

CHAPTER NO. 770

HOUSE BILL NO. 3391

By Representatives Briley, Stanley, Coleman

Substituted for: Senate Bill No. 3101

By Senators Trail, Person, Cooper, Bryson, Norris, Burks

AN ACT to amend Tennessee Code Annotated, Title 7, Chapter 59 and Title 39, Chapter 14, relative to certain types of theft.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-14-149, is amended by deleting the section in its entirety and substituting instead the following:

39-14-149.

(a) A person commits communication theft who, with the intent to defraud a communication service provider of any lawful compensation for providing a communication service, knowingly:

(1) Acquires, transmits, or retransmits a communication service;

(2) Makes, distributes, possesses with the intent to distribute or uses a communication device or modifies, programs or reprograms a communication device in such a manner that it is designed, adapted for use or used for the commission of communication theft in violation of subsection (a)(1);

(3) Makes or maintains any modification or alteration to any communication device installed with the express authorization of a communication service provider for the purpose of intercepting any program or other service carried by such provider that such person is not authorized by the provider to receive.

(4) Makes or maintains connections, whether physical, electrical, acoustical or by any other means, with cables, wires, components or other devices used for the distribution of communication services without the authority of the communication services provider; or

(5) Sells, possesses, or otherwise delivers to another or offers for sale any:

(A) Communication device or unlawful access device, or plans or instructions for making the same, under circumstances evincing an intent to use the communication device or unlawful access device, or to allow the same to be used, for a purpose prohibited by this section; or

(B) 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 or development of a communication device or unlawful access device in violation of this section;

(6) Publishes the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device, or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers or other credit devices knowing that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evincing an intent to have the telephone number, credit number, credit device or method of numbering or coding so used; or

(7) Assists another in committing an act prohibited by this section in a manner that would make such person criminally responsible for the act under §39-11-402;

(b) Any communication device or unlawful access device and other related items and equipment pertaining to a violation of this section may be seized under warrant or incident to a lawful arrest. Upon conviction for such a violation, the court may order the sheriff of the county in which the person was convicted to destroy as contraband or to otherwise lawfully dispose of any devices or other related items used in violation of this section.

(c) If conduct that violates this section:

(1) Also constitutes a violation of § 39-14-104 relative to theft of services, such conduct may be prosecuted under either but not both statutes as provided in § 39-11-109; and

(2) Is either commenced or consummated in this state, such conduct may be prosecuted in this state as provided in § 39-11-103.

(d)

(1) A violation of this section shall be punished as theft and graded in accordance with § 39-14-105.

(2) A person's first violation of this section shall be punished by fine only if the value of the services obtained is less than one thousand dollars (\$1,000). However, the trier of fact may impose a fine of double the amount otherwise authorized by § 40-35-111 for the appropriate offense class.

(3)

(A) Except as provided in subdivision (B), each communication device or unlawful access device involved in a violation of this section shall constitute a separate offense and each activity prohibited by this section found to have occurred shall constitute a separate offense

regardless of whether the activity involves one (1) or more than one (1) communication device or unlawful access device.

(B) If a defendant commits multiple violations of this section but such violations represent a single, continuous course of conduct by the defendant, such multiple violations, shall, for purposes of this section, be considered one (1) violation and shall be punished as such.

(4) In addition to any other sentence authorized by this section, the court may order a person convicted of violating this section to make restitution for the offense in accordance with the procedure set out in § 40-35-304.

(e)

(1)

(A) A communication service provider aggrieved by a violation of this section may institute a civil action in any court of competent jurisdiction to obtain appropriate relief. Whether the conduct giving rise to a violation of this section occurs wholly in this state, is commenced outside the state but consummated in this state, or is commenced in this state but consummated outside this state, venue for any such action shall be in any county in which conduct constituting a violation of this section occurs.

(B) Any such action shall be filed within two (2) years of the aggrieved communication service provider's actual knowledge of the violation, but in no event shall such an action be filed more than five (5) years from the date of the violation.

(2) The court, in its discretion, may:

(A) Award declaratory relief and other equitable remedies, including preliminary and final injunctions to prevent or restrain violations of this section;

(B) At any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any communication device 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;

(C) Award actual or statutory damages as authorized in subdivision (3) of this subsection; and

(D) As part of a final judgment or decree finding a violation of this section, order the remedial modification or destruction of any communication device 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 that has been impounded under subpart (B) of this subdivision.

(3) At any time before final judgment is entered, the aggrieved party may elect to have any damages that may be awarded to such party computed according to either of the following methods:

(A) The actual damages suffered by such party as a result of violations of this section and all profits of the violator that are attributable to all violations of this section against the aggrieved party.

(B)

(i) Except as provided in (ii) of this subdivision, in lieu of actual damages and the violator's profits as provided in subpart (A), statutory damages in an amount of not less than seven hundred fifty dollars (\$750) nor more than five thousand dollars (\$5,000) may be awarded for each communication device or unlawful access device involved in the action or each violation of this section found to have occurred. The trier of fact shall determine the appropriate amount of statutory damages from within the range available in this subpart as it deems equitable and just.

(ii) If a person commits multiple violations of this section but such violations represent a single, continuous course of conduct by that person, such multiple violations, shall, for purposes of this section, be considered one (1) violation and statutory damages awarded as such.

(C) Notwithstanding the provisions of subpart (B), if the trier of fact finds that there are mitigating factors present as to a particular defendant's involvement in a violation of this section, it may reduce the amount of statutory damages awarded below the minimum amount established in subpart (B). Such mitigating factors may include, but shall not be limited to:

(i) The defendant's role in the violation was minor;

(ii) The defendant assisted the aggrieved party in uncovering violations of this section committed by other persons or in detecting other persons who had committed violations of this act;

(iii) The defendant assisted the aggrieved party in locating other communication devices, unlawful access devices or equipment used to violate this section;

(iv) The defendant's violation of this act was committed solely for personal or household use;

(v) The defendant acted under a good faith belief that the defendant's violations of this section were lawful and ceased such violations upon learning that they were not; and

(vi) Any other factor consistent with this subpart that would cause the trier of fact to believe that the interests of justice require the amount of damages awarded to be below the statutory minimum set out in subpart (B).

(D) Notwithstanding the provisions of subpart (B), if the trier of fact finds that there are aggravating factors present as to a particular defendant's involvement in a violation of this section, it may increase the amount of damages awarded up to an amount not to exceed fifty thousand dollars (\$50,000). Such aggravating factors may include, but shall not be limited to:

(i) The defendant committed the offense willfully and for the purpose of commercial advantage or financial gain;

(ii) The defendant has a previous history of committing communication theft whether in this state, another state or under federal jurisdiction;

(iii) The defendant was the leader in the commission of a violation of this section involving two (2) or more other parties;

(iv) Violations of this section were also committed against other communication service providers on or about the same time as the violations against the aggrieved party;

(v) The value of the services taken from or damage done to the aggrieved party was particularly great; and

(vi) Any other factor consistent with this subpart that would cause the trier of fact to believe that the interests of justice require the amount of damages awarded be in excess of the statutory maximum set out in subpart (B) or that such amount should be added to any actual damages proven.

(E) If the defendant prevails in a civil action brought pursuant to this section, the court may tax all costs of the action against the plaintiff and award the defendant reasonable attorney fees and the reasonable costs of defending such action if the court finds that the plaintiff brought the action:

(i) In bad faith; and

(ii) For the purpose of impeding or stifling lawful competition; or

(iii) For the purpose of harassing or intimidating lawful competition.

(f) The provisions of this section shall not be construed to prohibit:

(1) The manufacture, use, advertisement or sale of a multipurpose device, or the possession of the same for any of the aforementioned purposes, unless such person acts with the intent required to violate this section and the person knows:

(A) That the primary use or purpose for which the device was designed manufactured, sold or licensed is for a violation of this section;

(B) The device has only a limited commercially significant purpose or use other than as an unlawful access device or for the commission of a violation of this section; or

(C) The device is marketed by that person, or another acting in concert with that person and with that person's knowledge, for use as an unlawful access device or for the purpose of committing a violation of this section;

(2) The use of a communication device to connect one (1) or more multipurpose devices at the person's residence or business premises unless the device causes substantial electronic or physical harm to the communication service provider's network, system or facility;

(3) The use of a communication device that is not selected by a communication service provider unless the device causes substantial electronic or physical harm to the communication service provider's network, system or facility.

(g) Breach of a service contract between a person and a communication service provider that establishes terms and conditions for the attachment of a communication device to a communication service provider's network, system, or facility shall not, in and of itself, be sufficient proof that such person acted with the intent required to commit a violation of this section. However, conduct which constitutes a breach of such a service contract may also constitute a violation of this section if the person knowingly commits an act prohibited by this section with the intent to defraud a communication service provider of any lawful compensation for providing a communication service.

(h) (1) Notwithstanding any other provision of this section or language contained therein to the contrary, a person does not commit either a civil or criminal violation of this section unless such person acts with the intent to defraud, as defined in subsection (i)(1), a communication service provider of any lawful compensation for providing a communication service in conjunction with some other conduct prohibited by this section.

(2) Notwithstanding any other provision of this section to the contrary, any entity that has a collectively bargained contract which provides for residual payments to performers, or any entity that licenses the public performing rights with a communications service provider and who is engaged in the distribution of royalty or

residual payments, operating in the ordinary course of business to monitor residual payments or the performing right in musical works, sound recordings or audiovisual works provided by a communication service provider, may engage in those monitoring activities under this section where such activities are intended and carried out for the sole purposes of distributing royalties or residuals to songwriters, music publishers, artists or performers or monitoring unauthorized performances.

(3) Nothing in this section shall be construed to prohibit a non-profit library, archive, or educational institution from engaging in circulation, course reserves, and inter-library and other lending services; classroom and instructional uses; or archiving and preservation to the extent such activities are permitted under the federal copyright law as codified in title 17 of the United States Code.

(i) As used in this section, unless the context otherwise requires:

(1) "Intent to defraud" means a person uses, in whole or in part, deceit, trickery, misrepresentation or subterfuge for the purpose of depriving a communication service provider of the lawful compensation to which it is entitled for providing a communication service.

(2) "Communication device" means any:

(A) Machine, equipment, technology or software that is capable of intercepting, transmitting, re-transmitting, decrypting or receiving a communication service, or any part thereof; or

(B) Computer circuit or chip, electronic mechanism or other component that is capable of facilitating the interception, transmission, re-transmission, decryption, or reception of any communication service;

(3) "Communication service" means 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 of any type, wire, wireless, radio, electromagnetic, photoelectronic or photo-optical systems, networks or facilities; and any service lawfully provided for a charge or compensation by any radio, photo-optical, electromagnetic, photoelectronic, electric power, fiber optic, 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" means any person or entity:

(A) Providing a communication service, whether directly or indirectly as a reseller, which, for a fee, supplies the facility, cell site, mobile telephone switching office or other equipment or communication service;

(B) 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; or

(C) Providing any communication service directly or indirectly by or through any such distribution systems, networks or facilities.

(5) "Multipurpose device" means a communication device that is capable of more than one (1) function, at least one (1) of which is lawful, and includes any component thereof, and any plans or instructions for developing or making such a device or any component thereof.

(6) "Unlawful access device" means any type of machine, equipment, technology or software which is primarily designed, manufactured, sold, possessed, used or advertised, for the purpose of defeating or circumventing any 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, decryption, communication, transmission or re-transmission.

SECTION 2. Tennessee Code Annotated, Section 7-59-109, is amended by deleting the section in its entirety. The Tennessee code commission is directed to change all references to the offense of cable television theft, currently codified as § 7-59-109, to references to communication theft, codified in § 39-14-149, at such time as such references appear in pocket parts and replacement volumes.

SECTION 3. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 4. This act shall take effect on July 1, 2004, the public welfare requiring it.

PASSED: May 6, 2004

APPROVED this 24th day of May 2004



JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES



JOHN S. WILDER
SPEAKER OF THE SENATE



PHIL BREDESEN, GOVERNOR