



Senate Fiscal Agency
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BILL



ANALYSIS

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House Bill 5748 (Substitute H-1 as passed by the House)
House Bills 5749 through 5755 (as passed by the House)
Sponsor: Representative Charles Perricone (House Bill 5748)
Representative Jon Jellema (House Bill 5749)
Representative Mike Green (House Bill 5750)
Representative James Ryan (House Bill 5751)
Representative Eric Bush (House Bill 5752)
Representative Terry Geiger (House Bills 5753 and 5754)
Representative William Byl (House Bill 5755)

House Committee: Commerce
Senate Committee: Technology and Energy

Date Completed: 5-22-96

CONTENT

House Bills 5748 (H-1) through 5755 would amend various acts to revise criminal violations and penalties relating to fraudulent use of computer and telecommunications devices and services.

The bills are tie-barred and would take effect on April 1, 1997.

House Bill 5748 (H-1)

The bill would amend Public Act 53 of 1979, which deals with computer crimes, to expand the prohibition and increase penalties for violations. The bill also would establish a rebuttable presumption that a person "did not have authorization...to access" a computer program, computer, computer system, or computer network.

Violations

The Act proscribes gaining access to or causing access to be made to a computer, computer system, or computer network for the purpose of devising or executing a scheme or artifice with intent to defraud or for the purpose of obtaining money, property, or a service by means of a false or fraudulent pretense, representation, or promise. The bill would add access to a computer program to that violation.

The Act also provides that a person may not intentionally and without authorization gain access to, alter, damage, or destroy a computer, computer system, or computer network, or gain access to, alter, damage, or destroy a computer software program or data contained in a computer, computer system, or computer network. The bill provides, instead, that a person could not intentionally and without authorization, or by exceeding valid authorization, do any of the following:

- Access or cause access to be made to a computer program, computer, computer system, or computer network to acquire, alter, damage, delete, or destroy property or otherwise use the service of a computer program, computer, computer system or computer network.
- Insert or attach, or knowingly create the opportunity for an unknowing and unwanted insertion or attachment of, a set of instructions or a computer program into a computer program, computer, computer system, or computer network, that was intended to acquire, alter, damage, delete, disrupt, or destroy property or otherwise use the services of a computer program, computer, computer system, or computer network. (This provision would not prohibit

free-speech conduct protected under Section 5 of Article I of the State Constitution of 1963 or under the First Amendment of the Constitution of the United States.)

The Act also prohibits the use of a computer, computer system, or computer network to commit various specified violations of the Michigan Penal Code. The bill would add computer program to that provision and would prohibit the use of a computer or computer system, network, or program, to commit any crime.

Penalties

Currently, a violation of the Act is a misdemeanor, if the violation involves \$100 or less, and is a felony, punishable by up to 10 years' imprisonment, a maximum fine of \$5,000, or both, if the violation involves more than \$100. Under the bill, if a violation involved an aggregate amount of less than \$200, it would be a misdemeanor, punishable by up to 93 days' imprisonment and/or a maximum fine of \$500 or three times the aggregate amount, whichever was greater.

If either of the following applied, the violation would be a misdemeanor, punishable by up to one year's imprisonment and/or a maximum fine of \$2,000 or three times the aggregate amount, whichever was greater:

- The violation involved an aggregate amount of \$200 or more, but less than \$1,000.
- The person violated the Act and had a prior conviction for committing or attempting to commit a violation of the Act.

If either of the following applied, the violation would be a felony, punishable by up to five years' imprisonment and/or a maximum fine of \$10,000 or three times the aggregate amount, whichever was greater:

- The violation involved an aggregate amount of \$1,000 or more, but less than \$20,000.
- The person violated the Act and had two prior convictions for violating the Act.

If either of the following applied, the violation would be a felony, punishable by up to 10 years' imprisonment and/or a maximum fine of three times the aggregate amount:

- The violation involved an aggregate amount of \$20,000 or more.
- The person violated the Act and had three or more prior convictions for violating the Act.

If the prosecuting attorney intended to seek an enhanced sentence based on the defendant's having a prior conviction, he or she would have to include on the complaint and information a statement listing that prior conviction. The existence of a defendant's prior conviction could be determined by the court, without a jury, at sentencing, and could be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

- A copy of the judgment of conviction.
- A transcript of a prior trial, plea-taking, or sentencing.
- Information contained in a presentence report.
- The defendant's statement.

(The bill would define "aggregate amount" as any direct or indirect loss incurred by a victim, including the value of any money, property or service lost, stolen, or rendered unrecoverable by the offense, or any actual expenditure incurred by the victim to verify that a computer program, computer, computer system, or computer network was not altered, acquired, damaged, deleted, disrupted, or destroyed by the access.)

Rebuttable Presumption

Under the bill, it would be a rebuttable presumption that a person did not have proper authorization to access a computer program, computer, computer system, or computer network, or had exceeded authorization, unless one or more of the following circumstances existed at the time of access:

- Written or oral permission was granted by the owner, system operator, or other person who had authority from the owner or system operator to grant permission of the accessed computer program, computer, computer system, or computer network.
- The accessed computer or computer program, system, or network had a preprogrammed access procedure that would display a bulletin, command, or other message, before access was achieved, that

a reasonable person would believe identified the computer, program, system, or network as being within the public domain.

- Access was achieved without the use of a set of instructions, code, or computer program that bypassed, defrauded, or otherwise circumvented the preprogrammed access procedure for the computer program, computer, computer system, or computer network.

The Act defines "access" as "to approach, instruct, communicate with, store data in, retrieve data from, or otherwise use the resources of a computer, computer system, or computer network". The bill would redefine "access" as "to instruct, communicate with, store data in, retrieve or intercept data from, or otherwise use the resources of a computer program, computer, computer system, or computer network".

House Bill 5749

The bill would amend the Revised Judicature Act to include in the Act's criminal forfeiture provisions the violations outlined in House Bills 5748, 5750, 5751, and 5752.

House Bill 5749 also provides that, if a computer or computer information storage device were seized for a violation of Public Act 53 of 1979 (which would be amended by House Bill 5748), the seizing agency immediately would have to make a copy of all information contained in the computer or computer information storage device under the supervision of the court and in a manner approved by the court having jurisdiction and provide that copy to the court. The court would have to retain the copy as a confidential record. The copy could be used only to verify the integrity of the information contained in the computer or computer storage device that was seized. Upon conclusion of the proceedings, the court would have to order the copy destroyed.

House Bill 5750

The bill would amend the Michigan Penal Code specify that it would be a crime for an officer, shareholder, partner, employee, agent, or independent contractor of a telecommunications service provider knowingly and without authority to use or divert telecommunications services for his or her own benefit or to the benefit of another.

If the total value of the telecommunications service used or diverted were less than \$200, the violation would be a misdemeanor, punishable by up to 93 days' imprisonment and/or a maximum fine of \$500 or three times the total value of the service, whichever was greater.

If either of the following applied, the violation would be a misdemeanor, punishable by up to one year's imprisonment and/or a maximum fine of \$2,000 or three times the total value of the telecommunications service used or diverted, whichever was greater:

- The total value of the service was \$200 or more, but less than \$1,000.
- The total value of the service was less than \$200, and the person had a prior conviction for committing or attempting to commit a violation of the bill.

If any of the following applied, the violation would be a felony, punishable by up to five years' imprisonment and/or a maximum fine of \$10,000 or three times the total value of the telecommunications service used or diverted, whichever was greater:

- The total value of the service was \$1,000 or more, but less than \$20,000.
- The total value was less than \$200, and the person had two prior convictions for committing or attempting to commit a violation of the bill.
- The total value was \$200 or more, but less than \$1,000, and the person had a prior conviction for committing or attempting to commit a violation of the bill.

If any of the following applied, the violation would be a felony, punishable by up to 10 years' imprisonment and/or a maximum fine of three times the value of the telecommunications service used or diverted:

- The total value of the service was \$20,000 or more.
- The total value was less than \$200, and the person had three or more prior convictions for committing or attempting to commit a violation of the bill.
- The total value was \$200 or more, but less than \$1,000, and the person had two or more prior convictions for committing or attempting to commit a violation of the bill.

- The total value was \$1,000 or more, but less than \$20,000, and the person had a prior conviction for committing or attempting to commit a violation of the bill.

Values of telecommunications services used or diverted in separate incidents pursuant to a scheme or course of conduct within one year could

be aggregated to determine the total value of the service used or diverted.

If the prosecuting attorney intended to seek an enhanced sentence based on the defendant's having a prior conviction, he or she would have to include on the complaint and information a statement listing that prior conviction. The existence of a defendant's prior conviction could be determined by the court, without a jury, at sentencing, and could be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

- A copy of the judgment of conviction.
- A transcript of a prior trial, plea-taking, or sentencing.
- Information contained in a presentence report.
- The defendant's statement.

House Bill 5751

The bill would amend the Michigan Penal Code to revise the offense of and penalties for fraudulently avoiding a charge for a telecommunications service and the provision for seizure of telecommunications devices.

Violations

Currently, the Code proscribes both of the following:

- Making, possessing, using, or knowingly participating in the use of any instrument, apparatus, equipment, or device designed or adapted either for use fraudulently to avoid the lawful charge for any telecommunications service, or to conceal the existence or place of origin or destination of any telecommunication services or unlawfully interconnect telephone lines.
- Selling, giving, or otherwise transferring any instrument, apparatus, equipment, or device

described above, or instructions or plans for making or assembling any such instrument, apparatus, equipment, or device.

The bill, instead, would prohibit the manufacture, possession, delivery, offer for delivery, or advertisement of a "counterfeit telecommunications device", or a "telecommunications device", with the intent to use the device or allow it to be used to do either of the following or knowing or having reason to know that the device was intended to be used to do either of the following:

- Obtain or attempt to obtain telecommunications service with the intent to avoid or aid or abet or cause another to avoid any lawful charge for telecommunications services.
- Conceal the existence or place of origin or destination of any telecommunications service.

The bill also would prohibit the delivery, offer to deliver, or advertisement of plans, instructions, or materials for manufacturing a counterfeit telecommunications device or a telecommunications device that the person intended to use, or knew or had reason to know that it would be used or was likely to be used, to violate the bill.

"Counterfeit telecommunications device" would mean a telecommunications device alone or with another telecommunications device that had been altered or programmed to acquire, intercept, receive, or otherwise facilitate the use of a telecommunications service without the authority or consent of the telecommunications service provider, including, but not limited to, a clone telephone, clone microchip, tumbler telephone, tumbler microchip, or wireless scanning device capable of acquiring, intercepting, receiving, or otherwise facilitating the use of a telecommunications service without immediate detection.

"Telecommunications device" would mean any instrument, equipment, machine, or device that facilitated telecommunications, including, but not limited to, a computer, computer chip or circuit, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enabled use of a modem.

"Telecommunications" would mean the origination, emission, transmission, or reception of data, images, signals, sounds, or other intelligence, or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, electronic, magnetic, optical, digital, or analog.

Penalties

The current violation is a misdemeanor, punishable by up to one year's imprisonment and/or a maximum fine of \$500, if the person engages in the conduct under circumstances indicating an intent to use or employ the equipment or to allow it to be used for purposes described in the violation. Any person who, with fraudulent intent to avoid lawful charges, alters or participates in the alteration of telecommunications service equipment or knowingly uses or participates in the use of altered telecommunications service equipment, also is subject to those misdemeanor penalties.

A violation of the bill would be a felony, punishable by up to four years' imprisonment and/or a maximum fine of \$2,000.

The bill specifies that it would not prohibit or restrict the possession of radio receivers or transceivers by licensees of the Federal Communications Commission in the amateur radio service that were intended primarily or exclusively for use in the amateur radio service.

Seizure

Currently, under the Code, any instrument, apparatus, equipment, device, plans, or instructions described in the violations above may be seized under warrant or incident to a lawful arrest. Upon conviction, the instrument, apparatus, equipment, device, plans, or instructions may be destroyed as contraband by the sheriff of the county in which the person was convicted or turned over to the person providing the telecommunications service involved in the territory in which the equipment was seized.

The bill provides, instead, that any telecommunications device, counterfeit telecommunications device, plans, instructions, or materials could be seized. Upon conviction, all of the following would apply to the device, plans, instructions or materials:

- The telecommunications device or materials would have to be returned to the lawful owner unless he or she were convicted of the violation or had prior actual knowledge of and consented to the violation or unless the lawful owner could not be determined or located.
- The counterfeit telecommunications device, plans, or instructions and any telecommunications device or materials not required to be returned to the lawful owner could be destroyed as contraband by the seizing law enforcement agency or retained and used by the seizing law enforcement agency for law enforcement purposes.
- Any telecommunications device or materials not required to be returned to the lawful owner could be turned over by the seizing law enforcement agency to the telecommunications service provider in the territory in which the seizure occurred.

House Bill 5752

The bill would amend the Michigan Penal Code to revise the violation and penalties for use of a false or fictitious telephone credit number or telephone number or the use of another's number without authority to use it, and repeal a section of the Code.

Violation

Currently, the Code prohibits knowingly obtaining or attempting to obtain telephone service or the transmission of a telephone message by the use of any false or fictitious telephone credit number or telephone number, or by the use of another's telephone credit number or telephone number without the authority of that person.

The bill, instead, would prohibit knowingly obtaining or attempting to obtain a telecommunications service with intent to avoid, attempt to avoid, or cause another person to avoid or attempt to avoid any lawful charge for that service by using any of the following:

- A telecommunications access device without the authority or consent of the subscriber or lawful holder of that device.
- A counterfeit telecommunications access device.
- A fraudulent or deceptive scheme, pretense, method, or conspiracy, or any device or

other means, including, but not limited to, using a false, altered, or stolen identification or the use of telecommunications access device to violate the bill by a person other than the subscriber or lawful holder of the telecommunications access device pursuant to an exchange of anything of value to the subscriber or lawful holder to allow that unlawful use of the telecommunications access device.

- A telecommunications device or counterfeit telecommunications device.

Penalties

The current violation is a misdemeanor, but must be prosecuted as a felony if the total value of telephone service obtained exceeds \$100.

A violation of the bill would be a misdemeanor, punishable by up to 93 days' imprisonment and/or a maximum fine of \$500 or three times the total value of the service obtained or attempted to be obtained, whichever was greater, if that value were less than \$200.

If either of the following applied, the violation would be a misdemeanor, punishable by up to one year's imprisonment and/or a maximum fine of \$2,000 or three times the total value of the service obtained or attempted to be obtained, whichever was greater:

- The total value of the service was \$200 or more, but less than \$1,000.
- The total value was less than \$200 and the person had a prior conviction for a violation of the current offense, the bill's offense, or the offense repealed by the bill.

If any of the following applied, the violation would be a felony, punishable by up to five years' imprisonment, and/or a maximum fine of \$10,000 or three times the total value of the service obtained or attempted to be obtained, whichever was greater:

- The total value of the service was \$1,000 or more, but less than \$20,000.
- The total value was less than \$200, and the person had two prior convictions for a violation of the current offense, the bill's offense, or the offense repealed by the bill.
- The total value was \$200 or more, but less than \$1,000, and the person had a prior conviction for a violation of the current

offense, the bill's offense, or the offense repealed by the bill.

If any of the following applied, the violation would be a felony, punishable by up to 10 years' imprisonment and/or a maximum fine of three times the value of the service obtained or attempted to be obtained, whichever was greater:

- The total value of the service was \$20,000 or more.
- The total value of the service was less than \$200, and the person had three or more prior convictions for a violation of the current offense, the bill's offense, or the offense repealed by the bill.
- The total value was \$200 or more, but less than \$1,000, and the person had two or more prior convictions for a violation of the current offense, the bill's offense, or the offense repealed by the bill.
- The total value was \$1,000 or more, but less than \$20,000, and the person had a prior conviction for a violation of the current offense, the bill's offense, or the offense repealed by the bill.

If the prosecuting attorney intended to seek an enhanced sentence based on the defendant's having a prior conviction, he or she would have to include on the complaint and information a statement listing that prior conviction. The existence of a defendant's prior conviction could be determined by the court, without a jury, at sentencing, and could be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

- A copy of the judgment of conviction.
- A transcript of a prior trial, plea-taking, or sentencing.
- Information contained in a presentence report.
- The defendant's statement.

Repealer

The bill would repeal a section of the Michigan Penal Code that prohibits knowingly obtaining or attempting to obtain, by the use of any fraudulent scheme, device, means, or method, telegraph or telephone service or the transmission of a message, signal, or other communication by telephone or telegraph, or over telephone, telegraph, or other communication facilities with intent to avoid payment of charges. The offense is

a misdemeanor with no specified penalty. (MCL 750.219c)

House Bills 5753 and 5754

House Bill 5753 would amend the Code of Criminal Procedure to specify that a violation of the prohibitions outlined in House Bills 5750 and 5752 could be prosecuted in the jurisdiction in which the telecommunication or telecommunications service originated or terminated or in the jurisdiction to which the bill for the telecommunications service was or would have been sent.

House Bill 5754 would amend the Code of Criminal Procedure to specify that, if a person violated Public Act 53 of 1979 (which would be amended by House Bill 5748), by accessing or causing access to be made to a computer, computer program, computer system, or computer network in one jurisdiction from another jurisdiction, the offense could be prosecuted in either jurisdiction.

House Bill 5755

The bill would amend the Michigan Penal Code to add a violation and penalties for knowingly or intentionally publishing a telecommunications access device or counterfeit telecommunications access device, with the intent that it be used, or knowing or having reason to know that it would be used or was likely to be used to violate the prohibition in House Bill 5752.

The offense would be a misdemeanor punishable by up to 93 days' imprisonment and/or a maximum fine of \$100. If a person who violated the bill had a previous conviction for a violation outlined in House Bill 5752 or 5751 or the violation repealed by House Bill 5752, the violation would be a felony, punishable by up to five years' imprisonment and/or a maximum fine of \$5,000.

If the prosecuting attorney intended to seek an enhanced sentence based on the defendant's having a prior conviction, he or she would have to include on the complaint and information a statement listing that prior conviction. The existence of a defendant's prior conviction could be determined by the court, without a jury, at sentencing, and could be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

- A copy of the judgment of conviction.
- A transcript of a prior trial, plea-taking, or sentencing.

- Information contained in a presentence report.
- The defendant's statement.

"Publish" would mean to communicate information or make information available to one or more persons orally, in writing, or by means of any telecommunications, and would include, but not be limited to, communicating information on a computer bulletin board or similar system.

MCL 752.792 et al. (H.B. 5748)
600.4701 et al. (H.B. 5749)
Proposed MCL 750.540g (H.B. 5750)
MCL 750.540c & 750.540d (H.B. 5751)
750.219a (H.B. 5752)
Proposed MCL 762.10a (H.B. 5753)
Proposed MCL 762.10b (H.B. 5754)
Proposed MCL 750.540f (H.B. 5755)

Legislative Analyst: P. Affholter

FISCAL IMPACT

House Bill 5748 (H-1)

The bill would have an indeterminate, yet likely minimal fiscal impact on the Department of Corrections and local criminal justice agencies.

The increased penalties and increased fines would result in longer sentences and additional revenue depending on the number of annual convictions and the type of sanction imposed. For comparison, in 1994, there were two convictions in circuit court for violations of the existing statute regarding access to computer with intent to defraud, one receiving a prison sentence, the other jail. To the extent that changes proposed in the bill resulted in increased convictions, and longer sentences for those individuals found guilty, costs could increase. There are no data currently available that might help predict the anticipated number of increased convictions.

House Bill 5749

The bill could generate new revenue for the State or local units of government, depending on the law enforcement agencies involved in the forfeiture proceedings.

House Bill 5750

The bill would have an indeterminate impact on the Department of Corrections and local criminal justice agencies.

The new crime proposed in the bill could result in additional costs of arresting, prosecuting, and sanctioning convicted violators of the bill's provisions. There are no data currently available that might predict the estimated number of annual violations.

House Bills 5751 and 5755

The bills would have an indeterminate impact on the Department of Corrections and local criminal justice agencies.

To the extent that the additional provisions and enhanced penalties resulted in an increase in convictions, and an increase in the use of sanctions, costs could increase. There are no data currently available that might predict the potential number of increased violations.

House Bill 5752

The bill would have an indeterminate, yet likely minimal fiscal impact on the Department of Corrections and local criminal justice agencies. The increased penalties in the bill could result in increased costs for sanctioning convicted violators, and the increased fines would result in additional revenue, depending on which sanctioning option judges would impose. While there are no data currently available that might predict the increased number of annual violations, in 1994, there were three convictions in circuit court for fraudulent use of a telephone credit card, all receiving a sentence of probation.

House Bills 5753 and 5754

The bills would have no fiscal impact on State or local government.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.