENATE
CRIMINAL JUSTICE COMMITTEE
State Capitol, Austin, TX**

May 6, 2003

**COMMENTS OF THE
CONSUMER ELECTRONICS ASSOCIATION
ON
S.B. 1116**

I. Introduction

The Consumer Electronics Association (CEA) appreciates the opportunity to provide the views of the consumer electronics industry concerning Senate Bill 1116 (“An Act Relating to Theft of Communications Services”). S.B. 1116 was promoted as addressing theft of cable and Internet service, but this overly broad legislation instead threatens the manufacture, sale and use of legitimate products such as computers, televisions and personal video recorders. If cable and Internet service theft is truly the issue, this legislation is not the solution.

CEA is the leading trade association representing the consumer technology industry. We represent more than 1,200 corporate members who design, make and sell audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels.

II. Overview

Having been rightfully denied anti-consumer legislation of this sort by Congress, the Motion Picture Association of America (MPAA) has switched tactics in an attempt to convince state legislatures to turn honest consumers, retailers and manufacturers into criminal and civil defendants. In a recent interview, the president and CEO of MPAA even stated that “Fair use is not a law...in the digital world; we don’t need back ups, because a digital copy never wears out.” Given MPAA’s views, it should be no surprise that their model legislation could criminalize normal fair use practices and subject honest consumers to massive civil liability.

This over-reaching bill is in no way confined to “stealing”, even as broadly defined by the MPAA. The vast litany of prohibited actions includes receiving, acquiring, transmitting, possessing, retransmitting, manufacturing, distributing, developing, assembling, transferring, importing, offering and advertising, and even includes possessing plans or instructions, as well as assisting others in any of those acts.

III. “Intent To Defraud” Provision Broad And Undefined

S.B. 1116 portends criminal liability for simple “harm” to a communication service provider, or on a showing of “intent to defraud.” Even if the standard is “intent to defraud,” which sounds harder to prove, this bill leaves this crucial provision undefined. Yet any limitation on exposure to prosecution or civil suit for “theft” depends on these words. Because an individual’s state of mind is difficult to prove, most states have doctrines of “constructive fraud” which allow proof, even in criminal cases, with no showing of actual “intent” at all. Under such an interpretation, a consumer who attaches legal products to a broadband network could be subject to criminal penalties if the device is prohibited or not specifically permitted by the service contract.

On April 14, CEA recommended to the MPAA that its model legislation should define the phrase “With Intent To Defraud.” The definition we suggested as taken from standard jury instructions used in cases enforcing U.S. law against the distribution of unauthorized cable and satellite TV descramblers, which also has an “intent to defraud” standard. This definition reads:

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.

Incorporation of this definition has been resisted in every state and in MPAA’s model law.

IV. “Transmission,” “Retransmission,” And Fair Use

CEA has also asked, if this bill is really about *unlawful acquisition of a service*, then why does it cover the audio and video programming content as well, and “transmission” and “retransmission” of such content? These are subjects that are controversial under federal copyright law and have not been state law issues. Moreover, such transmission only occurs *after* a consumer has lawfully acquired the signal or the content, yet the consumer may still be held criminally liable, or face massive civil liability. This change has also not been accepted by MPAA or in any state.

With S.B. 1116, manufacturers, retailers and their customers would have to be concerned about potential criminal status for activities that today they take for granted, such as use of consumer electronics products over the Internet, or allegedly “unauthorized” uses on a home network that may be controversial under federal copyright law.

V. Current And Future Technology Devices Broadly Targeted

S.B. 1116 is so extreme as to define devices possessed by one individual as “unlawful” based solely on subsequent usage by another individual. In other words, if a product is used by even one person to infringe, any other consumer or retailer in possession of that product could be subject to criminal penalties. These unknowing parties would then have to defend against criminal charges based on their “intent” as imputed by their mere possession or marketing of the products.

VI. Proposed Punishments Do Not Fit The Proposed Crimes

Draconian civil and criminal penalties would be imposed by S.B. 1116 that are potentially vastly disproportionate to the conduct of the person charged with its violations. Indeed, the inclusion of potentially massive civil liability has not existed in theft of services law prior to MPAA’s model bill. It appears the real intent is to intimidate and sue anyone who makes, sells or uses any product that the MPAA or other content providers do not like or approve of. The impact will be anti-consumer, anti-competitive and anti-innovation.

Some early suggestions from some consumer electronics manufacturers were accepted in the MPAA model legislation, but most have not been. Nevertheless, proponents of these bills have tried to paint them as non-controversial, and have claimed that they accommodate consumer electronics concerns and enjoy broad support in the industry. Neither is the case. CEA does not support this bill, and I am informed that the Consumer Electronics Retailers Coalition, which includes major retailers such as RadioShack, Best Buy, Circuit City and Sears, also vigorously opposes it. Along with them, and a wide range of consumer and technology groups, CEA urges the Criminal Justice Committee to issue an unfavorable report on S.B. 1116.

Respectfully submitted,

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