



**House
Legislative
Analysis
Section**

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**CYBER COURTS/ILLCIT TELECOM
ACTIVITIES**

**House Bill 6447 as enrolled
Public Act 663 of 2002
Second Analysis (1-23-03)**

**Sponsor: Rep. Marc Shulman
House Committee: Civil Law and the
Judiciary
Senate Committee: Judiciary**

THE APPARENT PROBLEM:

Public Act 262 of 2001 amended the Revised Judicature Act to create a state “cyber court” for cases involving technology and high-tech businesses, where the cases are tried via computer rather than in a physical courtroom. When it was enacted, it was said that the act would make Michigan the leader in applying information technology to a critical part of the judicial system, namely, business litigation: briefs may be filed online; evidence viewed by streaming video; oral arguments delivered by teleconferencing; and conferences held by e-mail. Lawyers do not have to be in Michigan or even be licensed to practice in the state. Cases can be “heard” at any time, and judges are being trained to understand the complex issues involved in technology disputes.

The cyber court appears to have been enthusiastically received. For example, in testimony before the House committee, the legal counsel to the Michigan Supreme Court acknowledged its benefits: Normally, he said, much of an attorney’s time is consumed in going to court, and waiting there. This, of course, runs up the cost of doing business. However, he recently had the opportunity to take a deposition from a defendant by means of television. That procedure lasted only one hour. It has been generally recognized for years that getting through the state’s courts often takes too much time and money. Now, the hope is that the cyber court may ease these problems.

However, when the cyber court legislation was introduced, it was intended that the proposed cyber court have a limited scope – cases involving technology and high-tech business—thought it was intended that its scope would be extended as the state gained experience in conducting such a court. Tort actions, including personal injury cases; landlord/tenant matters; employee/employer disputes;

administrative agency, tax, zoning, and other appeals; proceedings to enforce any type of judgment; and criminal matters were excluded from the court’s jurisdiction. However, by excluding all tort actions, it has now been revealed that cases which should rightfully be heard by the cyber court were inadvertently left out, under Public Act 262. Consequently, legislation has been introduced to more clearly define the types of cases the court may or may not address. In addition, the proposed legislation would resolve county clerks’ concerns over their role in cyber courts. The legislation would also clarify how a party can challenge the cyber court’s jurisdiction and have an action removed to circuit court.

In a separate matter, as the Motion Picture Association of America explains on the anti-piracy section of its web site, the motion picture industry has long relied on “a carefully planned sequential release of movies, first releasing feature films in cinemas, then to home video, and then to other media”. Planning this sequential release also involves calculating when to release films into foreign markets, which Hollywood relies on to supplement domestic revenues. More recently, HBO and other producers of original cable programming have begun to sequentially release popular series such as “The Sopranos” and “Sex and the City” on videocassette tape and digital video disc (DVD) so that people who do not subscribe to HBO can watch such programs too. Industry officials argue that sequential release benefits studios by increasing their return (or minimizing their loss) on their investments and that consumers benefit by having additional options for the price and conditions of viewing. Further, industry officials argue, video pirates upset this fine balance: for instance, according to the MPAA, *Star Wars: Episode 1 – The Phantom Menace* lost sales in the Asian market because pirates

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used digital camcorders to record the film as it played in U.S. theaters and made copies widely available before the film even reached Asian cinemas. While such free-riding clearly hurts the studios it is the honest ticket-buying filmgoers who end up paying for the costs of piracy through increased ticket prices.

With the growth of broadband service and digitized programming, many people fear that pirating—especially digital pirating—of movies, cable television programs, and other audio-visual “content” will become increasingly common and increasingly costly. Because the thousandth or ten-thousandth digital copy of a movie or television program is as pure as the original, the quality of the copy surpasses that of analog copies. Also, someone who gets a clean copy of a movie or cable program can upload the content and make it available to anyone with a web connection. Although downloading a two-hour movie with a dial-up connection can take twelve hours or longer, someone with a high-speed connection can download it in a far shorter period of time.

While copyright is a matter of federal law, Michigan has established civil and criminal penalties for the manufacture and use of devices designed to help people illicitly obtain cable television and other telecommunications content. Some people who use these devices to circumvent telecommunications service providers do so with no intent to copy and distribute the films, shows, or other content to others. However, others do intend to do so, and so motion picture industry officials and others concerned with digital piracy see prohibitions against the manufacture and use of devices such as descramblers, smart cards, or cable modems used to view cable television without receiving authorization from the cable company as one battle within the larger campaign. It has been suggested that provisions in the RJA dealing with telecommunications theft and the illicit use of telecommunications access devices be updated to encompass a broader range of ongoing and anticipated activities, especially those involving digital technologies.

THE CONTENT OF THE BILL:

House Bill 6447 would amend the Revised Judicature Act to establish the county clerk of the county in which the cyber court sits as the clerk for the cyber court and to clarify which types of actions would be under the cyber court’s jurisdiction. The bill would also amend the act to allow a telecommunications service provider to seek certain civil remedies in the case of a violation of provisions of the penal code

prohibiting the use of telecommunications devices to illicitly obtain telecommunications services, or a violation of related provisions in the RJA. The bill’s provisions dealing with the cyber court and the illicit use of telecommunications devices are described below.

Cyber Court. Chapter 80 of the RJA specifies that a “cyber court” is a court of record with concurrent jurisdiction over business and commercial actions involving more than \$25,000. Among other provisions, the stated purpose of the cyber court is to “allow disputes between business and commercial entities to be resolved with the expertise, technology, and efficiency required by the information age economy.”

At present, the act specifies that the supreme court is to assign the clerk of the cyber court. House Bill 6447 would specify, instead, that the county clerk of the county in which the cyber court sits would be the clerk for the cyber court, and that he or she would deputize staff designated by the supreme court to receive all pleadings filed in the cyber court.

Business and Commercial Enterprises. The bill would define “business enterprise” to mean a sole proprietorship, partnership, limited partnership, joint venture, limited liability company, limited liability partnership, for-profit or not-for-profit corporation or professional corporation, business trust, real estate investment trust, or any other entity in which a business may lawfully be conducted within its jurisdiction. The definition would exclude an ecclesiastical or religious organization.

Cyber Court Jurisdiction. Currently, the act limits “business and commercial actions” to disputes arising between business owners, associates, or competitors or between a business entity and its customers. These include, but are not limited to, disputes involving information technology, software, or website development; those involving the internal organization of business entities and the rights or obligations of shareholders and others; those arising out of contractual agreements or other business dealings; those arising out of commercial transactions; those arising out of business or commercial insurance policies and those involving commercial real property other than landlord/tenant disputes. The bill would include landlord/tenant disputes within the cyber court’s jurisdiction.

The bill would redefine “business and commercial actions.” (The bill would refer to “business or commercial *disputes*,” rather than “business or

commercial actions.”) Further, the bill would expand the types of business or commercial disputes for which actions could be brought to include any of the following:

- An action in which all of the parties were business enterprises.
- An action in which one or more of the parties was a business enterprise and the other parties were its or their present or former owners, managers, shareholders, members, directors, officers, agents, employees, suppliers, customers, or competitors, and the claims arose out of those relationships.
- An action in which one of the parties was a nonprofit organization and the claims arose out of organizational structure, governance, or finances.
- An action involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise.

Actions excluded from Cyber Court Jurisdiction.

The act currently excludes the following types of disputes: tort actions, including, but not limited to, personal injury, wrongful death, or medical malpractice matters; landlord/tenant matters; employee/employer disputes; administrative agency, tax, zoning, and other appeals; criminal matters; and proceedings to enforce judgments of any type. House Bill 6447 would specify, instead, that the following types of actions would be excluded from business or commercial disputes:

- Personal injury actions involving only physical injuries to one or more individuals, including wrongful death and malpractice actions against any health care provider.
- Product liability actions in which any of the claimants were individuals.
- Matters within the Family Division of the Circuit Court’s jurisdiction.
- Proceedings under the Probate Code (MCL 710.21 to 712A.21).
- Proceedings under the Estates and Protected Individuals Code (MCL 700.1101 to 700.8102).
- Criminal matters.
- Condemnation matters.

- Appeals from lower courts or any administrative agency.

- Proceedings to enforce judgments of any kind.

- Landlord-tenant matters involving only residential property.

Removal to Circuit Court. Currently, the act specifies that a defendant can have an action removed to circuit court within 14 days of the deadline for filing an answer to a complaint. House Bill 6447 would specify, instead, that a defendant in an action commenced in the cyber court, a plaintiff against whom a counterclaim was filed in that action, or any party added by motion of the original parties as a plaintiff, defendant, or third-party defendant, could cause the entire case to be transferred to the circuit court, in a county in which venue was proper, by filing a notice of transfer with the clerk of the cyber court within 28 days after the date on which the party had been served with the pleading that gave it the right to transfer. The bill would also specify that any determination by a cyber court judge made under the following provisions would be final and could not be reviewed or altered by the circuit court to which a case had been transferred:

- Within 14 days after the filing of an answer to a complaint or a motion by a defendant for summary disposition, whichever was earlier, the judge to whom the case had been assigned could make a determination, based solely upon the complaint and answer or the motion, whether the case was primarily a business or commercial dispute. If the judge determined that it was not, the court would have to notify the plaintiff of that decision, and the plaintiff would have 14 days after the court’s notification to transfer the case to circuit court in a county that had proper venue. If the plaintiff did not transfer the case to the circuit court, the judge of the cyber court could do so. Subject to the bill’s conditions for actions in which parties or claims may be added or deleted, if the judge determined that it was primarily a business or commercial dispute, the case would proceed in cyber court.

- If at the time of, or after the filing of, the defendant’s answer or motion for summary disposition, parties or claims were added or deleted, the judge to whom the case had been assigned would -- with 14 days after the answer or motion had been filed -- again make a determination, based solely upon the pleadings as they then existed, whether the case was then primarily a business or commercial dispute. Should the judge determine that it was not,

the court would have to notify the plaintiff of that decision, and the plaintiff would have 14 days after service of the court's notification to transfer the case to the circuit court in a county in which venue was proper. If the plaintiff did not transfer the case to the circuit court, the cyber court judge would have to do so. If the judge determined that it was primarily a business or commercial dispute, the case would proceed in cyber court. However, if parties or claims were later added or deleted, then the procedures outlined under the bill for those actions would apply.

- If a defendant in an action commenced in cyber court, a plaintiff against whom a counterclaim had been filed in such an action, or any party added by motion of the original parties as a plaintiff, defendant, or third-party defendant, transferred the action to the circuit court, or if it were determined that the case was not primarily a business or commercial dispute and was transferred to the circuit court, as provided under the bill, then the clerk of the cyber court would be required to forward to the circuit court, as a filing fee, a portion of the filing fee paid at the commencement of the action in the cyber court that was equal to the filing fee otherwise required in the circuit court.

Telecommunications. Chapter 29 of the RJA authorizes specific civil actions, including actions brought by a cable or satellite television provider to enjoin a person from “the unauthorized receipt of cable or satellite television service without the proper authorization, using an unauthorized device, making an unauthorized connection, or committing an act that would be in violation of section 540c of the Michigan penal code” (Section 540c of the penal code prohibits the manufacture and use of certain devices for specific purposes. For more see the House Legislative Analysis Section's second analysis of House Bill 6079, 2-4-03.) The bill would add a new section to the RJA permitting a telecommunications service provider to bring an action to enjoin a person from the unauthorized receipt of any telecommunications service, using an unlawful telecommunications access device, or the making of an unauthorized connection. The provider could seek one or more of the following:

- actual damages;
- exemplary damages of not more than \$1,000, unless the person's acts were for direct or indirect commercial advantage or financial gain, in which case exemplary damages of not more than \$50,000; and

- reasonable attorney fees and costs.

Violations of telecommunications provisions in penal code. A person injured by a violation of prohibitions set forth in sections of the penal code amended by House Bill 6079 could bring a civil action in any court of competent jurisdiction. The court could do any of the following:

- grant preliminary and final injunctions to prevent or restrain the violations;
- at any time while an action is pending, order the impounding (on the court's terms) of any telecommunications access device or unlawful telecommunications access device that was in the custody or control of the alleged violator and that the court had reasonable cause to believe was involved in the alleged violation;
- in its discretion, award reasonable attorney fees and costs, such as costs for investigation, testing, and expert witness fees;
- as part of a final judgment or decree finding a violation, order the modification or destruction of any telecommunications access device or unlawful telecommunications access device involved in the violation; and
- award damages, as described below.

If a person injured by a violation of those sections of the penal code brought a civil action, the court could award damages computed as one of the following upon the election of the complaining party at any time before the final judgment:

- the actual damages suffered by the complaining party as a result of the violation of “this section”— i.e., the section of the penal code being amended— and any profits of the violator that were attributable to the violation and were not taken into account in computing the actual damages; or
- damages of between \$250 and \$10,000 for each telecommunications access device or unlawful access device involved in the action, with the amount of the damages to be determined by the court.

If the court awarded actual damages, the complaining party would be required to prove only the violator's gross revenue, and the violator would be required to prove any deductible expenses and the elements of profit attributable to factors other than the violation. If the court awarded damages of between \$250 and \$10,000, and the court found that the violation was

committed willfully and for commercial advantage or financial gain, the court could increase the award of damages by an amount of not more than \$50,000 for each telecommunications access device or unlawful telecommunications access device involved in the action.

Other provisions. Under the bill, one could bring an action regardless of whether the telecommunications service provider or other injured party had suffered actual damages or whether the defendant had been convicted of any violations of the penal code. The bill would specify that such an action would be “in addition to any other penalties or remedies provided by law” and that each prohibited act would be a separate cause of action.

Definitions. “Unauthorized receipt of telecommunications service” would be defined as “the interception or receipt by any means of a telecommunications service over a telecommunications system without the specific authorization of the telecommunications service provider”.

“Unauthorized connection” would be defined as any physical, electrical, mechanical, acoustical, or other connection to a telecommunications system, without the specific authority of the telecommunications service provider. The bill would explicitly exclude from the definition of “unauthorized connection” all of the following:

- an internal connection made by a person within his or her residence for the purpose of receiving authorized telecommunications service;
- the physical connection of a cable or other device by a person located within his or her residence that was initially placed there by the telecommunications service provider; and
- the physical connection of a cable or other device by a person located within his or her residence that the person “had reason to believe” was an authorized connection.

MCL 600.2962a et al.

BACKGROUND INFORMATION:

The cyber court builds on other developments, both in society and in the judicial system: many courts allow for the electronic filing of initiatives, some use distance video for criminal arraignments, and many maintain judicial documents in some kind of electronically accessible form. The public, too, is

becoming more familiar with and increasingly uses information technology. Michigan took the additional step of creating a completely electronic business court.

The reason the state established a cyber court was due, in part, to rising caseloads and pressure to improve efficiency and effectiveness in court administration and the delivery of justice. The Internet already provides a wide range of legal information, and the benefit of having information provided this way is that it can be kept up-to-date as the law changes. The Internet can assist in legal research and can also assist in court processes generally, for example in trial preparation and in the courtroom throughout the hearing.

An abstract entitled “Cyber Courts: Using the Internet to Assist Court Processes” (Allison Stanfield, Queensland Law Foundation Technology Service Pty Ltd, Brisbane, Australia. April, 1998) investigates the ways in which the Internet can be used, and how technology can improve, a legal system. The author notes that lawyers are typically voracious users of documentation, and that documentation means volumes of text that require collecting, indexing, and a means of retrieval. All of this is made easier by using the Internet.

In the United Kingdom (U.K.), people will be able to use a cyber court service to make claims for amounts under 100,000 pounds (approximately \$170,000) by 2005. Rather than having to turn up at a court office during working hours to file several copies of a paper form, users will be able to log on to a secure website, register a user ID and password, and pay the court with a credit or debit card. The claim will be sent electronically to a central store, and claimants will receive a reference number to allow them to check the progress of their cases online. However, the claimant will still have to go to a courtroom if an online claim is disputed. The Health Service and the Inland Revenue in the U.K. are already online, and the government plans on having all services online by 2005.

FISCAL IMPLICATIONS:

The House Fiscal Agency reported that the “cyber court” provisions of the bill would have no fiscal impact on the state. (11-20-02) There is no fiscal information on the provisions dealing with illicit telecommunications devices.

ARGUMENTS:***For:***

When legislation establishing the state cyber court was enacted, some provisions were inadvertently left out of the act. Specifically, while it was intended that “slip and fall” type torts actions be excluded from the cyber court’s jurisdiction, it *was* intended that the cyber court have jurisdiction over several other types of torts between businesses. However, as written, the act is overly vague regarding which types of torts are included. (For example, the act specifies that the court’s jurisdiction is limited to “disputes arising between business owners, associates, or competitors, or between a business entity and its customers.”)

The act is even vague as to what constitutes a “business enterprise.” The bill would clarify these provisions, and also more clearly define actions that are excluded from the cyber court’s jurisdiction. The bill would also establish rules governing third party issues, for example how and when an action can be removed from cyber court to circuit court.

In addition, the bill would resolve an issue that has concerned county clerks. Reportedly, the county clerks were concerned about having a role in the cyber courts, since, under the act, the clerk was to be appointed by the supreme court. Negotiations were carried out with the supreme court, and it has been decided that the county clerk of the county in which the cyber court sits is to be the clerk for the cyber court, and he or she will deputize staff designated by the supreme court. Finally, the bill would delete the current provision that bars a determination made by a cyber court judge from being reviewed by an appeal court.

For:

House Bill 6447 would update and expand civil prohibitions and penalties to include the manufacture and use of computers and other digital technologies to circumvent legitimate means of obtaining telecommunications services. Because such devices help pirates obtain the content they want to sell to others and make it easier for individuals to obtain content from pirates, the bills will play a significant role in combating digital piracy. States have played an important role in combating traditional forms of cable theft and video piracy, and it is important that they have the tools they will need to keep up the fight in the digital age. Also, the bill would help create a secure environment for industry officials contemplating new means of making their products available to others. For instance, those who tout

broadband Internet service have long sung the praises of video-on-demand, where an individual can choose to watch a particular movie when she wants without having to leave her home. Before telecommunications companies make content available on a widespread basis, they want to be sure that their product is protected and that anyone who tries to obtain it without paying or receiving authorization will be punished.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.