

House Bill 867

By: Representatives Golick of the 34<sup>th</sup>, Post 3 and Boggs of the 145<sup>th</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Chapter 5 of Title 46 of the Official Code of Georgia Annotated, relating to  
2 telephone and telegraph service, so as to revise provisions relating to avoiding or attempting  
3 to avoid charges for telecommunications service, use of assembly plans for devices for theft  
4 of telecommunications service or for concealing the origin or destination of any  
5 telecommunication, and seizure and disposal of devices, equipment, or any plan or  
6 instruction used for theft of telecommunications service; to make such provisions applicable  
7 to communication service, communication devices, and unlawful access devices; to increase  
8 penalties for criminal violations and remedies for plaintiffs in civil actions; to provide for  
9 inferences regarding the defendant's intent; to revise definitions; to provide for giving over  
10 certain seized devices or plans to the communication service provider; to provide for related  
11 matters; to repeal conflicting laws; and for other purposes.

12 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

13 style="text-align:center">**SECTION 1.**

14 Chapter 5 of Title 46 of the Official Code of Georgia Annotated, relating to telephone and  
15 telegraph service, is amended by striking Code Section 46-5-2, relating to avoiding or  
16 attempting to avoid charges for telecommunication service, and inserting in lieu thereof the  
17 following:

18 "46-5-2.

19 (a) It shall be unlawful for any person to avoid or attempt to avoid or to cause another to  
20 avoid the lawful charges, in whole or in part, for any ~~telecommunication~~ communication  
21 service as defined in subsection (a) of Code Section 46-5-3 ~~or for the transmission of a~~  
22 ~~message, signal, or other communication by telephone or telegraph or over~~  
23 ~~telecommunication or telegraph facilities~~ by the use of any fraudulent scheme, means, or  
24 method, or by the use of any communication device or ~~telecommunication~~ access  
25 device as defined in subsection (a) of Code Section 46-5-3 or other mechanical, electric,  
26 or electronic device; provided, however, that this Code section and Code Sections 46-5-3

1 and 46-5-4 shall not apply to amateur radio repeater operation involving a dial  
2 interconnect.

3 (b)(1) Except as otherwise provided in paragraph (2) of this subsection, any person who  
4 violates this Code section shall be guilty of a misdemeanor; provided, however, that upon  
5 conviction of a second or subsequent such offense under this Code section, the defendant  
6 commits a felony and shall be punished by a fine of not more than \$5,000.00 or  
7 imprisoned for not less than one nor more than five years, or both.

8 (2)(A) Any person who violates this Code section by avoiding or causing another to  
9 avoid lawful charges for any ~~telecommunication~~ communication service which lawful  
10 charges are in an amount in excess of \$10,000.00 or if the offense involves at least five  
11 but not more than 25 communication devices or at least five but not more than 25  
12 unlawful access devices commits a felony and shall be punished by a fine of not more  
13 than \$5,000.00 or imprisoned for not less than one nor more than five years, or both.

14 (B) Any person who violates this Code section by avoiding or causing another to avoid  
15 lawful charges for any communication service commits a felony if the offense involves  
16 more than 25 communication devices or more than 25 unlawful access devices, and  
17 shall be punished by a fine of not less than \$5,000.00 or imprisoned for not less than  
18 one nor more than ten years, or both.

19 (3) The court may, in addition to any other sentence authorized by law, order a person  
20 convicted under this Code section to make restitution for the offense.

21 (4) For purposes of all criminal penalties or fines established for violations of this Code  
22 section, the prohibited activity established by this Code section as it applies to each  
23 communication device or unlawful access device shall be deemed a separate offense.  
24 Each day a person is in violation of this Code section also constitutes a separate offense.

25 (5) For purposes of imposing fines upon conviction of a defendant for an offense under  
26 this Code section, all fines shall be imposed as authorized by law for each day a person  
27 is in violation of this Code section and for each communication device or unlawful access  
28 device involved in the violation.

29 (6) Any person, corporation, or other entity aggrieved by a violation of this Code section  
30 may, in a civil action in any court of competent jurisdiction, obtain appropriate relief,  
31 including preliminary and other equitable or declaratory relief, compensatory and  
32 punitive damages, reasonable investigation expenses, cost of suit, and reasonable  
33 attorney's fees. The court may order injunctive relief without requiring proof that the  
34 plaintiff lacks an adequate remedy at law and has suffered or will suffer actual damages  
35 or irreparable harm.

36 ~~(5)~~(7) Compensatory damages awarded by a court in a civil action under this Code  
37 section shall be computed as one of the following:

1 (A) At any time prior to the entering of a final judgment, the complaining party may  
 2 elect to recover the actual damages suffered by the complaining party as a result of the  
 3 violation of this Code section and any profits of the violator that are attributable to the  
 4 violation and are not taken into account in computing the actual damages. Actual  
 5 damages include the retail value of any communication services illegally available to  
 6 those persons to whom the violator directly or indirectly provided or distributed any  
 7 communication device or unlawful access device. In proving actual damages, the  
 8 complaining party shall be required to prove only that the violator manufactured,  
 9 distributed, or sold any communication device or unlawful access device, but shall not  
 10 be required to prove that such device was actually used in violation of this Code  
 11 section. In determining the violator's profits, the complaining party shall be required  
 12 to prove only the violator's gross revenue, and the violator shall be required to prove  
 13 his or her deductible expenses and the elements of profit attributable to factors other  
 14 than the violation;

15 (B) In any case where a violator commits more than one violation of this Code section,  
 16 the complaining party, at any time before final judgment is entered, may elect to  
 17 recover, in lieu of actual damages, an award of statutory damages for all violations  
 18 involved in the action in a sum not less than ~~\$250.00~~ \$2,500.00 nor more than  
 19 \$10,000.00 per violation. The amount of statutory damages shall be determined by the  
 20 court as the court considers just; or

21 (C) In any case where the court finds that any of the violations of this Code section  
 22 were committed willfully and for the purposes of commercial advantage or financial  
 23 gain, the court in its discretion may increase the award of statutory damages, ~~whether~~  
 24 ~~actual or statutory~~, by an amount of not more than \$50,000.00; or for each  
 25 communication device or unlawful access device involved in the action and for each  
 26 day the defendant was in violation of this Code section.

27 ~~(D) Nothing in this paragraph shall prohibit the recovery of other types of damages~~  
 28 ~~otherwise authorized under paragraph (4) of this subsection.~~

29 (c) In any criminal prosecution or civil action under this Code section, any of the following  
 30 shall create an inference that the defendant intended to violate this Code section:

31 (1) The presence of an unauthorized connection of any kind between the defendant's  
 32 property or the premises occupied by the defendant and any network, system, or facility  
 33 owned or operated by the communication service provider; or

34 (2) The presence on the defendant's property or the premises occupied by the defendant,  
 35 or in the defendant's possession or control, of any communication device which is  
 36 connected in such a manner as would permit the unauthorized receipt, interception,  
 37 acquisition, decryption, transmission, or retransmission of a communication service.

1 Where a communication service provider notifies the owner or the occupant of the  
 2 premises of the circumstances described in paragraph (1) or (2) of this subsection and the  
 3 same circumstances are found to exist within a reasonable time thereafter, an inference  
 4 shall be created that the owner or occupant acted willfully in violation of this Code  
 5 section."

## 6 SECTION 2.

7 Said chapter is further amended by striking Code Section 46-5-3, relating to making,  
 8 possessing, selling, allowing use of, or publishing assembly plans for devices for theft of  
 9 telecommunications service or for concealing the origin or destination of any  
 10 telecommunication, and inserting in lieu thereof the following:

11 "46-5-3.

12 (a) As used in this ~~Code section~~ article, the term:

13 (1) 'Communication device' means:

14 (A) Any type of electronic mechanism, transmission lines, cables, or connections and  
 15 appurtenances thereto, instrument, device, machine, equipment, technology, or software  
 16 which is capable of intercepting, transmitting, retransmitting, acquiring, decrypting, or  
 17 receiving any communication service, including the receipt, acquisition, interception,  
 18 transmission, retransmission, or decryption of any communication service provided by  
 19 or through any cable television, information, broadband, fiber optic, telephone, satellite,  
 20 microwave, data transmission, radio, Internet based or wireless distribution network,  
 21 system, or facility; and

22 (B) Any component of the items listed in subparagraph (A) of this paragraph, including  
 23 any cable modem, computer circuit, splitter, connectors, switches, transmission  
 24 hardware, electronic serial number, mobile identification number, personal  
 25 identification number, security module, point of deployment ('POD') module,  
 26 conditional access card, smart card, software, computer chip, electronic mechanism, or  
 27 any other component, accessory, or part of any communication device which is capable  
 28 of facilitating the interception, transmission, retransmission, decryption, acquisition, or  
 29 reception of any communication service.

30 (2) 'Telecommunication 'Communication service' means any service lawfully provided  
 31 for a charge or compensation to facilitate the origination, transmission, emission, or  
 32 reception of signs, signals, data, writings, images, sounds, or intelligence of any nature  
 33 by telephone or telephone service, including public pay telephones, ~~or cable television~~  
 34 service (CATV), including cellular or other wireless telephones, ~~wire, radio,~~  
 35 electromagnetic, photoelectric, or photo-optical system and any other service lawfully  
 36 provided by any radio, fiber optic, photo-optical, electromagnetic, photoelectric, cable

1 television, broadband, information, satellite, microwave, data transmission, wireless or  
 2 Internet based distribution system, network, or facility, including, but not limited to, any  
 3 and all electronic, data, video, audio, Internet access, telephonic, microwave, and radio  
 4 communications, transmissions, signals, and services lawfully provided directly or  
 5 indirectly by or through any of such systems, networks, or facilities.

6 ~~(2)~~(3) 'Telecommunication Communication service provider' means a person,  
 7 corporation, or other entity which provides a telecommunication service, ~~including public~~  
 8 ~~pay telephones and including a cellular, paging, or other wireless communications~~  
 9 ~~company or other person, corporation, or entity which, for a fee, supplies the facility, cell~~  
 10 ~~site, mobile telephone switching office, or other equipment or telecommunication service~~  
 11 ~~whether directly or indirectly as a reseller, including, but not limited to, a cellular, paging,~~  
 12 ~~or other wireless communications company or other person, corporation, or entity which,~~  
 13 ~~for a fee, supplies the facility, cell site, mobile telephone switching office, or other~~  
 14 ~~equipment or communication service; any person, corporation, or entity owning or~~  
 15 ~~operating any fiber optic, photo-optical, electromagnetic, photoelectronic, cable~~  
 16 ~~television, broadband, information, satellite, Internet based, telephone, wireless,~~  
 17 ~~microwave, data transmission, or radio distribution system, network, or facility; and any~~  
 18 ~~person or entity providing any communication service directly or indirectly by or through~~  
 19 ~~any such distribution systems, networks, or facilities.~~

20 (3) 'Unlawful telecommunication device' means any telecommunications device that is  
 21 capable, or has been illegally altered, modified, or programmed or reprogrammed alone  
 22 or in conjunction with another access device or other equipment so as to be capable, of  
 23 acquiring or facilitating the acquisition of any electronic serial number, mobile  
 24 identification number, personal identification number, or any telecommunication service  
 25 without the consent of the telecommunication service provider or without the consent of  
 26 the legally authorized user of the telecommunication device. The term includes  
 27 telecommunications devices altered to obtain service without the consent of the  
 28 telecommunication service provider, tumbler phones, counterfeit or clone microchips,  
 29 scanning receivers of wireless telecommunication service of a telecommunication service  
 30 provider, and other instruments capable of disguising their identity or location or of  
 31 gaining access to a communications system operated by a telecommunication service  
 32 provider. Such term shall not apply to any device operated by a law enforcement agency  
 33 or telecommunication service provider in the normal course of its activities.

34 (4) 'Manufacture, assembly, or development of a communication device' means to make,  
 35 produce, develop, or assemble a communication device or to knowingly assist others in  
 36 those activities.

1 (5) 'Manufacture, assembly, or development of an unlawful access device' means to  
 2 make, develop, produce, or assemble an unlawful access device or modify, alter,  
 3 program, or reprogram any instrument, device, machine, equipment, technology, or  
 4 software so that it is capable of defeating or circumventing any technology, device, or  
 5 software that is used by the provider, owner, or licensee of a communication service or  
 6 of any data, audio or video services, programs, or transmissions, to protect any such  
 7 communication, data, audio or video services, programs, or transmissions from  
 8 unauthorized receipt, interception, acquisition, access, decryption, disclosure,  
 9 communication, transmission, or retransmission or to knowingly assist others in those  
 10 activities.

11 (6) 'Unlawful access device' means any communication device, instrument, machine,  
 12 equipment, technology, or software which is primarily designed, developed, assembled,  
 13 manufactured, sold, distributed, possessed, used, or offered, promoted, or advertised for  
 14 the purpose of defeating or circumventing any technology, device, or software or any  
 15 component or part thereof that is used by the provider, owner, or licensee of any  
 16 communication service or of any data, audio or video services, programs, or  
 17 transmissions, to protect any such communication, data, audio or video services,  
 18 programs, or transmissions from unauthorized receipt, acquisition, interception, access,  
 19 decryption, disclosure, communication, transmission, or retransmission.

20 (7) 'Publish' means the communication or dissemination of information to one or more  
 21 persons, either orally, in person or by telephone, radio, or television, or via the Internet,  
 22 or in a writing of any kind, including, without limitation, a letter or memorandum,  
 23 circular or handbill, newspaper or magazine article, or book, or electronically, including,  
 24 without limitation, by computer, electronic mail, or paging device.

25 (b) It shall be unlawful for any person knowingly to:

26 (1) Make, or possess, manufacture, develop, assemble, distribute, transfer, import into  
 27 this state, license, lease, sell or offer, promote, or advertise for sale, use, or distribution,  
 28 or publish any advertisement for any unlawful telecommunication communication device  
 29 designed, adapted, or used:

30 (A) For commission of a theft of ~~telecommunication~~ communication service in  
 31 violation of Code Section 46-5-2 or to acquire or facilitate the receipt, interception,  
 32 disruption, transmission, retransmission, decryption, or acquisition of  
 33 telecommunications a communication service without the express consent or  
 34 authorization of the ~~telecommunication~~ communication service provider; or

35 (B) To conceal, or to assist another to conceal, from any ~~supplier of telecommunication~~  
 36 communication service provider or from any lawful authority the existence or place of  
 37 origin or of destination of any ~~telecommunication~~ communication;

1 (2) Sell, give, transport, or otherwise transfer to another, or offer or advertise for sale,  
 2 any; ~~unlawful telecommunication device, or plans or instructions for making or~~  
 3 ~~assembling the same, under circumstances evincing an intent to use or employ such~~  
 4 ~~unlawful telecommunication device; or to allow such unlawful telecommunication device~~  
 5 ~~to be used or employed for a purpose described in paragraph (1) of this subsection or~~  
 6 ~~knowing or having reason to believe that the same is intended to be so used or that the~~  
 7 ~~aforesaid plans or instructions are intended to be used for making or assembling such~~  
 8 ~~unlawful telecommunication device; or~~

9 (A) Communication device, or plans or instructions for making or assembling any  
 10 communication device, under circumstances evincing an intent to use or employ such  
 11 communication device or such plans or to allow such communication device or such  
 12 plans to be used or employed for a purpose described in paragraph (1) of this subsection  
 13 or knowing or having reason to believe that such communication device or such plans  
 14 are intended to be so used; or

15 (B) Material, including hardware, cables, tools, data, computer software, or other  
 16 information or equipment, knowing that the purchaser or a third person intends to use  
 17 the material in the manufacture, assembly, or development of a communication device  
 18 for a purpose prohibited by this Code section, or for use in the manufacture, assembly,  
 19 or development of an unlawful access device;

20 (3) Possess, use, manufacture, assemble, develop, distribute, import into this state,  
 21 license, transfer, sell, lease or offer, promote, or advertise for sale, use, or distribution,  
 22 or publish any advertisement for, any unlawful access device;

23 ~~(3)~~(4) Publish plans or instructions for making, or assembling, or using any unlawful  
 24 telecommunication communication device: for a purpose described in paragraph (1) of  
 25 this subsection, or for making, assembling, or using any unlawful access device;

26 (5) Obtain the use of a communication service by false pretense or representation with  
 27 intent to cheat or defraud the communication service provider; or

28 (6) Assist others in committing any of the acts prohibited by this Code section.

29 (c)(1) Any person who violates this Code section shall be guilty of a felony and, upon  
 30 conviction thereof, shall be punished by a fine of not more than \$1,000.00 or by  
 31 imprisonment in the penitentiary for not less than one nor more than five years, or both;  
 32 provided, however, that upon conviction of a second or subsequent such offense under  
 33 this Code section, the defendant shall be punished by a fine of not more than \$5,000.00  
 34 or imprisoned for not less than three nor more than ten years, or both.

35 (2) The court may, in addition to any other sentence authorized by law, order a person  
 36 convicted under this Code section to make restitution for the offense.

1 (3) Any person, corporation, or other entity aggrieved by a violation of this Code section  
2 may, in a civil action in any court of competent jurisdiction, obtain appropriate relief,  
3 including preliminary and other equitable or declaratory relief, compensatory and  
4 punitive damages, reasonable investigation expenses, cost of suit, and reasonable  
5 attorney's fees. The court may order injunctive relief without requiring proof that the  
6 plaintiff has suffered or will suffer actual damages or irreparable harm or that the plaintiff  
7 lacks an adequate remedy at law.

8 (4) For purposes of all criminal penalties or fines established for violations of this Code  
9 section, the prohibited activity established in this Code section as it applies to each  
10 communication or unlawful access device shall be deemed a separate offense.

11 (5) For purposes of imposing fines upon conviction of a defendant for an offense under  
12 this Code section, all fines shall be imposed as authorized by law for each day a person  
13 is in violation of this Code section and for each communication device or unlawful access  
14 device involved in the violation.

15 (6) An offense or violation under this Code section may be deemed to have been  
16 committed at either the place where the defendant manufactures, develops, or assembles  
17 a communication device or unlawful access device or assists others in doing so, or the  
18 places where the communication device or unlawful access device is sold or delivered to  
19 a purchaser or recipient. It shall be no defense to a violation of this Code section that  
20 some of the acts constituting the violation occurred outside of the State of Georgia.

21 ~~(4)~~(7) Compensatory damages awarded by a court in a civil action under this Code  
22 section shall be computed as one of the following:

23 (A) At any time prior to the entering of a final judgment, the complaining party may  
24 elect to recover the actual damages suffered by the complaining party as a result of the  
25 violation of this Code section and any profits of the violator that are attributable to the  
26 violation and are not taken into account in computing the actual damages. Actual  
27 damages include the retail value of any communication services illegally available to  
28 those persons to whom the violator directly or indirectly provided or distributed any  
29 communication device or unlawful access device. In proving actual damages, the  
30 complaining party shall be required to prove only that the violator manufactured,  
31 distributed, or sold any communication device or unlawful access device, but shall not  
32 be required to prove that such a device was actually used in violation of this Code  
33 section. In determining the violator's profits, the complaining party shall be required  
34 to prove only the violator's gross revenue, and the violator shall be required to prove  
35 his or her deductible expenses and the elements of profit attributable to factors other  
36 than the violation;

1 (B) In any case where a violator commits more than one violation of this Code section,  
 2 the complaining party, at any time before final judgment is entered, may elect to  
 3 recover, in lieu of actual damages, an award of statutory damages of not less than  
 4 ~~\$250.00~~ \$2,500.00 nor more than \$10,000.00 for each ~~unlawful telecommunications~~  
 5 communication device or unlawful access device involved in the action. The amount  
 6 of statutory damages shall be determined by the court as the court considers just; or

7 (C) In any case where the court finds that any of the violations of this Code section  
 8 were committed willfully and for the purposes of commercial advantage or financial  
 9 gain, the court in its discretion may increase the award of statutory damages by an  
 10 amount of not more than \$50,000.00 for each ~~unlawful telecommunication~~  
 11 communication device or unlawful access device involved in the action and for each  
 12 day the defendant was in violation of this Code section. ~~or~~

13 ~~(D) Nothing in this paragraph shall prohibit the recovery of other types of damages~~  
 14 ~~otherwise authorized under paragraph (3) of this subsection.~~

15 (d) In any criminal prosecution or civil action under this Code section, any of the  
 16 following shall create an inference that the defendant intended to violate this Code section:

17 (1) The defendant's possession of five or more communication devices or unlawful  
 18 access devices for any purpose prohibited by this Code section;

19 (2) The existence on the defendant's property or the premises occupied by the defendant  
 20 of any connection, wire conductor, microwave antenna, lockbox key, pedestal key,  
 21 lockbox tool, or any device whatsoever, or connection in any pedestal or lockbox, which  
 22 is connected in such a manner as would permit the receipt of a communication service  
 23 without such service being reported for payment to and specifically authorized by the  
 24 communication service provider; or

25 (3) The giving of a false name or identity to a communication service provider in order  
 26 for the communication service provider to provide a communication service to the  
 27 defendant's property or the premises occupied by the defendant.

28 Where a communication service provider notifies the owner or the occupant of the  
 29 premises of the circumstances described in paragraph (1), (2), or (3) of this subsection and  
 30 the same circumstances are found to exist within a reasonable time thereafter, an inference  
 31 shall be created that the owner or occupant acted willfully in violation of this Code  
 32 section."

### 33 SECTION 3.

34 Said chapter is further amended by striking Code Section 46-5-4, relating to seizure and  
 35 disposal of devices, equipment, or any plan or instruction used for theft of  
 36 telecommunications service, and inserting in lieu thereof the following:

1 "46-5-4.  
2 Any ~~unlawful telecommunication~~ communication device or unlawful access device as  
3 defined in subsection (a) of Code Section 46-5-3 or other instrument, apparatus, equipment,  
4 or device, or any plan or instruction therefor, referred to in Code Section 46-5-3 may be  
5 seized by court order, or under a search warrant issued by a judge or a magistrate, or  
6 incident to a lawful arrest. Upon the conviction of any person for a violation of any  
7 provisions of Code Section 46-5-2 or 46-5-3, such instrument, apparatus, equipment,  
8 device, plan, or instruction shall be either destroyed as contraband by the sheriff of the  
9 county in which such person was convicted or ~~turned~~ given over to the ~~telephone company~~  
10 ~~or telecommunication~~ communication service provider in whose ~~territory~~ service area such  
11 instrument, apparatus, equipment, device, plan, or instruction was seized."

12 **SECTION 4.**

13 All laws and parts of laws in conflict with this Act are repealed.