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BILL ANALYSIS

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Senate Bill 131 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Alan Sanborn
Committee: Judiciary

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RATIONALE

Vehicles equipped with video entertainment systems are increasingly popular. Reportedly, more than 401,000 motor vehicles were manufactured with digital video disk (DVD) systems in the first half of 2004, compared with about 136,000 for all of 2002. In addition, it has been estimated that more than 110,000 DVD systems were installed after vehicles were purchased in 2004. While many drivers use these systems to entertain young backseat passengers with children's videos, apparently motorists and their passengers, including children, are increasingly being subjected to the display of sexually explicit videos playing on other vehicles' video systems. Some states are enacting measures to outlaw sexually explicit videos in cars. Tennessee became the first state to adopt such a law in 2003, and Louisiana passed similar legislation in 2004. As in those states, there have been complaints in Michigan about so-called "drive-by porn". Some people believe that this State also should prohibit the display of sexually explicit videos in vehicles, if the material is visible to the public.

CONTENT

The bill would create a new act to prescribe criminal penalties for publicly displaying sexually explicit material by recklessly displaying the material in a vehicle so that it could be seen by members of the general public outside the vehicle.

A first or second violation would be a civil infraction. The maximum fine would be $1,500 for a first violation and $5,000 for a second violation. A third or subsequent violation would be a misdemeanor punishable by up to 93 days' imprisonment and/or a maximum fine of $10,000.

A person would be guilty of publicly displaying sexually explicit material if the person, knowing the nature of the material, recklessly displayed sexually explicit visual material in a vehicle on a street, highway, or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking, when the displaying of that material was visible to members of the general public outside the vehicle, either as pedestrians or as individuals in other vehicles within the line of sight of an average individual, but not more than 100 feet from the vehicle. The offense would occur only if all of the following conditions applied:

-- A member of the general public was, or would be, made to observe the material unwillingly.
-- A member of the general public was, or would be, incapable of taking reasonable action to avoid exposure to the material, so that the exposure would constitute more than a remote and fleeting glimpse of the material.
-- The person displaying the material did nothing to stop displaying it upon having reason to know that a member of the general public was, or would be, exposed to the material.

The bill specifies that a person would know the nature of the material if he or she either were aware of its character and content or recklessly disregarded circumstances suggesting its character and content.

A person would be guilty of publicly displaying sexually explicit material regardless of whether any individual member of the general public in particular actually viewed the material being displayed, if the displaying occurred under circumstances in which an individual could reasonably be expected to observe the material.

Section 3 of the bill, which describes the proposed offense and penalties, would not apply to a radio or television station licensed and regulated by the Federal Communications Commission.

The bill specifies that if Section 3, or part of it, were determined by the court to be unconstitutional, a person would be responsible or liable for a violation of the proposed act if he or she, in a manner described in Section 3, publicly displayed material to which one or both of the following applied:

-- The material was "obscene" as that term is defined in Public Act 343 of 1984 (MCL 752.362).
-- The material was "harmful to minors" as defined in Public Act 33 of 1978 (MCL 722.674), and the person knew a minor was observing the material or that there was a substantial and imminent likelihood that a minor could reasonably be expected to be unwillingly exposed to the material and the person did nothing to stop the displaying of the material.

A person would know the status of a minor if he or she either were aware that the person who viewed the material was under 18 or recklessly disregarded a substantial risk that a person who was able to view it was under 18.

(Under Public Act 343 of 1984, "obscene" means any material that the average individual, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; that the reasonable person would find, taken as a whole, lacks serious literary, artistic, political, or scientific value; and that depicts or describes sexual conduct in a patently offensive way.

Under Public Act 33 of 1978, "harmful to minors" means sexually explicit matter that, considered as a whole, appeals to the prurient interest of minors as determined by contemporary local community standards; that is patently offensive to contemporary local community standards of adults as to what is suitable for minors; and that, considered as a whole, lacks serious literary, artistic, political, educational, and scientific value for minors.)

The bill would define "sexually explicit material" as sexually explicit visual material or sexually explicit visual material and sexually explicitly audible material. "Sexually explicit visual material" would mean a picture, photograph, drawing, sculpture, motion picture film, videotape, compact disc, digital video, or versatile disc or similar form of visual representation through any technical means that depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse, or a book, magazine, or pamphlet that contains such a photograph, drawing, or other form of visual representation.

"Sexually explicit audible material" would mean a sound recording that contains an explicit and detailed verbal description or aural representation of sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse.

"Display" would mean to exhibit, hold up, present, project, show, put or set out to view, or make visible.

The bill also would define "erotic fondling", "nudity", "sadomasochistic abuse", "sexual excitement", and "sexual intercourse".

The bill would take effect 90 days after its enactment.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

There have been instances in Michigan and other states in which people in vehicles have been unwitting observers of sexually explicit material being displayed in nearby vehicles. According to an article in the *New York Times*, a man in Schenectady, New York, was arrested after he drove by a police station while playing a pornographic video on three screens in his car; he later was

convicted on a misdemeanor charge of public display of sexual material ("When the Car Beside You Is an XXX Theater", 10-27-04). In 2003, Tennessee enacted a law prohibiting "the display of obscene and patently offensive movies…in a motor vehicle which are visible to other drivers". The law was enacted in response to complaints from both drivers and pedestrians whom the law's sponsor said were "held hostage" to those kinds of displays at traffic lights, according to the *New York Times* article. In response to similar reports, Louisiana in 2004 enacted a law that makes it illegal "to knowingly exhibit sexually explicit material in a motor vehicle…knowing that the material is visible to the public from outside the motor vehicle".

This type of activity constitutes an unwarranted invasion of privacy, and people should not have to be subjected to viewing such images unwillingly. In addition, sexually explicit videos can distract motorists and create a driving hazard. Michigan should join Tennessee and Louisiana in prohibiting people from making others a captive audience to sexually explicit material shown on a car's video screen.

Supporting Argument

The State has a compelling interest in the psychological health and welfare of its children, and promotes this interest by protecting children from exposure to sexually explicit material. While several provisions of existing law address displaying or disseminating sexually explicit or obscene material, however, it is unlikely that any of them would apply to the display of sexually explicit videos inside a motor vehicle. Public Act 33 of 1978 prohibits disseminating, exhibiting, or displaying sexually explicit matter to a minor, but addresses situations in which material is exchanged or a minor is admitted into a performance or viewing. Also, penalties under that Act for displaying sexually explicit matter to a minor apply to a person possessing managerial responsibility for a business enterprise. The Michigan Penal Code prohibits exhibiting obscene matter to or within view of minors (MCL 750.143). In order for that proscription to apply to the display of an on-board video, however, it would have to meet the law's strict definition of "obscene" (described above).

By prohibiting and prescribing criminal penalties for recklessly displaying sexually explicit material in a vehicle, if the material were visible to the public within 100 feet of the vehicle, the bill would apply to very specific types of displays and add to the body of Michigan law that promotes the State's interest in protecting minors from exposure to sexually explicit material.

Response: The proposed prohibition would not be limited to the display of the material to children.

Supporting Argument

The United States Supreme Court has held that certain expressions, including the display of visual material that may be offensive, generally are protected by the First Amendment right to freedom of speech. Any law restricting free expression of sexually explicit material must be narrowly drafted to fit into exceptions established under case law. The bill would fit into those exceptions.

In the 1975 case of *Erznoznik* v *City of Jacksonville* (442 U.S. 205), the Court held unconstitutional a Jacksonville ordinance that prohibited the showing of films containing nudity at drive-in theaters, if the screen was visible from a public street or place. The Court stated, however, that a state "may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content" and that "selective restrictions" on First Amendment speech rights may be upheld "when the speaker intrudes on the privacy of the home…or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure". The *Erznoznik* Court cited the 1971 case of *Cohen* v *California* (403 U.S. 15), in which the Court stated that the government's ability to close off discourse simply to protect others' exposure to it is "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner". Also, the *Erznoznik* Court opined that "precision of drafting and clarity of purpose are essential" when First Amendment freedoms are at stake, and held that the Jacksonville ordinance did not meet that standard.

Senate Bill 131 (S-2) would withstand a review based on precision of drafting and clarity of purpose, and would meet the narrow privacy-protection standards carved

out by the Supreme Court. Under the bill, a violation would require that the offender knew the nature of the material and recklessly displayed it in a vehicle so that it was visible to members of the general public outside the vehicle, and that a member of the public was unwillingly made to observe the material and was incapable of taking reasonable action to avoid exposure to it. The bill also would require that, for a violation to occur, the person displaying the material did nothing to stop the display upon having reason to know that a member of the public was or would be exposed to the material.

In addition, citing a body of established case law, the *Erznoznik* Court stated that "minors are entitled to a significant measure of First Amendment protection…and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them". Based on this premise, the Court overturned the Jacksonville ordinance, in part because it was "not directed against sexually explicit nudity" but it "sweepingly" prohibited the "display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness". The bill, on the other hand, would enact a very narrow prohibition against the display of material that otherwise may enjoy First Amendment protection. Unlike the ordinance overturned in *Erznoznik*, the bill would not broadly restrict any depiction of nudity but would use a sexually explicit material standard.

Response: The *Erznoznik* Court stated, "Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." Quoting the *Cohen* opinion, the *Erznoznik* Court also stated that "the burden…normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes'". A person who sees a sexually explicit video being displayed in another vehicle easily can avoid exposure to it simply by looking elsewhere.

Opposing Argument

The proposed offense would be committed if the display were in the average person's line of sight, up to 100 feet from the vehicle in which the material was displayed. It is difficult to see anything on the small screen of an on-board video player from such a distance. Indeed, the *Erznoznik* Court concluded that a drive-in theater screen is not so obtrusive as to prevent an unwilling viewer from avoiding exposure to a movie being shown on the screen. If a person is not a captive audience to a drive-in theater screen viewable from a public road or other public place, surely the small video screen inside a vehicle cannot hold captive an unwilling viewer.

Response: The 100-feet standard in the substitute bill was reduced from 500 feet in the introduced version of the bill. Still, the material would have to be visible to members of the general public and in the line of sight of an average individual, and 100 feet would be the maximum distance for a violation to occur.

Opposing Argument

Law enforcement officials have enough to contend with, without having to check the visual material being viewed inside cars. Even if a child caught a quick glimpse of an inappropriate video being played in another vehicle, it would not be a big deal unless the parents made it into one.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders would be found responsible for or convicted of a violation. Local units would incur the costs of misdemeanor probation or incarceration in a local facility, which vary by county. Public libraries would benefit from penal fine revenue.

Fiscal Analyst: Bethany Wicksall

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