

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1078

SPONSOR: Criminal Justice Committee and Senator Atwater

SUBJECT: Communications Services

DATE: April 15, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	<u>Fav/1 amendment</u>
2.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>ACJ</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 1078 expands application of the cable theft statute, s. 812.15, F.S., to cover, apparently, any communication of images, data, or sound transmitted by any means except for voice transmission over telephone landlines. The CS broadens and changes the elements of the offense of intercepting or receiving communications services to include decryption, disruption, transmission, retransmission, or acquisition of access to any communication service. Similarly, it broadens and changes the elements of the offense of assisting by including the sale, transfer, license, distribution, deployment, lease, manufacture, development, or assembly of any device used to commit these unlawful acts and by adding similar language relating to devices for the purpose of defeating or circumventing any technology, device, or software used to protect communications services from these unlawful acts.

The CS amends the provisions on criminal penalties to:

- Apply enhanced criminal penalties to cases in which the unlawful acts were committed for private financial gain.
- Provide that for purposes of all criminal penalties, each communications device involved in prohibited activity constitutes a separate violation of this section, with all fines to be imposed for each communications device and for each day a defendant is in violation of this section.
- Require restitution as an additional penalty.
- Authorize forfeiture of any communications device in a convicted defendant's possession or control that was involved in the violation for which the defendant was convicted.

The CS amends the provisions on civil remedies to:

- Authorize the court to impound any communications 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 and to grant other equitable relief, including the imposition of a constructive trust, as the court considers reasonable and necessary.
- Authorize the court to order the remedial modification or destruction of any communication device or other device used in a violation which is in the custody and control of the violator.
- Include in actual damages the retail value of all communications services to which the violator had unauthorized access and the retail value of any communications service illegally available to each person to whom the violator directly or indirectly provided a communications device.
- Provide that statutory damages apply to each device and for each day the defendant was in violation of the section.
- Make the discretionary increase in damages of up to \$50,000 for each violation apply to any case where the court finds that the violation was committed willfully and for purposes of financial gain, and to be an amount of not more than \$50,000 for each communications device and for each day the defendant was in violation of the section.

This CS substantially amends s. 812.15, F.S.

II. Present Situation:

A. State Law on Unauthorized Reception of Cable Television Services

Section 812.15, F.S., establishes both criminal and civil penalties for crimes relating to unauthorized reception of cable television services.

It is a first degree misdemeanor for any person to willfully receive, or assist in receiving, any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or by law. Assisting in receiving services includes the manufacture of or distribution of equipment intended for unauthorized reception of any communications service offered over a cable system.

It is also a first degree misdemeanor for any person to intentionally possess equipment, knowing or having reason to know that the design of the equipment renders it primarily useful for the purpose of the unauthorized reception of any communications service offered over a cable system.

If a person has previously been convicted of either of these offenses, a second offense is a third degree felony. If a violation is for purposes of direct or indirect commercial advantage, it is also a third degree felony.

As to possession of equipment for unauthorized reception, if a person so possesses five or more such devices or pieces of equipment, it is a third degree felony. If a person so possesses fifty or more devices or pieces of equipment, it is a second degree felony.

It is a first degree misdemeanor for any person to place an advertisement that, in whole or in part, promotes the sale of equipment if the person placing the advertisement knows or has reason to know that the equipment is designed to be primarily useful for the unauthorized reception of any communications service offered over a cable system. If a person has been previously convicted of this offense, a second offense is a third degree felony. If a violation is for purposes of direct or indirect commercial advantage, it is a third degree felony.

As to civil penalties, any person aggrieved by any violation of this section may bring a civil action in a circuit court or in any other court of competent jurisdiction. The court may grant injunctions to prevent violations of this section, award damages, and award costs and reasonable attorney's fees to a prevailing aggrieved party. Damages are to be either actual damages or statutory damages. Actual damages consist of the actual damages suffered by the aggrieved party plus any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages. In determining the violator's profits, the aggrieved party is required to prove only the violator's gross revenue, and the violator is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the violation. Statutory damages consist of a sum of not less than \$250 or more than \$10,000 for each violation involved in the action. Additionally, in any case in which the court finds that the violation was committed willfully and for purposes of commercial advantage, the court may increase the award of damages by an amount of not more than \$50,000 for each violation. Finally, in any case in which the court finds that the violator was not aware and had no reason to believe that his or her acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than \$100.

Section 775.082, F.S., sets out applicable terms of incarceration for the various levels of offenses, including:

- For a second degree felony, a term of imprisonment not exceeding 15 years,
- For a third degree felony, a term of imprisonment not exceeding 5 years, and
- For a first degree misdemeanor, by a definite term of imprisonment not exceeding 1 year.

Section 775.083, F.S., sets out applicable fines for the various levels of offenses, including:

- For a second degree felony, \$10,000,
- For a third degree felony, \$5,000, and
- For a first degree misdemeanor, \$1,000.

B. The Cable Communications Policy Act of 1984

Congress enacted the Cable Communications Policy Act of 1984, 47 U.S.C. 521 *et seq.*, "which authorizes local governments to own and operate their own cable television systems." *Warner Cable Communication, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990). In this act, "Congress sought to establish a national policy for cable television systems, to encourage their growth, and to provide for uniform federal, state, and local regulation of such systems." *Id.* at n.2.

The federal statutes, 47 U.S.C. 553 and 605 “are aimed at combating the piracy of radio and television signals.” *Adelphi Cable Partners v. E & A Beepers Corporation*, 188 F.R.D. 662, 665 (S.D. Fla. 1999).

Section 812.15, F.S., is “remarkably similar” to 47 U.S.C. 553 and 605. *Id.* at 666. (Section 605 is now Section 705. “Prior to the enactment of Section 553, the federal statute which proscribed theft of over-the-air pay television service was Section 605 of the federal Communications Act of 1934. Section 705 of the Cable Communications Policy Act of 1984 redesignated former Section 605 as Section 705(a)....” *Storer Communications, Incorporated v. Mogel*, 625 F.Supp 1194,1199 (S.D.Fla. 1985)). For example, 47 USC 553(a)(1) “prohibits any person from intercepting, receiving or assisting in the interception or reception of any communications service offered over a cable system unless specifically authorized to do so by a cable operator.” *Id.* at 1197. (“Section 553 was originally enacted as Section 634 and the legislative history of the Cable Communications Act refers to it as such. Section 634 was redesignated as Section 633 and was subsequently recodified in United States Code Annotated as Section 553.” *Id.* at 1197, n.1).

III. Effect of Proposed Changes:

Section 812.15, F.S., currently applies to “communications service offered over a cable system,” which is not defined but appears to be limited to cable television video programming. The CS expands this by defining “communications service” to mean “any service lawfully provided for a charge or compensation by any cable system or by any radio, fiber optic, photooptical, electromagnetic, photoelectronic, satellite, microwave, data transmission, Internet-based, or wireless distribution network, system, or facility, including, but not limited to, any electronic, data, video, audio, Internet access, microwave, and radio communications, transmissions, signals, and services, and any such communications, transmissions, signals, and services lawfully provided for a charge or compensation directly or indirectly by or through any of those networks, systems, or facilities.” Also, “communications service provider” is defined to mean “any person or entity owning or operating any cable system or any fiber optic, photooptical, electromagnetic, photoelectronic, satellite, wireless, microwave, radio, data transmission, or Internet-based distribution network, system, or facility,” or “any person or entity providing any lawful communications service, whether directly or indirectly, as a reseller or licensee, by or through any such distribution network, system, or facility.”

The net effect appears to be that the section would cover any communication transmitted by any means except for voice transmission over telephone landlines, which appear to be excluded as the definition of communications service provider does not include copper wire. Inclusion of an “Internet-based distribution network” likely would capture DSL even though copper lines are used for some part of the transmission.

The CS broadens the offense of intercepting or receiving communications services and modifies its elements. The offense, as amended, prohibits a person from knowingly intercepting, receiving, decrypting, disrupting, transmitting, retransmitting, or acquiring access to any communications service without the express authorization of the cable operator or other communications service provider as stated in a contract or otherwise, with the intent to defraud either of them, or knowingly assist others in doing those acts with the intent to defraud either of them. The CS broadens the offense of assisting by including the sale, transfer, license,

distribution, deployment, lease, manufacture, development, or assembly of any device used to commit these unlawful acts and by adding similar language relating to devices for the purpose of defeating or circumventing any technology, device, or software used to protect communications services from these unlawful acts.

The enhanced penalty (a third degree felony instead of a first degree misdemeanor) for committing these unlawful acts willfully and for purposes of commercial advantage and for possessing a communications device or advertising a communications device for sale is amended to apply this enhanced penalty to situations where the violation is done for “financial gain.” If “financial gain” includes avoidance of payment of retail charges or fees for all communications services to which the violator had unauthorized access, it appears that, with the possible exception of possession without proven use or sale, this would include all such unlawful acts as all are done for financial gain, thus making the enhanced penalty the rule rather than the exception.

The CS provides that all fines are to be imposed for each communications device and for each day a defendant is in violation of this section.

The CS requires restitution as an additional penalty.

The CS authorizes a court to order a convicted defendant to forfeit any communications device in the defendant’s possession or control which was involved in the violation for which the defendant was convicted.

The CS provides that a violation has been committed at any place where the defendant manufactures, develops, or assembles any communications devices involved in the violation, or assists others in these acts, or any place where the communications device is sold or delivered to a purchaser or recipient.

The CS amends the provisions on civil remedies to:

- Authorize the court to impound any communications 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 and to grant other equitable relief, including the imposition of a constructive trust, as the court considers reasonable and necessary.
- Authorize the court to order the remedial modification or destruction of any communication device or other device used in a violation which is in the custody and control of the violator.
- Include in actual damages the retail value of all communications services to which the violator had unauthorized access and the retail value of any communications service illegally available to each person to whom the violator directly or indirectly provided a communications device. In proving this element of damages, the aggrieved party is required to prove only that the violator manufactured, distributed, or sold a communications device, and is not required to prove that the device was unlawfully used.
- Provide that the current statutory damages may be applied to each device and for each day the defendant was in violation of the section.

- Make the discretionary increase in damages of up to \$50,000 for each violation apply to any case where the court finds that the violation was committed willfully and for purposes of financial gain, and to be an amount of not more than \$50,000 for each communications device and for each day the defendant was in violation of the section. The financial gain standard would provide broad application, including cases such as when a person has one communication device to illegally unscramble cable television programming.

The CS provides that s. 812.15, F.S., does not impose any criminal or civil liability upon any state or local law enforcement agency; any state or local agency, municipality, or authority; or any communications service provider, unless such entity is acting knowingly and with intent to defraud a communications services provider.

The CS provides that a person does not violate s. 812.15, F.S., by manufacturing, producing, assembling, designing, selling, distributing, licensing, or developing a multipurpose device (defined in the CS), unless the person is acting knowingly and with intent to defraud a communications service provider and the multipurpose device meets certain specified conditions.

The CS provides that s. 812.15, F.S., does not require that the design of, or design and selection of parts, software code, or components for, a communications 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 communications service or of any data, audio or video programs, or transmissions to protect any of them from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission, or retransmission.

The CS takes effect October 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The Florida Cable Telecommunications Association estimates that the state loses approximately \$31 million in communications services tax revenue per year based on its estimates of losses to theft of services provided by franchised cable television operators.

B. Private Sector Impact:

According to the Florida Cable Telecommunications Association, the theft of services provided by Florida's franchised cable television operators is estimated to be approximately \$340 million per year.

C. Government Sector Impact:

According to the Criminal Justice Impact Conference (CJIC), SB 1078 is likely to have an insignificant prison bed impact. CJIC indicates that there were only two convictions under s. 812.15, F.S., in the last fiscal year and neither received a prison sentence. CJIC has not yet analyzed CS/SB 1078, but the changes incorporated in the CS do not involve any additional offenses or penalties beyond what was specified in the original bill, so the impact estimate for the CS should be identical to that of the original bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.