

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 Rules

BILL: CS/SB 538

INTRODUCER: Criminal Justice Committee and Senator Simmons

SUBJECT: Disclosure of Sexually Explicit Images

DATE: April 8, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Sumner</u>	<u>Phelps</u>	<u>RC</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 538 creates the new criminal offense of electronic disclosure of sexually explicit images.

The bill creates a second degree misdemeanor offense for intentionally and knowingly disclosing sexually explicit images of a person to a social networking service or a website, or by means of any other electronic medium with the intent to harass the person if the person depicted in the sexually explicit image did not consent to the disclosure.

The bill enhances the conduct to a first degree misdemeanor if the offender is at least 18 years old and the victim is younger than 16 years old at the time of the offense.

The new offense is added to the list of offenses for which a court must issue a no-contact order to a defendant, which prohibits the defendant from having contact with the victim at the time of sentencing for the duration of the sentence imposed.

The bill clarifies that providers of Internet and storage services, or other information and communication services, such as electronic communications and messaging, are not liable under the provisions of this bill.

II. Present Situation:

Revenge Porn

Publishing a nude or semi-nude photograph or video on the Internet which was originally intended to be kept private between two people has become known as “revenge porn.” In many cases, the embarrassing photos or videos are posted on a website that is specifically designed to provide a forum for this activity. These websites generally do not create their own content, but allow persons to post content to the site after the person agrees to certain terms and conditions.¹

Section 230 of the Communications Decency Act of 1996 protects website hosts from being considered the publisher or speaker of material posted by third parties provided that the material is not illegal, such as child pornography.²

Florida law does not specifically 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. In limited circumstances, victims may seek relief through prosecution under the offense of stalking if they can prove cyberstalking (s. 784.048, F.S.), or extortion (s. 836.05, F.S.). Posting a picture that depicts nudity of a child may be punished as a second-degree felony or a third-degree felony under chs. 827 (Abuse of Children) or 847 (Obscenity), F.S. Section 817.568(4), F.S., makes it a first degree misdemeanor for a person without consent to use another person’s personal identification information to harass that person.³ However, victims of unauthorized web postings typically have no recourse in the state.

New Jersey was the first state to respond to “revenge porn” with legislation in 2004. The New Jersey Legislature made it a felony for any person to knowingly disclose or cause the disclosure⁴ of any photograph or video recording of himself or herself engaging in sexual activity with another person without the express consent of the other person.⁵ Since 2013, at least 13 states have enacted revenge porn laws.⁶

¹ The website host typically derives profit from advertising revenue and, in some cases, from charging a fee to remove the offending material.

² The relevant portion of the Act provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. 230(c)(1).

³ Section 817.568(1)(f), F.S., defines “personal identification information” as “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including ... 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, governmental 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; ... unique biometric data; ... unique electronic identification number; ... medical records; ... telecommunication identifying information or access device; or other number or information that can be used to access a person’s financial resources.”

⁴ Disclose is defined to mean sell, manufacture, give, provide, lend trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. N.J. STAT. ANN. § 2C:14-9(2004).

⁵ *Id.*

⁶ As of March 2, 2014, the National Conference of State Legislatures reported that Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, Pennsylvania, Utah, Virginia, and Wisconsin had passed revenge porn laws. 2015 State Revenge Porn Legislation (Information provided from National Conference of State Legislatures (NCSL) March 2, 2015.)

Criminal Penalties

A second degree misdemeanor is punishable by up to 60 days in jail and up to a \$500 fine. A first degree misdemeanor is punishable by up to a year in jail and up to a \$1,000 fine.

No Contact Orders

In addition to authority provided to the court to prevent an offender from having contact with a victim, s. 921.244, F.S., specifically requires the court to enter an order of no contact when an offender has committed:

- Sexual battery (s. 794.011, F.S.);
- A lewd or lascivious offense on a victim under the age of 16 (s. 800.04, F.S.);
- Specific acts of computer pornography when the offender knows or should know that a victim under the age of 16 has viewed the transmission (s. 847.0135(5), F.S.); or
- An offense for which the offender qualifies for sentencing as a violent career criminal, a habitual felony offender, a habitual violent felony offender, or a three-time violent felony offender (s. 775.084, F.S.).

Telecommunications

Interactive Computer Service (47 U.S.C. s. 230(f))

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a service or system that provides access to the Internet and systems operated or services offered by libraries or educational institutions.

Information Service (47 U.S.C. s. 153 (24))

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, including electronic publishing. An information service does not include the use of any capability for management, control, or operation of a telecommunications system or the management of a telecommunications service.

Communications Services (Section 202.11, F.S.)

“Communications services” means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services to a point or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method, regardless of the protocol used for transmission or conveyance. The term includes transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing irrespective of whether the service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added. The term does not include:

- Information services.
- Installation or maintenance of wiring or equipment on a customer’s premises.
- The sale or rental of tangible personal property.

- The sale of advertising, including, but not limited to, directory advertising.
- Bad check charges.
- Late payment charges.
- Billing and collection services.
- Internet access service, electronic mail service, electronic bulletin board service, or similar online computer services.

III. Effect of Proposed Changes:

The bill creates s. 847.0136, F.S., to specifically address the non-consensual transmission or posting of sexually explicit images to social networking services or a website, or by means of any other electronic medium. 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.

Under the bill, a person may not disclose a sexually explicit image⁷ of an identifiable person⁸ to a social networking website or by means of another electronic medium if the disclosure is:

- Made without the person's consent;
- Knowing and intentional; and
- Made with the intent to harass the person.

A person who makes the disclosure commits a second degree misdemeanor. The bill enhances the conduct to a first degree misdemeanor if the offender was 18 years or older and the victim was younger than 16 years of age. The bill also provides that a violation is considered to take place in this state if any conduct that is an element of the offense or any harm to the identifiable person resulting from the offense occurs within this state.

The bill also 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.

The bill does not apply to disclosure of sexually explicit images for:

- Reporting, investigation, and prosecution of an alleged crime for law enforcement purposes; or
- Voluntary and consensual purposes in public or commercial settings.

Providers of Internet and storage services, or other information and communication services, such as electronic communications and messaging, are not liable under the provisions of this bill.

The bill takes effect October 1, 2015.

⁷ "Sexually explicit image" is defined in the bill as a private photograph, film, videotape, recording or other reproduction of nudity or sexual intercourse, including but not limited to, oral or anal sexual intercourse.

⁸ "Identifiable person" is defined in the bill as an individual in a sexually explicit image who can be identified through visual recognition of any part of his or her body depicted in the image or identifying information as defined in s. 397.311(13), F.S. (name, address, social security number, fingerprints, photograph, and other similar information), which accompanies or is associated with the image.

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:

To date, no First Amendment challenges to statutes prohibiting the conduct of “revenge porn” have been made at the appellate level. Should this bill become law, the potential exists for a First Amendment challenge. However, appellate courts have upheld the prosecution of individuals under anti-harassment and anti-stalking laws for distributing sexually explicit images or sending harassing messages.⁹ Additionally, the United States Supreme Court has ruled that the First Amendment does not attach to the dissemination of child pornography.¹⁰ As such, a defendant would not be successful in asserting a first amendment challenge for disseminating sexually explicit images of children.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) reviewed the identical bill in the House, HB 151. CJIC found that HB 151 will have a positive insignificant impact.

⁹ A court upheld an anti-stalking act’s anti-harassment provision in the prosecution of a defendant who distributed a sex video of the victim in addition to other prohibited conduct (State v. Bradford, 175 Wash.App. 912, 917 (2013)). A court upheld an anti-stalking statute on the basis that the statute regulated conduct, not speech, and prosecution was proper of a defendant who established a pattern of engaging in intimidating text messages, phone calls, and emails to the victim. Here, the court held “Such intimidating conduct serves no legitimate purpose and merits no First Amendment protection.” (State v. Hemingway, Wis.2d 297, 304-305, 310 (2012)).

¹⁰ New York v. Ferber, 458 U.S. 747, 756-757 (1982). In Ferber, the court upheld as legitimate the state interest in protecting the physical and psychological well-being of children. Id. at 756, 761.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 921.244 of the Florida Statutes.

This bill creates section 847.0136 of the Florida Statutes.

This bill reenacts section 784.048 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 30, 2015:

- Changes the penalty from a third degree felony to second degree misdemeanor for intentionally and knowingly disclosing sexually explicit images of a person to a social networking service or a website, or by means of any other electronic medium with the intent to harass the person.
- Changes the penalty from a second degree felony to a first degree misdemeanor if the offender was 18 years of age or older and the victim was younger than 16 years of age.

- B. **Amendments:**

None.