

**DRAFT MODEL
COMMUNICATIONS
SECURITY
LEGISLATION**

**BROADBAND & INTERNET
SECURITY TASK FORCE**

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Unlawful Communication and Access Devices

(a) Offense defined.--Any person commits an offense if he knowingly **and with the intent to defraud a communication service provider:**

(1) possesses, uses, manufactures, develops, assembles, distributes, transfers, imports into this state, licenses, leases, sells or offers, promotes or advertises for sale, use or distribution any communication device:

(i) for the commission of a theft of a communication service or to receive, intercept, disrupt, transmit, re-transmits, decrypt, acquire or facilitate the receipt, interception, disruption, transmission, re-transmission, decryption or acquisition of any communication service without the express consent or express authorization of the communication service provider; or

(ii) to conceal or to assist another to conceal from any communication service provider, or from any lawful authority, the existence or place of origin or destination of any communication, **provided that such concealment is for the purpose of committing a violation of subparagraph (i) above;** or

(2) modifies, alters, programs or reprograms a communication device for the purposes described in subparagraphs (a)(1)(i) and (ii) above; or

(3) possesses, uses, manufactures, develops, assembles, distributes, imports into this state, licenses, transfers, leases, sells, offers, promotes or advertises for sale, use or distribution any unlawful access device or

(4) possesses, uses, prepares, distributes, sells, gives, transfers or offers, promotes or advertises for sale, use or distribution any:

(i) plans or instructions for making, or assembling or developing any communication or unlawful access device, under circumstances evidencing an intent to use or employ such communication or unlawful access device, or to allow the same to be used or employed, for a purpose prohibited by this section, or knowing or having reason to believe that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for manufacturing or assembling such communication or unlawful access device for a purpose prohibited by this section; or

(ii) material, including hardware, cables, tools, data, computer software or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture, assembly or development of a communication device for a purpose prohibited by this section, or for use in the manufacture, assembly or development of an unlawful access device; and

(5) Assist others in committing any of the acts prohibited by this section.

(b) Criminal Penalties.--

(1) Except for violations of this section as provided for in paragraph (2) or (3), an offense under this section is a misdemeanor.

(2) An offense under this section is a _____ felony if:

(i) the defendant has been convicted previously under this section or convicted of any similar crime in this or any Federal or other state jurisdiction; or

(ii) the violation of this section involves at least 10, but not more than 50, communication or access devices.

(3) An offense under this section is a _____ felony if:

(i) the defendant has been convicted previously on two or more occasions for offenses under this section or for any similar crime in this or any Federal or other state jurisdiction; or

(ii) the violation of this section involves more than 50 communication or unlawful access devices.

(4) For purposes of grading an offense based upon a prior conviction under this section or for any similar crime pursuant to subparagraphs (b)(2)(i) and (b)(3)(i), a prior conviction shall consist of convictions upon separate indictments or criminal complaints for offenses under this section or any similar crime in this or any Federal or other state jurisdiction.

(5) As provided for in subparagraphs (b)(2)(i) and (b)(3)(i), in grading an offense under this section based upon a prior conviction, the term "any similar crime" shall include, but not be limited to, offenses involving theft of service or fraud, including violations of the Cable Communications Policy Act of 1984 (Public Law 98-549, 98 Stat. 2779).

(6) **Separate offenses.**--For purposes of all criminal penalties or fines established for violations of this section, the prohibited activity established herein as it applies to each communication or unlawful access device shall be deemed a separate offense. Each day a person is in violation of this section also constitutes a separate offense.

(7) **Fines.**--For purposes of imposing fines upon conviction of a defendant for an offense under this section, all fines shall be imposed as authorized by law for each day a person is in violation of this section and for each communication or unlawful access device involved in the violation.

(8) **Restitution.** --The court shall, in addition to any other sentence authorized by law, sentence a person convicted of violating this section to make restitution as authorized by law.

(9) **Forfeiture of communication or unlawful access devices.**--Upon conviction of a defendant under this section, the court may, in addition to any other sentence authorized by law, direct that the defendant forfeit any communication or unlawful access devices in the defendant's possession or control which were involved in the violation for which the defendant was convicted.

(c) Venue.--An offense or violation under subsection (a) may be deemed to have been committed at either place where the defendant manufactures, develops or assembles an communication or unlawful access device or assists others in doing so, or the places where the communication or unlawful access device is sold or delivered to a purchaser or recipient. It shall be no defense to a violation of subsection (a) that some of the acts constituting the violation occurred outside of this [State or Commonwealth].

(d) Civil actions. --

(1) Any person aggrieved by a violation of this section may bring a civil action in any court of competent jurisdiction. "Any person aggrieved" shall include any communication service provider.

(2) The court may:

(i) award declaratory relief and other equitable remedies, including preliminary and final injunctions to prevent or restrain violations of this section, without requiring proof that the plaintiff has suffered, or will suffer, actual damages, irreparable harm or lacks an adequate remedy at law;

(ii) at any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any communication or unlawful access device that is in the custody or control of the violator and that the court has reasonable cause to believe was involved in the alleged violation of this section;

(iii) award damages as described in subsection (3) below;

(iv) in its discretion, award reasonable attorney fees and costs, including, but not limited to, costs for investigation, testing and expert witness fees, to an aggrieved party who prevails; and

(v) as part of a final judgment or decree finding a violation of this section, order the remedial modification or destruction of any communication or unlawful access device, or any other devices or equipment involved in the violation, that is in the custody or control of the violator, or has been impounded under subparagraph (ii) above.

(3) Types of damages recoverable. --Damages awarded by a court under this section shall be computed as either of the following:

(i) Upon his election of such damages at any time before final judgment is entered, the complaining party may recover the actual damages suffered by him as a result of the violation of this section and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages. Actual damages include the retail value of any communication services illegally available to those persons to whom the violator directly or indirectly provided or distributed any communication or unlawful access devices. In proving actual damages, the complaining party shall be required to prove only that the violator manufactured, distributed or sold any communication or unlawful access devices, but shall not be required to prove that those devices were actually used in violation of this section. In determining the violator's profits, the complaining party shall be required to prove only the

violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(ii) Upon election by the complaining party at any time before final judgment is entered, that party may recover in lieu of actual damages an award of statutory damages of between \$1,500 to \$10,000 for each communication or unlawful access device involved in the action, with the amount of statutory damages to be determined by the court as the court considers just.

(4) In any case where the court finds that any of the violations of this section were committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the total award of any damages amended under subparagraphs (i) and (ii) above, by an amount of not more than \$50,000 for each communication or unlawful access device involved in the action and for each day the defendant was in violation of this section.

(e) Definitions.—As used in this section, the following words and phrases shall have the following meanings:

(1) "**Manufacture, assembly or development of a communication device.**" To make, produce, develop or assemble a communication device, or to knowingly assist others in those activities.

(2) "**Communication device.**"

(i) Any type of electronic mechanism, transmission lines or connections and appurtenances thereto, instrument, device, machine, equipment, technology or software which is capable of intercepting, transmitting, re-transmitting, acquiring, decrypting or receiving any communication service; and

(ii) Any component thereof, including any electronic serial number, mobile identification number, personal identification number, computer circuit, splitter, connectors, switches, transmission hardware, security module, smart card, software, computer chip, electronic mechanism or any component, accessory or part of any communication device which is capable of facilitating the interception, transmission, re-transmission, decryption, acquisition or reception of any communication service;

(3) "**Communication service.**" Any service lawfully provided for a charge or compensation to facilitate the lawful origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular or other wireless telephones, wire, wireless, radio, electromagnetic, photoelectric or photo-optical systems, networks or facilities; and any service lawfully provided **for a charge or compensation** by any radio, telephone, fiber optic, photo-optical, electromagnetic, photoelectric, cable television, satellite, microwave, data transmission, wireless or Internet-based distribution system, network or facility, including, but not limited to, any and all electronic, data, video, audio, Internet access, telephonic, microwave and radio communications, transmissions, signals and services, and any such communications, transmissions, signals and services lawfully provided directly or indirectly by or through any of the aforementioned systems, networks or facilities.

(4) **"Communication service provider."** (i) Any person or entity providing a communication service, whether directly or indirectly as a reseller, including, but not limited to, a cellular, paging or other wireless communications company or other person or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office or other equipment or communication service; (ii) any person or entity owning or operating any fiber optic, photo-optical, electromagnetic, photoelectronic, cable television, satellite, Internet-based, telephone, wireless, microwave, data transmission or radio distribution system, network or facility; and (iii) any person or entity providing any communication service directly or indirectly by or through any such distribution systems, networks or facilities.

(5) **"Unlawful access device."** Any type of instrument, device, machine, equipment, technology or software which is primarily designed, developed, assembled, manufactured, sold, distributed, possessed, used or offered, promoted or advertised, for the purpose of defeating or circumventing an **effective** technology, device or software, or any component or part thereof, used by the provider, owner or licensee of any communication service or of any data, audio or video programs or transmissions, to protect any such communication, data, audio or video services, programs or transmissions from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission or re-transmission.

(6) **"Manufacture, assembly or development of an unlawful access device."** To make, develop, produce or assemble an unlawful access device or modify, alter, program or reprogram any instrument, device, machine, equipment, technology or software **for the purpose of** defeating or circumventing any effective technology, device or software used by the provider, owner or licensee of a communication service, or of any data, audio or video programs or transmissions, to protect any such communication, data, audio or video services, programs or transmissions from unauthorized receipt, interception, acquisition, access, decryption, disclosure, communication, transmission or re-transmission, or to knowingly assist others in those activities.

(7) **"Multipurpose Device"** means any communication device that is capable of more than one function, and includes any component thereof.

(f) Notwithstanding anything to the contrary in this section, the manufacture, production, assembly, design, sale, distribution, license or development of a multipurpose device shall not constitute a violation of subsection (a)(3) unless the multipurpose device is manufactured, developed, assembled, produced, designed, distributed, sold or licensed for the primary purpose of committing a violation of subsection (a)(3); or has only a limited commercially significant purpose or use other than as a unlawful access device; or is marketed by a person or another acting in concert with that person with that person's knowledge for use as an unlawful access device.

(g) Nothing in this section shall require that the design of, or design and selection of parts, software code, and/or components for, a communication device provide for a response to any particular technology, device or software, or any component or part thereof, used by the provider, owner or licensee of any communication service or of any data, audio or video programs or transmissions, to protect any such communication, data, audio or video service, programs or transmissions from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission or re-transmission.