

BILL ANALYSIS

Senate Research Center

C.S.S.B. 1116
By: Williams
Criminal Justice
5/9/2003
Committee Report (Substituted)

DIGEST AND PURPOSE

C.S.S.B. 1116 provides for criminal and civil consequences for conduct involving the theft of or tampering with certain communication or information services.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading of Section 31.12, Penal Code, to read as follows:

Sec. 31.12. THEFT OF OR TAMPERING WITH COMMUNICATION SERVICES.

SECTION 2. Amends Sections 31.12(a) and (b), Penal Code, as follows:

- (a) Provides that a person commits an offense if, without the effective consent of a communication service provider and with the intent to defraud the, rather than “without the authorization of the multichannel video or information services,” provider, the person intentionally or knowingly engages in certain activities.
- (b) Defines “communication device,” “communication service,” and “communication service provider.”

SECTION 3. Amends the heading to Section 31.13, Penal Code, to read as follows:

Sec. 31.13. POSSESSION OR USE OF COMMUNICATION DEVICE OR UNAUTHORIZED ACCESS DEVICE.

SECTION 4. Amends Sections 31.13(a), (b), and (d), Penal Code, as follows:

- (a) Provides that a person commits an offense if, with the intent to harm or defraud a communication service provider, the person intentionally or knowingly possesses or uses a communication device or unauthorized access device for the purpose of committing an offense under Section 31.12 or 31.14. Deletes “for remuneration intentionally or knowingly manufactures, assembles, modifies, imports into the state, exports out of the state, distributes, advertises, or offers for sale, with an intent to aid in the commission of an offense under Section 31.12, a device, a kit or part for a device, or a plan for a system of components wholly or partly designed to make intelligible an encrypted, encoded, scrambled, or other nonstandard signal carried or caused by a multichannel video or information services provider.”
- (b) Provides definitions for “communication device,” “communication service,” “communication service provider,” and “unauthorized access device.”
- (d) Provides that an offense under this section is a Class A misdemeanor, unless it is shown on the trial of the offense that the offense was committed with respect to five or

more communication devices or unauthorized access devices in a single criminal episode, in which event it is a state jail felony.

SECTION 5. Amends the heading to Section 31.14, Penal Code, to read as follows:

Sec. 31.14. MANUFACTURE, DISTRIBUTION, SALE, LEASE, OR
ADVERTISEMENT OF COMMUNICATION DEVICE OR UNAUTHORIZED
ACCESS DEVICE.

SECTION 6. Amends Sections 31.14(a), (b), and (d), Penal Code, as follows:

(a) Provides that a person commits an offense if, with the intent to defraud a communication service provider, the person intentionally or knowingly manufactures, assembles, imports into the state, exports out of the state, distributes, advertises, sells, or leases, or offers for sale or lease certain items.

(b) Defines "communication device," "communication service," "communication service provider," and "unauthorized access device."

(d) Provides that, except as otherwise provided by this subsection, an offense under this section is a Class A misdemeanor. Provides that an offense under this section is:

(1) a state jail felony if it is shown on the trial of the offense that:

(A) the offense was committed with respect to more than one but not more than 50 communication devices or unauthorized access devices in a single criminal episode; or

(B) the defendant has been previously convicted one time of an offense under this section or of an offense under federal law or the laws of another state containing elements that are substantially similar to the elements of an offense under this section; or

(2) a felony of the third degree if it is shown on the trial of the offense that:

(A) the offense was committed with respect to more than 50 communication devices or unauthorized access devices in a single criminal episode; or

(B) the defendant has been previously convicted on two or more occasions of an offense under this section or of an offense under federal law or the laws of another state containing elements that are substantially similar to the elements of an offense under this section.

SECTION 7. Amends Chapter 31, Penal Code, by adding Section 31.145 and 31.146, as follows:

Sec. 31.145. PRESUMPTION FOR OFFENSES AFFECTING COMMUNICATION SERVICE. (a) Provides that for purposes of Section 31.12, 31.13, or 31.14, an intent to defraud is presumed if, not later than the 30th day after the date the actor receives a written notice from the provider that complies with Subsection (b), the actor fails to deliver to the provider a written response in which the actor admits or denies the statements contained in the written notice from the provider.

(b) Requires a written notice from the provider to contain certain information.

(c) Provides that a written notice that complies with Subsection (b) is presumed to be received by the actor not later than the fifth day after the date the notice is sent.

(d) Provides that the presumption established by this section does not apply if the

actor meets certain criteria.

Sec. 31.146. DEFENSE TO PROSECUTION FOR OFFENSES AFFECTING COMMUNICATION SERVICE. (a) Provides certain defenses to prosecution under Section 31.12, 31.13, or 31.14.

(b) Defines “multipurpose device.”

SECTION 8. Amends Section 134.002(2), Civil Practice and Remedies Code, to remove references to Sections 31.12, 31.13, or 31.14, Penal Code from the definition of “theft.”

SECTION 9. Amends Title 6, Civil Practice and Remedies Code, by adding Chapter 135, as follows:

CHAPTER 135. COMMUNICATION SERVICES OFFENSES

Sec. 135.001. DEFINITIONS. Defines "claimant," "communication device," "communication service," "communication service provider," "communication services offense," “multipurpose device” and "unauthorized access device."

Sec. 135.002. DAMAGES. (a) Authorizes a claimant to elect at any time before the final judgment is entered to recover damages under Subsection (b) or under Subsection (c).

(b) Authorizes a claimant that elects to recover damages under this subsection to recover actual damages incurred by the claimant arising out of the communication services offense and any profits of the defendant attributable to the communication services offense that are not included in the computation of the claimant's actual damages. Provides that actual damages computed under this subsection include the retail value of the communication services to which the defendant had unauthorized access as a result of the offense and the retail value of any unauthorized communication services obtained by other persons through the defendant's provision or distribution of a communication device or unauthorized access device. Authorizes the claimant to prove actual damages by proving only that the defendant manufactured, distributed, or sold any communication device or unauthorized access device and is not required to prove the devices were actually used to commit a communication services offense. Authorizes the claimant to prove the defendant's profits by proving only the defendant's gross revenue. Prohibits the defendant's expenses and profits attributable to factors other than the communication services offense from being deducted unless proved by the defendant.

(c) Authorizes a claimant that elects to recover damages under this subsection to recover, instead of actual damages and the defendant's profits, an amount of damages specified by the court for:

(1) each communication device or unauthorized access device involved in the communication services offense;

(2) each day the defendant committed the communication services offense; or

(3) both Subdivisions (1) and (2).

(d) Requires the amount of damages specified by the court under Subsection (c) to be at least \$2,500 and not more than \$10,000, as the court considers just.

(e) Authorizes the court, if the court determines that the communication services offense was committed wilfully and for the purposes of commercial advantage or private financial gain, to increase the amount of damages awarded under

Subsection (b) or (c) by an amount of not more than \$50,000 for each communication or unauthorized access device involved in the action or for each day the defendant committed the communication services offense or both.

Sec. 135.003. ATTORNEY'S FEES AND COURT COSTS. Requires the court to award a claimant who prevails in an action filed under this section reasonable attorney's fees and costs, including expert witness fees and the costs of investigation, testing, and storage of any impounded items.

Sec. 135.004. INNAPPLICABILITY TO CERTAIN CLAIMS. Provides that a person described by Section 31.145(d)(1), Penal Code, is not civilly liable for an offense under Section 31.12, 31.13, or 31.14, Penal Code, unless the person acts with a certain mental state, including the intent to defraud a communication service provider for certain multipurpose devices.

SECTION 10. Provides that this Act does not require that the design or the design and selection of parts, software code, or components for a communication device provide for a response to any particular technology, device, or software, or any component or part of that item, used by the provider, owner, or license holder of any communication service or of any data, audio or video service, program, or transmission from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communications, transmission or retransmission.

SECTION 11. Provides that this Act does not impose criminal or civil liability on any person unless the person acts with a mental state required to establish a certain offense.

SECTION 12. Provides that this Act does not impose criminal or civil liability on any person for using a communication device to connect one or more multipurpose devices at the person's residential or business premises unless certain conditions are present.

SECTION 13. (a) Effective date: September 1, 2003.

(b) and (c) Make application of this Act prospective.