

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3332/1dn
RNK:hmh:jf

February 26, 2002

I have placed the encryption prohibition created in this draft in chapter 100 of the statutes. That chapter is generally administered by DATCP. If it was not your intention to have DATCP administer this prohibition, please let me know and I will redraft accordingly.

It is possible that a court might conclude that the encryption prohibition created in this draft 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.

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