

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 946

INTRODUCER: Senator Simmons

SUBJECT: Computer or Electronic Device Harassment

DATE: March 12, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Pre-meeting
2.			JU	
3.			ACJ	
4.			AP	
5.				
6.				

I. Summary:

SB 946 creates a third degree felony offense for non-consensual transmission or posting of nude photographs and videos that include personal identification information to websites or social networking services. The bill enhances the conduct to a second degree felony if the offender was 18 years of age or older and the victim was younger than 16 years of age. It also adds the new offense to the offenses for which a court must issue a no-contact order to a defendant pursuant to s. 921.244, F.S.

This bill creates section 847.0042 of the Florida Statutes. The bill substantially amends section 921.0042 of the Florida Statutes.

II. Present Situation:

It has become fairly common to hear about people whose lives are disrupted because embarrassing pictures or other information is published on the Internet. In many cases, the pictures or information either originated when the aggrieved person was immature or in circumstances when they intended it to remain private. This problem often takes the form of what has been termed "revenge porn," which is characterized by the publishing on the Internet of a nude or semi-nude photograph or video that was originally intended to be kept private between two people. This occurred recently to a young woman in Brevard County whose ex-boyfriend posted nude photographs and videos of her online along with her name, e-mail address, and city where she lived. The woman is often embarrassed because the pictures have been seen by friends

and co-workers. Some victims of such activity have been so emotionally affected that they have committed or attempted suicide.¹

In many cases, the embarrassing photos or videos are posted on a website that is specifically designed to provide a forum for such activity. These websites generally do not create their own content, but allow persons to post content to the site after the person has agreed to certain terms and conditions.² Section 230 of the Communications Decency Act of 1996 protects website hosts from being considered the publisher or speaker of materials posted by third parties if the material is not illegal, such as child pornography.³ This provision was applied by a federal appellate court to protect Yahoo! from a lawsuit for failure to remove nude pictures and personal identification information (PII) from a personal profile page that appeared to belong to an Oregon woman. As in most such cases, the false profile page had been created by the women's vengeful ex-boyfriend.⁴ Currently, a group including dozens of Texas women are pursuing a lawsuit seeking damages against a revenge porn website operator in an attempt to pierce the protections provided by the Communications Decency Act.⁵

McAfee, an Internet security provider, recently published the results of a survey exploring the connection between romantic breakups and loss of privacy online. Among other results, the survey found that 1 in 10 ex-partners have threatened to expose risqué photos online, and that these threats were carried out nearly 60 percent of the time. Men reported being threatened with such exposure more often than women, and also reported that a higher proportion of the threats were carried out.⁶

In Florida, there are no criminal laws that prohibit posting pictures of a nude adult person on the Internet for viewing by other adults if the picture was taken with the knowledge and consent of the person. However, in some circumstances posting such pictures could be an element of the offenses of stalking (s. 784.048, F.S.), or extortion (s. 836.05, F.S.). Posting a picture that depicts nudity of a child may be punishable as a second-degree felony or a third-degree felony under chs. 827 or 847, F.S.

Regardless of whether accompanied by other material, s. 817.568(4), F.S., prohibits the non-consensual use of a person's personal identification information to harass that person. This offense of harassment by use of personal identification information is a misdemeanor of the first degree.

¹ See <http://www.wftv.com/news/news/local/9-investigates-issue-nude-photos-posted-online-wit/nWgdb/> (last viewed March 13, 2013).

² The website host typically derives profit from advertising revenue and, in some cases, from charging a fee to remove the offending material.

³ The relevant portion of the Act states: *No provider or user of an interactive computer service shall be treated as the publisher or speaker or any information provided by another information content provider.*

⁴ See *Barnes v. Yahoo, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

⁵ See <http://abcnews.go.com/blogs/headlines/2013/01/womens-outrage-after-ex-boyfriends-post-nude-photos/> (last viewed on March 13, 2013); see also <http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php> (last viewed on March 13, 2013).

⁶ <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx> (last viewed on March 13, 2013).

III. Effect of Proposed Changes:

The bill creates s. 847.0042, F.S., to specifically address the non-consensual transmission or posting of nude photographs and videos that include personal information to websites or social networking services. Currently, it may be possible to prosecute such behavior under s. 817.568(4), F.S., as a first degree misdemeanor for harassment by use of personal identification information. If supported by additional facts, such actions might also be prosecuted as a felony if it includes the elements of crimes such as stalking (s. 784.048, F.S.), extortion (s. 836.05, F.S.), or an offense against a child under chs. 827 or 847, F.S.

Specifically, the bill prohibits a person from knowingly using a computer or other device capable of electronic data transmission or distribution to:

- transmit or post to a website or any other social networking service, or cause to be posted to a website or any other social networking service;
- any photograph or video of an individual which depicts nudity⁷ and contains:
 - any of the depicted individual's PII,⁸ or
 - counterfeit or fictitious information purporting to be such personal identification information;⁹
- without first obtaining the depicted person's written consent;
- unless the victim was photographed or videotaped in public and a lack of objection to the photography or videotaping could reasonably be implied by the victim's conduct.

The bill provides that the offense is committed in Florida if any conduct that is an element of the offense is committed in this state. While that is a common standard for computer crimes, the bill attempts to extend the reach of jurisdiction by also stating that the offense is committed in

⁷ The following definition of "nudity" in s 847.001(9), F.S., would be applicable to the bill: " 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding."

⁸ The bill incorporates the definition of PII from s. 817.568(1)(f), F.S.:

"Personal identification information" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

1. Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
2. Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
3. Unique electronic identification number, address, or routing code;
4. Medical records;
5. Telecommunication identifying information or access device; or
6. Other number or information that can be used to access a person's financial resources.

⁹ Although it is not incorporated by reference in the bill, s. 817.568(1)(g), F.S., defines "counterfeit or fictitious personal identification information" to mean "counterfeit, fictitious, or fabricated information in the similitude of the data outlined in paragraph (f) that, although not truthful or accurate, would in context lead a reasonably prudent person to credit its truthfulness and accuracy."

Florida if any harm to the depicted person, including harm to the depicted person's privacy interests, occurs within this state.

Section 2 of the bill adds the new offense to the list of offenses for which a court must issue a no-contact order to a defendant pursuant to s. 921.244, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill could be subject to constitutional challenge on grounds of being overbroad. An example of potential overbroad application of the bill's provisions is that it would be a second degree felony for parents to post a picture of their baby to Facebook if the baby's buttocks were not covered and the post included the baby's name. In addition, some commenters have expressed concern that posting a picture that includes a named person standing next to a classic nude painting could subject the person posting the picture to a third-degree felony charge. Some of these concerns might be cured by rewording and by including a requirement that the transmission or posting be done for the purpose of harassment.

The bill could also be subject to constitutional challenge as being void for vagueness. An example of this concern would be the difficulty in some cases of determining whether there was consent as indicated by "lack of objection to the photography or videotaping could reasonably be implied by the victim's conduct."

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill could cause loss of revenues for operators of websites that feature the types of posts that are prohibited by the bill.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet estimated the impact of the bill on prison bed space requirements.

VI. Technical Deficiencies:

- The wording of the bill does not prohibit the non-consensual posting of a photograph or video that depicts nudity unless the photograph or video itself contains a depicted person's PII or fictitious PII. As worded, the bill would not address the posting of such a photograph or video with an accompanying description that contains the individual's PII, as is usually the case. It is suggested that the wording on line 30 be amended to provide that the PII can be a description of the photograph or video, rather than being contained therein.
- The bill does not clearly indicate that nudity in the picture must be that of the person whose PII is revealed. Although this can be reasonably inferred, it is recommended that the language on lines 29-31 be clarified.
- It is recommended that line 32 be reworded to refer to "counterfeit or fictitious personal identification information" and that the definition of that term in s. 817.568(1)(g), F.S., be incorporated by reference.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.