

JAN 28 2009

S.B. NO. 1609

A BILL FOR AN ACT

RELATING TO COMMUNICATIONS FRAUD.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. This Act updates existing statutes relating to
2 cable television and telecommunication service fraud to address
3 an expanding array of technology services offered by
4 communication companies that include cable television and
5 telecommunication, internet-based, or wireless distribution
6 networks.

7 SECTION 2. Section 708-800, Hawaii Revised Statutes, is
8 amended by adding seven new definitions to be appropriately
9 inserted and to read as follows:

10 "Communication device" means:

11 (1) Any type of instrument, device, machine, mechanism, or
12 equipment that is capable of transmitting, acquiring,
13 decrypting, or receiving any telephonic, electronic,
14 data, internet access, audio, video, microwave, or
15 radio transmissions, signals, communications, or
16 services, including the receipt, acquisition,
17 transmission, or decryption of all the communications,
18 transmissions, signals, or services provided by or



1 through any cable television, fiber optic, telephone,
2 satellite, microwave, radio, internet-based, data
3 transmission, or wireless distribution network,
4 system, or facility; and

5 (2) Any part, accessory, or component thereof, including
6 any computer circuit, security module, smart card,
7 software, computer chip, electronic mechanism,
8 electronic serial number, mobile identification
9 number, personal identification number, switches, or
10 other component, accessory, or part of any
11 communication device that is capable of facilitating
12 the transmission, decryption, acquisition, or
13 reception of all such communications, transmissions,
14 signals, or services.

15 "Communication service" means:

16 (1) Any service lawfully provided for a charge or
17 compensation to facilitate the origination,
18 transmission, emission, or reception of signs,
19 signals, data, writings, images, and sounds or
20 intelligence of any nature by telephone, including but
21 not limited to cellular telephones or wire, wireless,



1 radio, electromagnetic, photo-electronic, or photo-
2 optical systems; and

3 (2) Any service lawfully provided for a charge or
4 compensation by any radio, telephone, cable
5 television, fiber optic, satellite, microwave,
6 internet-based or wireless distribution network,
7 system, facility, or technology, including but not
8 limited to any and all electronic, data, video, audio,
9 internet access, telephonic, microwave, and radio
10 communications, transmissions, signals, and services,
11 and any such communications, transmissions, signals,
12 and services provided directly or indirectly by or
13 through any of those networks, systems, facilities, or
14 technologies.

15 "Communication service provider" means:

16 (1) Any person or entity owning or operating any cable
17 television, fiber optic, satellite, telephone,
18 wireless, microwave, radio, data transmission, or
19 internet-based distribution network, system, or
20 facility for the provision of communications services;

21 (2) Any person or entity providing a communication service
22 directly or indirectly as a reseller, including but



1 not limited to a cellular, paging, or other wireless
2 communications company or other person or entity that,
3 for a fee, supplies the facility, cell site, mobile
4 telephone switching office, or other equipment or
5 communication service; and

6 (3) Any person or entity providing any communication
7 service directly or indirectly by or through any
8 distribution system, network, or facility.

9 "Unlawful communication device" means:

10 (1) Any communication device, electronic serial number,
11 mobile identification number, or personal
12 identification number that is capable of acquiring or
13 facilitating the acquisition of a communication
14 service without payment of lawful charges due to the
15 communication service provider or that has been
16 altered, modified, programmed, or reprogrammed, alone
17 or in conjunction with another communication device or
18 other equipment, to so acquire or facilitate the
19 acquisition of a communication service without payment
20 of lawful charges due to the communication service
21 provider;



1 (2) Any phone altered to obtain service without payment of
2 lawful charges due to the communication service
3 provider, tumbler phone, counterfeit or clone phone,
4 tumbler microchip, counterfeit or clone microchip, or
5 other instrument capable of gaining access to a
6 communication system, network, or facility operated by
7 a communication service provider without payment of
8 lawful charges due to the communication service
9 provider; and

10 (3) Any communication device that is capable of, or has
11 been altered, designed, modified, programmed, or
12 reprogrammed, alone or in conjunction with another
13 communication device or devices, so as to be capable
14 of facilitating the unauthorized disruption, or the
15 decryption, acquisition, receipt, or transmission, of
16 a communication service without payment of lawful
17 charges due to the communication service provider,
18 including but not limited to any device, technology,
19 product, service, equipment, computer software, or
20 component or part thereof, primarily distributed,
21 sold, designed, assembled, manufactured, modified,
22 programmed, or reprogrammed or used for the purpose of



1 providing the decryption, acquisition, receipt, or
2 transmission of or access to any communication service
3 provided by a communication service provider without
4 payment of lawful charges due to it.

5 "Manufacture or assembly of an unlawful communication
6 device" means to make, produce, or assemble an unlawful
7 communication device or to modify, alter, program, or reprogram
8 a communication device to be capable of acquiring, receiving, or
9 transmitting communication services without payment of lawful
10 charges due to the communication service provider, or disrupting
11 or decrypting the services, or facilitating the acquisition,
12 receipt, or transmission of the services without payment of
13 lawful charges due to the communication service provider, or
14 decryption or disruption of the services, or to knowingly assist
15 others in those activities.

16 "Unlawful access device" means any:

- 17 (1) Type of instrument, device, machine, equipment,
18 technology, or software that is primarily possessed,
19 used, designed, assembled, manufactured, sold,
20 distributed, offered, promoted, or advertised for the
21 purpose of defeating or circumventing any technology,
22 device, or software, or any component or part thereof,



1 used by the provider, owner, or licensee of any
2 communication service or of any data, audio, or video
3 programs or transmissions to protect any
4 communication, audio, or video services, programs, or
5 transmissions from unauthorized access, acquisition,
6 receipt, decryption, disclosure, communication,
7 transmission, or re-transmission;

8 (2) Number or code of an existing, canceled, revoked, or
9 nonexistent telephone number, telephone calling card
10 number, credit card number, account number, personal
11 identification number, or other credit device or
12 method of numbering or coding that is employed in the
13 issuance of telephone numbers, credit numbers, or
14 other credit devices that can be used to obtain
15 communication service.

16 "Manufacture or assembly of an unlawful access device"
17 means to make, produce, or assemble an unlawful access device or
18 to modify, alter, program, or reprogram any instrument, device,
19 machine, equipment, or software so that it is capable of
20 defeating or circumventing any technology, device, or software
21 used by the provider, owner, or licensee of a communication
22 service or of any data, audio, or video services, programs, or



1 transmissions to protect any communication, data, audio, or
2 video services, programs, or transmissions from unauthorized
3 access, acquisition, disclosure, receipt, decryption,
4 communication, transmission, or re-transmission."

5 SECTION 3. Chapter 708, Hawaii Revised Statutes, is
6 amended by adding a new part to be appropriately designated and
7 to read as follows:

8 "PART . COMMUNICATION SERVICE FRAUD

9 §708-A Communication service fraud in the first degree.

10 (1) A person commits communication service fraud in the first
11 degree if the person knowingly and with the intent to defraud a
12 communication service provider:

13 (a) Publishes plans or instructions for making,
14 assembling, or using an unlawful communication device
15 or unlawful access device or sells, offers to sell,
16 distributes, transfers, or otherwise makes available
17 written instructions, plans, or materials, including
18 hardware, cables, tools, data, computer software, or
19 other information or equipment, to make or assemble an
20 unlawful communication device or unlawful access
21 device and knows that the written plans, instructions,
22 or materials are intended to be used to make or



1 assemble a device to obtain communication service
2 without payment of applicable charges;

3 (b) Possesses with the intent to distribute, imports into
4 this State, makes, assembles, sells, offers to sell,
5 promotes, advertises, distributes, leases, transports,
6 transfers, or otherwise makes available an unlawful
7 communication device or unlawful access device and
8 knows that the device is intended to be used to obtain
9 communication service without payment of applicable
10 charges; or

11 (c) Whether by use of an unlawful communication device or
12 unlawful access device, by a connection or attachment
13 to a communication service provider's system, or by
14 trick, artifice, deception, false pretenses, or
15 identification, or by other fraudulent means, uses,
16 obtains, or attempts to obtain a communication service
17 without payment of applicable charges, the value of
18 which exceeds \$1,000 in any six-month period;

19 (2) For the purpose of this section, "publish" means the
20 communication or dissemination of information to any one or more
21 persons, either orally, in person, or by telephone, radio,
22 television, or computer, or in a writing of any kind, including



1 without limitation a letter, memorandum, circular, handbill,
2 newspaper, magazine article, or book.

3 (3) Communication service fraud in the first degree is a
4 class C felony; provided that if the defendant has previously
5 been convicted of an offense:

6 (a) Under this part;

7 (b) Part XII prior to its repeal; or

8 (c) 17 United States Code section 1201 or 47 United States
9 Code sections 553 or 605,

10 communication service fraud in the first degree is a class B
11 felony.

12 **§708-B Communication service fraud in the second degree.**

13 (1) A person commits the offense of communication service fraud
14 in the second degree if the person knowingly and with intent to
15 defraud a communication service provider:

16 (a) Possesses an unlawful communication device with intent
17 to obtain communication service without payment of
18 applicable charges;

19 (b) Possesses written instructions or plans to make or
20 assemble an unlawful communication device with the
21 intent to use the written plans or instructions to



1 make or assemble a device to obtain communication
2 service without payment of applicable charges; or
3 (c) Whether by use of an unlawful communication device or
4 unlawful access device, by a connection or attachment
5 to a communication service provider's system or by
6 trick, artifice, deception, false pretenses, or
7 identification, or by other fraudulent means, uses,
8 obtains, or attempts to obtain a communication service
9 without payment of applicable charges, the value of
10 which does not exceed \$1,000 in any six-month period;
11 (d) Modifies, alters, programs, or reprograms a
12 communication device or access device for the purpose
13 of obtaining communication service without payment of
14 applicable charges.
15 (2) Communication service fraud in the second degree is a
16 misdemeanor; provided that if the defendant has previously been
17 convicted of an offense:
18 (a) Under this part;
19 (b) Part XII prior to its repeal; or
20 (c) 17 United States Code section 1201 or 47 United States
21 sections 553 or 605,



1 communication service fraud in the first degree is a class C
2 felony.

3 **§708-C Civil remedies.** (1) Any communication service
4 provider aggrieved by a violation of this part may bring a civil
5 action to obtain the following relief:

6 (a) Preliminary or final injunctions to prevent or
7 restrain violations, to prevent destruction of
8 evidence, or to prevent dissipation of profits
9 properly recoverable by an aggrieved communication
10 service provider pursuant to subsection (2) (a);

11 (b) Monetary damages as set forth in subsection (2) (b),
12 below; and

13 (c) Reasonable attorneys' fees and investigation costs.

14 (2) Damages awarded by a court under this section shall be
15 computed as provided in this subsection, with a communication
16 service provider having the right to elect to recover under
17 either paragraph (a) or (b) at any time prior to final judgment:

18 (a) The actual damages suffered by the communication
19 service provider as a result of the violation and any
20 profits of the violator that are attributable to the
21 violation that are not taken into account in computing
22 the actual damages. In determining the violator's



1 profits, the complaining party shall be required to
2 prove only the violator's gross revenue, and the
3 violator shall be required to prove its deductible
4 expenses and the elements of profit attributable to
5 factors other than the violation. In calculating
6 actual damages for violations of section 708-A(1)(c)
7 or section 708-B(1)(c), there shall be a rebuttable
8 presumption that they equal the difference between the
9 value of services paid for by the violator and the
10 value of services to which the violator gained access
11 as a result of the violation; or

12 (b) Statutory damages, to be awarded by the court and not
13 a jury, in an amount between \$5,000 and \$10,000 for
14 each violation of subsection 708-A(1)(a) to (c), and
15 in an amount between \$1,000 and \$10,000 for each
16 violation of subsection 708-B(1)(a) to (d), as the
17 court considers just.

18 (3) In any case where it is found that any violation of
19 this part was committed willfully and for purposes of commercial
20 advantage or private financial gain, in its discretion, the
21 court may increase the award of either actual or statutory
22 damages by an amount not more than \$50,000.



1 (4) For purposes of all civil remedies established for
2 violations of this part , the prohibited activity shall be
3 deemed a separate violation with respect to each device, plan,
4 or set of instructions involved in the action. For purposes of
5 acts that involve public display of a communication service,
6 each separate instance of public display shall be deemed a
7 separate violation.

8 **§708-D Forfeiture of unlawful communication or access**
9 **device.** Any unlawful communication or access device, or
10 instructions or plans therefor, or any materials for making or
11 assembling unlawful communication or access device possessed or
12 used in violation of this part may be ordered forfeited to the
13 State for destruction by it or, at the State's direction, by an
14 aggrieved communication service provider or other disposition,
15 subject to the requirements of chapter 712A.

16 **§708-E Possession of devices as evidence of intent;**
17 **rebuttable presumption.** In a prosecution for a violation of
18 this part, the existence on the property and in the possession
19 of the defendant of:

20 (a) Any communication or unlawful access device that is
21 connected in a manner as would permit the receipt of a



1 communication service without payment of lawful
2 charges to the communication service provider; or
3 (b) Any device designed in whole or in part to facilitate
4 the performance of any illegal acts set forth in this
5 part, where the totality of the circumstances,
6 including the quantity of devices, surrounding the
7 defendant's arrest indicates possession for resale,
8 shall give rise to a rebuttable presumption that the defendant
9 intended to violate the provisions of this part."

10 SECTION 4. Part XII, chapter 708, Hawaii Revised Statutes,
11 is repealed.

12 SECTION 5. In codifying the new sections added by section
13 5 of this Act, the revisor of statutes shall substitute
14 appropriate section numbers for the letters used in designating
15 the new sections in this Act.

16 SECTION 6. This Act does not affect rights and duties that
17 matured, penalties that were incurred, and proceedings that were
18 begun, before its effective date.

19 SECTION 7. Statutory material to be repealed is bracketed
20 and stricken. New statutory material is underscored.



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1 SECTION 8. This Act shall take effect upon its approval.

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Report Title:

Communication Service; Fraud

Description:

Establishes the offense of communication service fraud in the first and second degrees. Provides civil remedies. Authorizes forfeiture. Establishes evidentiary presumption. Adds definitions.

