

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4955/P1dn
RNK/MDK/MGG:jld:pg

February 21, 2002

Representative Montgomery:

One of the instructions for this draft under the heading of "Consumer Protection" relates to "contract acceptance." That instruction was made in two parts. After receiving some clarification from John Stolzenberg, I believe that the language created in this draft in proposed s. 100.207 (3m) satisfies the intent of both parts of the instruction. Please let me know if you believe any additional language is needed.

With regard to the instruction concerning encryption, I have placed the encryption prohibition in chapter 100 because I have assumed that you intended that this prohibition be administered by DATCP. If this was not your intention, please let me know and I will redraft accordingly.

It is possible that a court might conclude that the prohibition created in this draft relating to encryption is preempted by federal law. Generally, federal law preempts state law if Congress has expressed an intent to occupy a given field. The encryption issue concerns the fields of radio and television broadcasting and of copyright. Both of these complicated areas are heavily regulated under federal law. Furthermore, the FCC has been involved in the proposed license for an encryption technology for digital television known as DFAST (Dynamic Feedback Arrangement Scrambling Technique). This technology would enable the program provider to mark a given program with instructions about whether the program may be recorded. The recording device will not be able to record a program for which a "no copy" instruction is given. Because the FCC appears to support the right of a content provider to scramble or encrypt its programming, and because the broadcasting and copyright fields are heavily regulated under federal law, it is possible that a challenge to the prohibition created in this draft on preemption grounds might be successful. If you would like me to research this area in greater depth, please let me know.

Robin N. Kite
Legislative Attorney
Phone: (608) 266-7291
E-mail: robin.kite@legis.state.wi.us

Section VI (A) (1) (d) of the instructions refer to requiring a telecommunications provider to provide records regarding s. 100.207, stats., to the PSC, in addition to DATCP, without a subpoena. However, the PSC does not enforce s. 100.207. Therefore, I'm not sure why you want such a requirement, and I haven't included the requirement in this version of the draft.

I haven't determined yet whether the penalty provisions of ch. 196, stats., must be changed to apply to telecommunications providers who are subject to information collection authority that is created for the PSC in this bill. I will make appropriate changes in the next version of the draft.

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
E-mail: mark.kunkel@legis.state.wi.us

Doesn't DATCP already have inspection authority which does not require a subpoena under s. 93.15 (2) and under s. 100.18 (11) (c), which is cross-referenced in s. 100.207 (6) (b) 2.? Due to this, we have not "drafted" point VI A 1. d. which is found on page 10 of the Task Force Recommendations as it relates to DATCP authority.

Mary Gibson-Glass
Senior Legislative Attorney
Phone: (608) 267-3215